

MEMORIAL OF SWITZERLAND, 23 JUNE 2020



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Swiss Confederation

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

THE M/T “SAN PADRE PIO” (NO. 2) CASE

SWITZERLAND / NIGERIA

MEMORIAL OF SWITZERLAND

VOLUME I

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DMA	Distillate Marine A (complying with standard ISO 8217)
DPR	Nigeria's Department of Petroleum Resources
EEZ	Exclusive economic zone
EFCC	Nigeria's Economic and Financial Crimes Commission
FPSO	Floating Production Storage and Offloading
FSO	Floating Storage and Offloading
FSU	Floating Storage Unit
GT	Gross tonnage
ICC	International Chamber of Commerce
ICCPR	International Covenant on Civil and Political Rights
IMB	International Maritime Bureau of the International Chamber of Commerce
IMO	International Maritime Organization
ISO	International Organization for Standardization
ITLOS	International Tribunal for the Law of the Sea
MARPOL	International Convention for the Prevention of Pollution from Ships
MLC	Maritime Labour Convention
MT	Metric ton
M/T	Motor tanker
M/V	Motor vessel
₦	Nigerian Naira
NIMASA	Nigerian Maritime Administration and Safety Agency
NM	Nautical mile
NNPC	Nigerian National Petroleum Corporation
NNS	Nigerian Navy Ship
OML	Oil Mining Lease
SOF	Statement of facts
SOLAS	International Convention for the Safety of Life at Sea
SPP	The <i>M/T "San Padre Pio"</i>
STCW	International Convention on Standards of Training, Certification and Watchkeeping for Seafarers
STS	Ship-to-ship

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TEPNG	Total E&P Nigeria Limited
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNTS	United Nations Treaty Series
USD	United States dollar

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INTRODUCTION

0.1. The present dispute between the Swiss Confederation (“**Switzerland**”) and the Federal Republic of Nigeria (“**Nigeria**”) concerning the *M/T “San Padre Pio”* was submitted to the International Tribunal for the Law of the Sea (“**ITLOS**” or “**the Tribunal**”) pursuant to a Special Agreement that entered into force on 17 December 2019.

0.2. The dispute arises out of the interception of the *M/T “San Padre Pio”*, a vessel flying the Swiss flag (“**the vessel**”), on 23 January 2018 in Nigeria’s exclusive economic zone (“**EEZ**”), the arrest and prosecution of the vessel and her crew and the detention of the vessel, her crew and cargo. The vessel’s entire 16-member crew was detained in Nigeria for more than six months after their arrest. The Master and the three other officers remained in detention (both in prison and on the vessel) for more than one year and 10 months before they and the vessel were acquitted of all charges by the Federal High Court of Nigeria on 28 November 2019.¹ Two and half years after her arrest, the vessel remains detained in Nigeria.²

0.3. Switzerland has undertaken numerous diplomatic interventions to safeguard its rights under the United Nations Convention on the Law of the Sea (“**UNCLOS**” or “**the Convention**”). Up until the Tribunal’s Provisional Measures Order of 6 July 2019 in the *M/T “San Padre Pio” case (Switzerland v. Nigeria, Provisional Measures (“the Provisional Measures case”))*, Switzerland sought to communicate with Nigeria on no less than 15 occasions, at various diplomatic levels, including through direct contact with the Nigerian President.³

0.4. Much to the regret of Switzerland, all of its attempts to find a solution to the dispute, through bilateral negotiations and exchanges of view, have been met with silence from Nigeria. With the sole exception of a letter from Nigeria’s Economic and Financial Crimes Commission (“**EFCC**”), which was sent four months after the arrest of the vessel and her crew, Nigeria failed to keep Switzerland informed about developments. Nigeria did not notify Switzerland when it arrested the vessel and her crew. It did not notify Switzerland when the crew was taken ashore and imprisoned. Nor did it notify Switzerland when they were subsequently acquitted of all charges or when appeals were lodged in 2020. This continuing failure has had the effect of impeding Switzerland from exercising its rights as the flag State and performing its duties in relation to the vessel and her crew.

¹ The Master and the three other officers have each produced affidavits describing these events from their perspective: Affidavit of Captain Andriy Vasko, Master of the *M/T “San Padre Pio”*, dated 19 June 2020 (“Affidavit of the Master”): **Annex CH/M-1**; Affidavit of Mr Mykhaylo Garchev, Chief Mate of the *M/T “San Padre Pio”*, dated 17 June 2020 (“Affidavit of the Chief Mate”): **Annex CH/M-2**; Affidavit of Mr Vladislav Shulga, 2nd Mate of the *M/T “San Padre Pio”*, dated 19 June 2020 (“Affidavit of the 2nd Mate”): **Annex CH/M-3**; Affidavit of Mr Ivan Orlovskiy, 3rd Mate of the *M/T “San Padre Pio”*, dated 19 June 2020 (“Affidavit of the 3rd Mate”): **Annex CH/M-4**.

² The Managing Director of the Augusta Energy Group Ltd (the parent company of the vessel’s charterer), Mr Giuseppe Nestola, has produced an affidavit setting out his understanding of the relevant events: Affidavit of Mr Giuseppe Nestola, Managing Director of The Augusta Energy Group, dated 21 June 2020 (“Affidavit of Mr Nestola”): **Annex CH/M-5**.

³ Diplomatic Interventions by Switzerland between 13 March 2018 and 8 May 2019 (“Diplomatic Interventions by Switzerland”): **Annex CH/M-6**.

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0.5. This Introduction is organised as follows: **Section I** describes the procedural history of the case; **Section II** highlights the main features of the dispute; and **Section III** sets out the structure of this Memorial.

I. Procedure

0.6. Both Switzerland and Nigeria are Parties to UNCLOS. Switzerland ratified the Convention on 1 May 2009 and made a declaration under Article 287(1) by which it chose ITLOS as “the only competent organ for disputes concerning law of the sea matters.” Nigeria ratified the Convention on 14 August 1986, but did not deposit a declaration under Article 287(1) until 2 December 2019.

0.7. At the time the dispute arose, Switzerland and Nigeria had not accepted the same procedure for the settlement of disputes concerning the interpretation or application of the Convention. Therefore, by Notification dated 6 May 2019, Switzerland initiated arbitral proceedings under Articles 286-287 and Annex VII of the Convention.

0.8. On 21 May 2019, Switzerland submitted a Request for Provisional Measures to ITLOS under Article 290(5) of the Convention. Following a hearing on 21 and 22 June 2019, ITLOS issued an Order prescribing provisional measures on 6 July 2019 (“**the Provisional Measures Order**”).⁴

0.9. By Special Agreement, initialled on 3 December 2019 and which entered into force on 17 December 2019 (“**the Special Agreement**”), Switzerland and Nigeria agreed to submit to ITLOS this dispute concerning the arrest and detention of the *M/T “San Padre Pio”*, her crew and cargo.⁵

0.10. Part XV of the Convention and Article 21 of the Statute of the Tribunal (“**the Statute**”) make provision for the jurisdiction of ITLOS. In the present case, ITLOS has jurisdiction over the dispute by virtue of the Special Agreement. The dispute submitted to ITLOS concerns the interpretation or application of the Convention and the conditions set out in Section 1 of Part XV of the Convention have been met.⁶

⁴ *M/T “San Padre Pio” (Switzerland v. Nigeria), Provisional Measures, Order of 6 July 2019, ITLOS Reports 2018-2019*, to be published. During the Provisional Measures case, Nigeria made numerous false assertions of fact and of law. Switzerland responded at the time, insofar as it was necessary to do so for the purposes of those proceedings. Switzerland does not consider it necessary or appropriate to respond to Nigeria’s assertions point-by-point in the present Memorial, but reserves the right to do so should Nigeria return to any of these matters in its Counter-Memorial.

⁵ Special Agreement and Notification of the Government of Swiss Confederation and the Government of the Federal Republic of Nigeria of 17 December 2019 (“Special Agreement”), entered into force 17 December 2019, para. 1; see also the Minutes of Consultations by the President of the Tribunal with representatives of Switzerland and Nigeria, 3 December 2019 (annexed to the Special Agreement) (Special Agreement and Notification (including Minutes of Consultation), dated 17 December 2019: **Annex CH/M-7**).

⁶ The Parties agreed, in the Special Agreement, that if any objection to jurisdiction or admissibility were to be raised before the Tribunal, it would be dealt with together with the merits. Thus if Nigeria were to seek to raise objections to jurisdiction or admissibility in its Counter-Memorial, Switzerland reserves the right to respond in writing and at the oral hearing on the merits.

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0.11. Switzerland and Nigeria have each appointed a judge *ad hoc* in accordance with Article 17(3) of the Statute: Switzerland has chosen Ms Anna Petrig and Nigeria has chosen Mr Sean Murphy.

0.12. Following consultations with the Parties, by Order dated 7 January 2020, the President of the Tribunal fixed the time limits for the filing of the Memorial by Switzerland and the Counter-Memorial by Nigeria as 6 July 2020 and 6 January 2021, respectively.⁷ The question of a Reply and Rejoinder was left to be determined upon completion of the first round of written pleadings. The present Memorial is submitted in accordance with the Order of 7 January 2020.

II. The dispute before the Tribunal

0.13. On 23 January 2018, the Nigerian Navy intercepted the *M/T "San Padre Pio"*, which at the time was engaged in ship-to-ship ("STS") transfers of gasoil, and took enforcement action against the vessel and her crew within Nigeria's EEZ. The Navy arrested the vessel and ordered it to proceed to Bonny Anchorage, where the crew was required to remain onboard under armed guard. These actions were in flagrant violation of the provisions of the Convention concerning the rights of the flag State (Switzerland) and the jurisdiction of the coastal State (Nigeria) in the EEZ.

0.14. On 9 March 2018, the crew was beaten, forcibly taken ashore and detained in prison under very difficult conditions. Twelve crew members were in prison for 11 days before being returned to the vessel on 20 March 2018. On 23 March 2018, the four remaining crew members, the Master and the three other officers, were transferred to a maximum-security prison, where they were held until 13 April 2018. After leaving prison, the officers and crew were detained on board the vessel under armed guard. The EFCC charged the Master, the officers, the crew members and the vessel with various criminal offences, despite the absence of any jurisdiction under the Convention for Nigeria to do so. The criminal charges against 12 crew members were dropped on 19 March 2018 but they were only allowed to leave Nigeria on 23 July 2018, six months after their arrest and four months after charges against them were dropped. Finally, on 28 November 2019, the Nigerian Federal High Court ("**the High Court**") determined that the Master, the three other officers and the vessel were not guilty on all charges. On 30 November 2019 the Master and the three other officers were finally able to leave Nigeria after some 22 months in detention.

0.15. By notice purportedly dated 29 November 2019,⁸ the EFCC appealed against the High Court judgment to the Nigerian Federal Court of Appeal ("**the Court of Appeal**"). On 19 March 2020, the Court of Appeal dismissed the EFCC's appeal, finding that the prosecution "has gone into a deep slumber" and "that the appeal is deemed abandoned and ... is thereby dismissed for non-diligent prosecution." The EFCC appealed against this decision to the Nigerian Supreme Court ("**the Supreme Court**") by notice dated 13 April 2020. The EFCC also filed a motion with the Court of Appeal, purportedly dated 25 March 2020 (although it appears that the Court of Appeal did not receive it until 27 April 2020) seeking to restore and re-list its appeal against the High Court judgment. In any event, neither the Court of Appeal nor the Supreme Court have ordered a stay of execution of the High Court judgment. Thus,

⁷ *M/T "San Padre Pio" (No. 2) (Switzerland/Nigeria), Order of 7 January 2020, ITLOS Reports 2020*, to be published.

⁸ See below para. 2.64 and note 236.

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despite Nigeria’s attempts to reopen the criminal proceedings, as at the time of the filing of this Memorial, there are no pending criminal charges against the vessel and her crew and the High Court judgment dismissing all charges remains in force.

0.16. The reasons provided by Nigerian authorities for arresting and detaining the vessel and her crew have changed repeatedly:

- i. First, at the time of arrest on 23 January 2018, the Navy alleged that the vessel was operating in Nigerian waters without authorisation in violation of the Coastal and Inland Shipping (Cabotage) Act 2003 and without paying certain levies.
- ii. Shortly thereafter, these allegations were dropped and criminal charges were eventually brought against the crew and the vessel for allegedly distributing or dealing with petroleum products without appropriate authority or licence and conspiring to do so, and for forging and falsifying the cargo manifest and bill of lading.
- iii. Then, during the Provisional Measures case before the Tribunal in June 2019, a different narrative was advanced. Nigeria alleged – without a shred of evidence – that the gasoil transported by the *M/T “San Padre Pio”* was stolen oil, of poor quality;⁹ that a neighbouring State, Togo, was a “suspicious location”¹⁰ where “false documentation of origin may be readily obtained”;¹¹ and that environmental considerations were the reason for the arrest.¹² Nigeria argued that, as a result, it had been entitled to arrest and detain the vessel and her crew in the exercise of its sovereign rights under Article 56(1)(a) of the Convention in respect of non-living resources and also in exercise of the coastal State’s duties to protect the marine environment from pollution from seabed activities under Articles 208 and 214 of the Convention.¹³

0.17. It is difficult to see how these *ex post facto* justifications, some of which were presented for the first time to this Tribunal in June 2019, some 17 months after the events, could possibly justify the arrest and detention of the vessel and her crew on 23 January 2018.

0.18. This case raises serious issues concerning the interpretation and application of the Convention. The specific legal regime of the EEZ is a central element of the international law of the sea, under the Convention and customary international law. It is among the main achievements of the Third United Nations Conference on the Law of the Sea. Maintaining and properly applying the EEZ regime is crucial for the public order of the oceans; adherence to this regime is essential if the international law of the sea is to continue to play its role in ensuring peace and security at sea. Moreover, Nigeria’s actions in this case highlight the

⁹ *M/T “San Padre Pio” (Switzerland v. Nigeria), Provisional Measures, Statement in Response of the Federal Republic of Nigeria of 17 June 2019 (“Statement in Response”)*, at p. 8, para. 2.11.

¹⁰ *Statement in Response* (above note 9), at p. 8, para. 2.11.

¹¹ *Statement in Response* (above note 9), at p. 5, para. 2.3.

¹² *Statement in Response* (above note 9), at p. 20, para. 3.16.

¹³ *Statement in Response* (above note 9), at p. 19, para. 3.9.

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special vulnerability of the seafarers on whom we all depend¹⁴ and put at risk the contribution of the Convention to the “maintenance of peace, justice and progress for all peoples of the world” and the legal order of the seas and oceans established through the Convention.¹⁵

0.19. Nigeria has acted in blatant disregard of the provisions of the Convention in important respects. These include:

- i. The enactment and maintenance of legislation in excess of the powers of the coastal State in the EEZ, in itself a serious breach of the Convention and a matter of concern to all States, including Switzerland.
- ii. The undertaking of enforcement action within the EEZ (and outside any safety zone) against the *M/T “San Padre Pio”*, her crew and cargo. This constituted a flagrant violation of the Convention, including of Switzerland’s rights as the flag State, as did the manner in which enforcement action was undertaken.
- iii. The treatment, detention and prosecution of the *M/T “San Padre Pio”*, her master, the three other officers and other crew members, and detention of the cargo, which violated the Convention, including Switzerland’s rights as the flag State.
- iv. The failure by Nigeria to keep Switzerland, the flag State, informed of the arrest, detention and prosecution, which amounts to a violation of the Convention, impeding Switzerland’s ability to enjoy its rights and carry out its duties in respect of the vessel and her crew.

0.20. Switzerland’s case, in outline, is that:

- i. The legal regime governing the EEZ, including the respective entitlements of coastal States and flag States with regard to prescriptive jurisdiction and enforcement jurisdiction in the EEZ is set out in the Convention.
- ii. The flag State has exclusive prescriptive jurisdiction and enforcement jurisdiction over vessels and their crews, and enjoys freedom of navigation in the EEZ under Articles 58, 87(1) and 92(1), except where otherwise expressly provided for in the Convention.
- iii. There was no legal basis under the Convention, or elsewhere, for Nigeria to exercise jurisdiction over the vessel, her crew and cargo:
 - a. There was no legal basis, under the Convention or elsewhere, for Nigeria to exercise *prescriptive* jurisdiction over the vessel, her crew and cargo. Articles 56(1)(a), 56(1)(b)(i) and 80 (read with Article 60) do not provide a basis for prescriptive jurisdiction in the EEZ in respect of the activities of

¹⁴ According to UNCTAD, “[a]round 80 per cent of the volume of international trade in goods is carried by sea”, UNCTAD, *Review of Maritime Transport (Series)*, available at [unctad.org/en/Pages/Publications/Review-of-Maritime-Transport-\(Series\).aspx](http://unctad.org/en/Pages/Publications/Review-of-Maritime-Transport-(Series).aspx) (last accessed 21 June 2020).

¹⁵ United Nations Convention on the Law of the Sea of 10 December 1982 (“UNCLOS” or “the Convention”), 1833 UNTS 3, entered into force 16 November 1994, first and fourth preambular paragraphs.

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the *M/T “San Padre Pio”*, nor are Articles 56(1)(b)(iii) and 208 or 211 relevant or applicable. Among other reasons, while Article 211(6) of the Convention provides a legal basis for coastal States to “adopt laws and regulations” for the “prevention, reduction and control of pollution from vessels” in their EEZs – making it, and not Article 208 as Nigeria asserted during the Provisional Measures case, the potentially relevant provision in this case –, Article 211(6) puts clear limitations on the coastal State’s prescriptive powers, which Nigeria did not respect.

- b. There was no legal basis, under the Convention or elsewhere, for Nigeria to exercise *enforcement* jurisdiction over the vessel, her crew and cargo. None of the enforcement powers set out in the Convention was applicable to the activities of the *M/T “San Padre Pio”*. Article 56(1)(a) does not provide a basis for enforcement powers in the EEZ in respect of non-living resources, nor are Articles 56(1)(b)(i) and 80 (read with Article 60), or Articles 56(1)(b)(iii) and 214 or 220 relevant or applicable. Among other reasons, the legal basis in the Convention providing for the arrest by coastal States of vessels engaged in STS operations in their EEZ is set out in Article 220 and requires there to be an actual “discharge causing major damage or threat of major damage to the coastline or related interests of the coastal State”. At no point has Nigeria claimed that the STS operations resulted in any such discharge, nor is there any evidence of such discharge.

- iv. In addition, Nigeria violated multiple safeguards applicable to enforcement actions:
 - a. Nigeria breached Articles 225, 226, 230 and 231 of the Convention because it put the vessel, her crew and the environment at risk; it inspected the vessel in a manner that was excessive; it imposed penalties other than monetary ones; it did not observe the rights of the accused (the vessel’s Master and the three other officers); it failed to notify Switzerland of any of the measures it had taken; it submitted the release of the Master and the three other officers to unreasonable procedures; and it prevented (and continues to prevent) the departure of the vessel.
 - b. Nigeria failed to have due regard to Switzerland’s rights and duties under Article 56(2) of the Convention, read together with Article 94 and in light of the Maritime Labour Convention¹⁶ and the International Covenant on Civil and Political Rights.¹⁷
 - c. Nigeria acted in a manner that was contrary to the principle of humanity and its conduct toward the *M/T “San Padre Pio”* and her crew was neither reasonable nor proportionate. In doing so, it breached several principles that constitute safeguards to a State’s enforcement jurisdiction.

¹⁶ Maritime Labour Convention of 23 February 2006 (“MLC”), 2952 UNTS 3, entered into force 20 August 2013.

¹⁷ International Covenant on Civil and Political Rights of 16 December 1966 (“ICCPR”), 999 UNTS 171, entered into force 23 March 1976.

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- d. Nigeria exercised its rights under the Convention in a manner that contravened Article 300 of the Convention.

0.21. It follows that Nigeria's interception, arrest, detention and prosecution of the vessel and her crew, and detention of the cargo were unlawful and in breach of Switzerland's rights under the Convention. As a result, Switzerland is entitled to cessation of those violations which are still ongoing and full reparation.

III. Structure of the Memorial

0.22. This Memorial consists of four volumes. The present Volume I comprises the main text; the remaining three volumes contain the annexes.

0.23. Volume I consists of this Introduction followed by seven chapters, and concludes with Switzerland's Submissions. It is arranged as follows.

0.24. **Part I** deals with the facts relevant to the case, and consists of two chapters. **Chapter 1** describes the *M/T "San Padre Pio"* and the Swiss merchant fleet; the relevant geographical context; the extent of piracy and armed attacks in the Gulf of Guinea; Nigeria's oil industry; and the Odudu field. **Chapter 2** sets out the events leading up to the interception, arrest and detention of the *M/T "San Padre Pio"*; the various allegations and criminal charges brought against the vessel and her crew; the criminal proceedings in Nigeria that led to the acquittal of all five defendants on all charges; and the current situation of the vessel, her crew and cargo.

0.25. **Part II** addresses the law and consists of five chapters. **Chapter 3** describes the nature of the EEZ regime, its relationship to the continental shelf and Switzerland's exclusive jurisdiction and enjoyment of freedom of navigation in respect of the activities of the *M/T "San Padre Pio"*. **Chapter 4** demonstrates that the domestic legislation under which the vessel, her crew and cargo were intercepted, arrested and detained exceeded the prescriptive jurisdiction to which Nigeria is entitled in its EEZ under the Convention. **Chapter 5** explains that Nigeria's exercise of enforcement jurisdiction exceeded the powers to which it was entitled under the Convention. **Chapter 6** concerns Nigeria's other breaches of the Convention arising under Articles 56(2), 225, 226, 230, 231 and 300. Finally, **Chapter 7** sets out the remedies to which Switzerland is entitled as a result of Nigeria's violations of Switzerland's rights under the Convention.

0.26. The Memorial concludes with Switzerland's **Submissions**.

MEMORIAL OF SWITZERLAND**PART I: THE FACTS**

This Part sets out the factual background of the dispute, including the events leading up to the interception, arrest and detention of the *M/T “San Padre Pio”*.

Chapter 1 provides a description of the vessel and the Swiss merchant fleet; the geographical context of the dispute; the extent of piracy and armed attacks in and around Nigeria; Nigeria’s oil industry; and the Odudu field.

Chapter 2 describes the events leading to the interception, arrest and detention of the *M/T “San Padre Pio”* in January 2018 and the events that occurred thereafter, including the detention of the crew.

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CHAPTER 1
BACKGROUND TO THE DISPUTE

1.1. This Chapter describes the vessel and the Swiss merchant fleet (**Section I**); the geographical context of the dispute (**Section II**); the extent of armed attacks and piracy in Nigeria's waters and its EEZ (**Section III**); Nigeria's oil industry (**Section IV**); and the Odudu field (**Section V**).

I. The *M/T "San Padre Pio"* and the Swiss merchant fleet

A. The *M/T "San Padre Pio"*

1.2. The *M/T "San Padre Pio"* (IMO number 9610339) is a Swiss-flagged oil/chemical motor tanker built in 2012.¹⁸ She has an overall length of 112.7 metres and a deadweight tonnage of 7,616.7 metric tons ("**MT**").

1.3. The vessel is owned by San Padre Pio Schifffahrt SA, a Swiss company ("**the vessel owner**"),¹⁹ and is managed by ABC Maritime AG, also a Swiss company ("**the manager**").²⁰ The manager crews the vessel and handles the human resources aspects of the vessel's operations. On 23 January 2018, at the time of her interception, arrest and detention, the vessel was time-chartered to Argo Shipping and Trading Ltd ("**the charterer**"), which is incorporated in Dubai and owned by the Augusta Energy Group Ltd of Cyprus.²¹ Augusta Energy Group Ltd also owns Augusta Energy SA, a company incorporated in Switzerland,²² which is the owner of the cargo on board the *M/T "San Padre Pio"* ("**the cargo owner**").²³

1.4. The contract by which the *M/T "San Padre Pio"* was chartered ("**the charterparty**") was for an initial period of 12 months, at a daily hire rate of USD 9,450.²⁴ The charterparty was concluded on 13 July 2017 and the vessel was delivered to the charterer on 27 August 2017.²⁵ The charterer used the *M/T "San Padre Pio"* to transport gasoil as cargo or fuel for vessels and oil installations off the coast of West Africa. Up until her arrest on 23 January 2018, the vessel had been engaged in this activity without incident, under the charterparty, for a period of five months.

B. The Swiss merchant fleet

1.5. The Convention, to which Switzerland is a Party, recognises that all States – including those which are land-locked – have the right to *inter alia* freedom of navigation on the high

¹⁸ ABC Maritime AG, Ship Specifications: *M/T "San Padre Pio"*, dated 11 May 2017: **Annex CH/M-8**.

¹⁹ Extract from the Commercial Register for San Padre Pio Schifffahrt SA, dated 18 June 2020: **Annex CH/M-9**.

²⁰ Extract from the Commercial Register for ABC Maritime AG, dated 18 June 2020: **Annex CH/M-10**.

²¹ Where it is not necessary to distinguish between Argo Shipping and Trading Ltd, Augusta Energy SA and the Augusta Energy Group Ltd, Switzerland will refer to these entities generically as "the charterer". See also Affidavit of Mr Nestola (above note 2), para. 1: **Annex CH/M-5**.

²² Extract from the Commercial Register for Augusta Energy SA, dated 18 June 2020: **Annex CH/M-11**.

²³ See Schematic Diagram of the Relationships between Various Relevant Entities: **Annex CH/M-12**.

²⁴ Time Charter Party between San Padre Pio Schifffahrt SA and Argo Trading and Shipping Ltd, dated 12 July 2017 ("**Charterparty**"): **Annex CH/M-13**.

²⁵ Affidavit of Mr Nestola (above note 2), para. 58: **Annex CH/M-5**.

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seas and the EEZ.²⁶ All States have the right to sail ships flying their flags on the high seas and in the EEZ of other States.²⁷

1.6. Switzerland has played an active role in the development of the international law of the sea, including at the Third United Nations Conference on the Law of the Sea.²⁸ In addition, Switzerland has actively contributed to the development and harmonisation of international maritime law, having been a Member State of the International Maritime Organization (“**IMO**”, formerly the Inter-Governmental Maritime Consultative Organization) since its establishment. It has ratified all major treaties relating to international shipping, including:

- i. the International Convention for the Safety of Life at Sea (“**SOLAS**”),²⁹
- ii. the International Convention for the Prevention of Pollution from Ships (“**MARPOL**”),³⁰
- iii. the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (“**STCW**”);³¹
- iv. the Maritime Labour Convention (“**MLC**”);³²
- v. the Convention on the International Regulations for Preventing Collisions at Sea;³³
- vi. the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation;³⁴ and
- vii. the International Convention on Maritime Search and Rescue.³⁵

1.7. Switzerland’s flag State administration, the Swiss Maritime Navigation Office (*Office suisse de la navigation maritime*) was established through the Federal Law on Maritime

²⁶ Art. 87 and 58(1) of the Convention.

²⁷ Art. 90 and 58(2) of the Convention.

²⁸ As a neutral and land-locked country Switzerland’s priority, since the Second World War, has been to maintain its capacity to sail ships under its flag, and, in order to do so, to obtain rights of transit through and over the territory of its neighbours. Another related aim was that of preserving the freedoms of the sea and, in particular, of preventing attempts to transform the EEZ into an area of coastal State sovereignty, so as to maintain freedom of navigation to its fullest possible extent.

²⁹ International Convention for the Safety of Life at Sea (“**SOLAS**”) of 1 November 1974, 1184 UNTS 2, entered into force 25 May 1980.

³⁰ Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships (1973) of 17 February 1978 (“**MARPOL**”), 1940 UNTS 61, entered into force 2 October 1983.

³¹ International Convention on Standards of Training, Certification and Watchkeeping for Seafarers of 7 July 1978 (“**STCW**”), 1361 UNTS 2, entered into force 28 April 1984.

³² See above note 16.

³³ Convention on the International Regulations for Preventing Collisions at Sea of 20 October 1972, 1050 UNTS 16, entered into force 15 July 1977.

³⁴ Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 10 March 1988, 1678 UNTS 201, entered into force 1 March 1992.

³⁵ International Convention on Maritime Search and Rescue of 27 April 1979, 1405 UNTS 97, entered into force 22 June 1985.

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Navigation under Swiss Flag.³⁶ The Swiss Maritime Navigation Office is responsible for the implementation of all applicable national and international instruments in relation to maritime navigation and exercises oversight as the flag State authority over all seagoing vessels flying the Swiss flag.

1.8. The current form of Switzerland's merchant fleet goes back to the aftermath of the Second World War. Switzerland operated vessels during the war to ensure its supply of essential goods. By 1947, these vessels had been sold to private entities, as the end of the war rendered them less necessary. As the possibility of another war could not be excluded, from 1947 until 1959 Switzerland granted preferential loans to finance a fleet that would be able to play this role again.

1.9. In 1959, the present-day system was established, by which, instead of providing loans, the Swiss Government underwrites debts assumed by Swiss purchasers of vessels able to supply essential goods ("**federal guarantees**"). This means that if the owner of a vessel benefitting from such guarantee is unable to repay its loan, the Swiss Government is financially responsible for the outstanding amount towards the lender. In return, vessel owners are to act upon the Swiss Government's instruction to provide essential goods that may be in short supply during a major crisis. Moreover, as a security instrument, the Swiss Confederation holds a lien on each vessel.

1.10. The importance of the Swiss merchant fleet, in terms of security policy, is due to Switzerland's inland location, the possible shortage of raw materials and limited domestic food supply in times of crisis. In addition, the Swiss economy imports and exports goods in considerable quantities. Experience has shown that, in the event of an international crisis, there is always the risk of a shortage of trading cargo space and thus an interruption of Switzerland's vital overseas trade flows. This is why Switzerland decided, almost 80 years ago, to ensure sufficient shipping tonnage of its own as a land-locked country. The federal guarantee system served to ensure that the Swiss merchant fleet reached the standard, in terms of its stock and composition, that would enable Switzerland to meet the requirements of its security policy. The regulations adopted at the federal level to ensure the national economic supply are therefore located in Chapter 5 of the Swiss internal law, which concerns "National Defence".

1.11. Based on a constitutional mandate regarding national supply,³⁷ the possibility of promoting cargo space under the Swiss flag by means of federal guarantees is regulated by the Federal Act on National Economic Supply of 17 June 2016 (Article 36)³⁸ as well as the Ordinance on the Guarantee of Loans for the Financing of Swiss Ocean-going Vessels of 14 June 2002.³⁹

³⁶ Switzerland, *Loi fédérale sur la navigation maritime sous pavillon suisse*, RS 747.30, 23 September 1953: **Annex CH/M-14**.

³⁷ Switzerland, *Constitution fédérale de la Confédération suisse*, RS 101, 18 April 1999 ("*Swiss Constitution*"), Art. 102: **Annex CH/M-15**.

³⁸ Switzerland, *Loi fédérale sur l'approvisionnement économique du pays*, RS 531, 16 June 2016: **Annex CH/M-16**.

³⁹ Switzerland, *Ordonnance sur le cautionnement de prêts pour financer des navires suisses de haute mer*, RS 531.44, 14 June 2002: **Annex CH/M-17**.

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1.12. In 1959, the first federal guarantee was issued. Since then, around 200 cargo ships have been financed with the help of federal guarantees, including the *M/T “San Padre Pio”*. From 2007, a small tanker fleet was also included in the scheme. In 2016, the Swiss merchant fleet reached its peak with around 50 ships with a total of approximately 1,700,000 deadweight tonnage.⁴⁰

1.13. In recent years, the size of the Swiss merchant fleet has progressively decreased. The Swiss Federal Office for National Economic Supply has reassessed the freight capacity required for national economic supply under the Swiss flag. Measured against the forecast consumption in a shortage situation, there is currently a significant overcapacity, with one exception: product tankers, which are used to carry refined oil (such as the *M/T “San Padre Pio”*). In addition, an analysis of the supply chains showed that logistical bottlenecks are accentuated when there is a severe shortage, especially in European ports and on the feeder routes to Switzerland (river, road, rail and air). For these reasons, no additional ships have been subsidised by means of federal guarantees since 2017. By June 2020, the total number of vessels still enrolled in the scheme was 20, including two product tankers, one of which is the *M/T “San Padre Pio”*.

1.14. It is against this backdrop that, in December 2012, the manager applied for a federal guarantee to finance the *M/T “San Padre Pio”*. In view of the need for product tankers in the Swiss merchant fleet, the technical quality of the ship and her suitability for potential use in the context of national economic supply, the application was granted. San Padre Pio Schiffahrt SA was created as a new company to become the vessel owner. The bank loan taken out for the acquisition of the *M/T “San Padre Pio”* was secured in April 2013 with a federal guarantee of up to USD 8,400,000. The federal guarantee has a maximum duration of 15 years. Due to the repayments made so far, as of December 2019, the guarantee has been reduced to USD 4,305,000.

II. Geographical context of the dispute

1.15. Nigeria is a West African State bordering the Gulf of Guinea in the Atlantic Ocean. Its capital is Abuja. Nigeria’s coastline extends over 853 kilometres, between Benin to the west and Cameroon to the east. Togo lies to the west of Benin. To the south-east lies the island of Bioko, part of Equatorial Guinea. Nigeria is a federal State, composed of 36 states.

1.16. The Niger River crosses Nigeria from the north-west to the south, ending in the large Niger Delta that flows into the Gulf of Guinea. The Niger Delta covers the eastern part of Nigeria’s coastline (towards the border with Cameroon). One arm of the Niger Delta is the Bonny River, which runs through Rivers State. Port Harcourt, the capital of Rivers State, lies 66 kilometres upstream from the Bight of Bonny, which is located within the Gulf of Guinea. The town of Bonny is located downstream from Port Harcourt, near the mouth of the Bonny River in the Gulf of Guinea (**Figure 1**).

⁴⁰ In addition, about 2,000 sports and pleasure crafts are registered and fly the Swiss flag.

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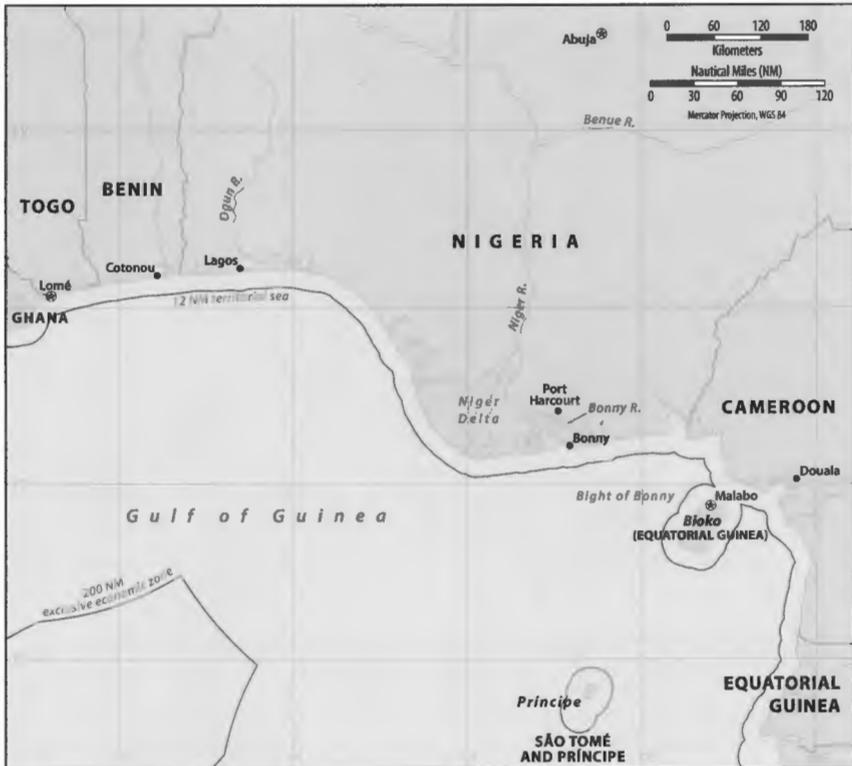


Figure 1. Gulf of Guinea Region

1.17. In 1998, Nigeria amended its Territorial Waters Act 1967 (“**Territorial Waters Act**”) to reduce its claim of a 30 nautical-mile (“**NM**”) territorial sea to the 12 NM maximum prescribed by the Convention.⁴¹ By 1978, Nigeria had already claimed an EEZ extending up to 200 NM.⁴² Nigeria’s EEZ contains several oil fields, among which are the Odudu field, located in Oil Mining Lease (“**OML**”) 100 and the Akpo field, located in OML 130 (**Figure 2**).

⁴¹ Nigeria, *Territorial Waters Act*, 8 April 1967, section 1: **Annex CH/M-18**. To the extent that this Memorial describes various Nigerian domestic legislative and regulatory provisions, this should not be construed as an acceptance by Switzerland that Nigeria’s laws are consistent with the Convention.

⁴² Nigeria, *Exclusive Economic Zone Act*, 2 October 1978 (“**EEZ Act**”), section 1(2): **Annex CH/M-19**. See also below, paras. 1.31-1.32.

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Figure 2. Location of the Akpo and Odudu fields

III. Piracy in Nigeria’s EEZ and armed violence in waters under Nigerian sovereignty

1.18. Both the Odudu field and the Bonny River Inner Anchorage (where the vessel is presently detained) are located in a region where the risk of piracy and armed attacks is very high. West Africa, and the Gulf of Guinea in particular, have for many years been among the highest-risk areas for piracy and armed attacks in the world, and continue to be so now.

1.19. The danger of piracy and armed attacks in the region is reflected in the charterparty, which includes the following “West Africa Clause”:

All ship to ship operations in Nigeria / Benin / Ivory Coast to be carried out at all times more than 40 nautical miles from shore or at Lagos Safe Anchorage area. Vessel only to come closer to the Nigerian/Benin/Ivory Coast coast for entering or leaving the port of loading/discharge and/or to approach offshore platforms.⁴³

1.20. The “West Africa Clause” reflects the inherent risk to vessels that operate or are anchored too close to the coast of Nigeria.

⁴³ Charterparty (above note 24), para. 4 and Rider clause 9(6): Annex CH/M-13.

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1.21. In its 2018 report, the International Chamber of Commerce’s International Maritime Bureau summarised the situation in the Gulf of Guinea as follows:

Reports of attacks in waters between the Ivory Coast and the Democratic Republic of Congo have more than doubled in 2018. These waters accounted for all six hijackings worldwide, 13 of the 18 ships fired upon, 130 of the 141 hostages taken globally, and 78 of 83 seafarers kidnapped for ransom.... In the last three months of 2018, 41 kidnappings were recorded in waters off Nigeria alone.⁴⁴

1.22. The International Maritime Bureau’s report on Nigeria in 2019 reads as follows:

Nigeria (Lagos / Apapa, Off Bayelsa / Brass / Bonny Island / Port Harcourt): Pirates / robbers are often well armed, violent and have attacked and hijacked / robbed ships / kidnapped crews along / far from the coast, rivers, anchorages, ports and surrounding waters. In the past, incidents reported up to about 170nm from the coast. In many past incidents, pirates hijacked the vessels for several days, ransacked the vessels and stole part cargo, usually gas oil. Several crews were also injured and kidnapped in these incidents. Generally, all waters in / off Nigeria remain risky. Vessels are advised to be vigilant, as many incidents may have gone unreported. Incidents continue to rise substantially, especially kidnapping of crews for ransom. Vessels are advised to take additional measures in these high-risk waters. In 2019, 44 crews were reported kidnapped.⁴⁵

1.23. Nigeria’s waters and its EEZ represent a fast-rising proportion of actual and attempted pirate and armed attacks around the world over the past four years. From 2015 to 2019, Nigeria’s share in worldwide actual and attempted pirate attacks rose from 5.7% to 21.6%.⁴⁶ Worse still, in 2019, two out of the four successful vessel hijackings that occurred worldwide took place in Nigeria, and Nigeria’s share represented 81.8% of situations during which a vessel’s crew was fired at.⁴⁷

1.24. As explained below,⁴⁸ the *M/T “San Padre Pio”* was attacked by armed assailants on 15 April 2019 while being detained in Nigeria and a Nigerian Navy guard was gravely injured.

⁴⁴ ICC International Maritime Bureau, *IMB piracy report 2018: attacks multiply in the Gulf of Guinea*, available at www.icc-ccs.org/index.php/1259-imb-piracy-report-2018-attacks-multiply-in-the-gulf-of-guinea (last accessed 21 June 2020).

⁴⁵ ICC International Maritime Bureau, *Piracy and Armed Robbery Against Ships, Report for the Period 1 January 2019 – 31 December 2019*, available at www.standard-club.com/media/3229418/icc-2019-annual-piracy-report.pdf, at p. 21 (last accessed 21 June 2020) (“*ICC Piracy Report 2019*”). See also *M/T “San Padre Pio” (Switzerland v. Nigeria), Provisional Measures, Separate Opinion of Judge ad hoc Petrig, ITLOS Reports 2018-2019*, to be published (“*M/T “San Padre Pio”, Separate Opinion of Judge ad hoc Petrig*”), at p. 2, para. 5.

⁴⁶ *ICC Piracy Report 2019* (above note 45), at p. 5.

⁴⁷ *ICC Piracy Report 2019* (above note 45), at p. 8.

⁴⁸ See below, para. 2.71.

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IV. Nigeria’s oil industry

1.25. Nigeria is the largest oil producer and exporter in Africa with a 2018 production of 1,989,000 barrels of oil per day from more than 200 fields.⁴⁹ As of 2018, the oil and gas sector accounted for approximately 10% of Nigeria’s gross domestic product and petroleum exports revenue represented around 86% of total exports revenue.⁵⁰ Nigeria’s remaining oil reserves were estimated to be 37.45 billion barrels in 2018, ranking tenth in the world and first in Africa.⁵¹ Nigeria is also the largest importer of refined petroleum products in the region, due to its limited refining capacity.⁵²

1.26. The origins of the Nigerian oil industry date back to 1937, when Shell and BP were granted concessions by the British Government to explore oil fields.⁵³ Four years after its independence in 1960, Nigeria adopted a system of joint ventures between international oil companies and governmental entities.⁵⁴

A. The Petroleum Act 1969

1.27. The Nigerian Petroleum Act 1969 (“**Petroleum Act**”)⁵⁵ sets out the legal framework for the extraction of oil in Nigeria’s offshore maritime zones. It “provide[s] for the exploration of petroleum from the territorial waters and the continental shelf of Nigeria” and vests “the ownership of, and all on-shore revenue from petroleum resources derivable therefrom in the Federal Government.” The Act regulates the granting and management of oil exploration licences, oil prospecting licences and oil mining licences. It also prohibits the importation, storage, sale or distribution of any petroleum products in Nigeria without a licence granted by “the Minister”,⁵⁶ thereby regulating the entry of petroleum products into Nigeria and its territorial waters.⁵⁷

1.28. Pursuant to the provisions of the Petroleum Act, the Department of Petroleum Resources enacted Guidelines for the Importation of Petroleum Products into Nigeria. These Guidelines state that a fee of 75,000 Nigerian Naira (“**₦**”) per 30 MT and a processing fee of

⁴⁹ CIA, *The World Factbook: Nigeria*, available at <https://www.cia.gov/library/publications/resources/the-world-factbook/geos/ni.html> (last accessed 21 June 2020).

⁵⁰ Organization of the Petroleum Exporting Countries, *Nigeria facts and figures*, available at www.opec.org/opec_web/en/about_us/167.htm (last accessed 21 June 2020).

⁵¹ *The World Factbook: Nigeria* (above note 49).

⁵² *The World Factbook: Nigeria* (above note 49).

⁵³ S. Ariweriokuma, *The Political Economy of Oil and Gas in Africa: The case of Nigeria*, Abingdon, Routledge, 2009, at p. 23.

⁵⁴ Ariweriokuma (above note 53), at p. 60; S. P. Stedjan, “Land is Not the New Oil: What the Nigerian Oil Experience Can Teach South Sudan About Balancing the Risks and Benefits of Large Scale Land Acquisition”, *Penn State Journal of Law & International Affairs*, Vol. 3, 2015, 168-234, at pp. 205-206. Current joint ventures involve Shell, Chevron, Exxon Mobil, Agip and Total (NNPC, *Joint Operating Agreement*, available at <https://www.nnpcgroup.com/NNPC-Business/Upstream-Ventures/Pages/Joint-Operating-Agreement.aspx> (“NNPC, *Joint Operating Agreement*”) (last accessed 21 June 2020)).

⁵⁵ Nigeria, *Petroleum Act*, 27 November 1969 (“**Petroleum Act**”): **Annex CH/M-20**.

⁵⁶ *Petroleum Act* (above note 55), section 4(1): **Annex CH/M-20**.

⁵⁷ *Petroleum Act* (above note 55), section 1(2)(d): **Annex CH/M-20**. By virtue of the Territorial Waters Act: “The territorial waters of Nigeria shall for all purposes include every part of the open sea within twelve nautical miles of the coast of Nigeria (measured from low water mark) or of the seaward limits of inland waters” (see *Territorial Waters Act* (above note 41), section 1(1): **Annex CH/M-18**).

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₦ 210,000 per application is payable for the purpose of obtaining a petroleum products import permit.⁵⁸

B. The Nigerian National Petroleum Corporation

1.29. In 1971, the Nigerian National Oil Corporation was created. By 1977, it was replaced by the Nigerian National Petroleum Corporation (“**NNPC**”).⁵⁹ The NNPC was established through the Nigerian National Petroleum Corporation Act 1977 and is charged with a wide array of tasks.⁶⁰ This Act makes provision for the corporate structure and duties of the NNPC, and for the involvement of the Nigerian Government. The Board of Directors, which conducts the affairs of the NNPC,⁶¹ is composed of individuals appointed by the President of Nigeria.⁶² Board decisions are taken on a majority basis, with the Chairperson having a casting vote.⁶³

1.30. Joint ventures between the NNPC and private corporations are usually established through comprehensive agreements which deal with various aspects of the relationship between them. The underlying relationship is dealt with in a “Joint Venture Agreement”, while the modalities of operation are set out in a “Joint Operating Agreement”.⁶⁴ The NNPC explains on its website that:

Technical matters are discussed and policy decisions are taken at operating committees where partners are represented on the basis of equity holding.⁶⁵

It follows that in situations where the NNPS is the majority shareholder, it is predominantly responsible for policy decisions regarding procurement and physical delivery of fuel requirements.

C. The Exclusive Economic Zone Act 1978

1.31. In 1978, Nigeria enacted its Exclusive Economic Zone Act (“**EEZ Act**”), through which it claimed an EEZ reaching out to 200 NM and asserted a limited number of rights.⁶⁶ The EEZ Act asserts a broad range of powers in relation to the establishment of installations (such as oil platforms and activities thereon), but is much more limited in other respects.

1.32. Under section 4(1) of the EEZ Act, criminal offences subject to Nigerian criminal law are limited to those committed within 200 metres of an installation in the EEZ:

⁵⁸ Nigerian Department of Petroleum Resources, *Guidelines for the Importation of Petroleum Products into Nigeria*, 1 June 2015: **Annex CH/M-21**.

⁵⁹ Ariweriokuma (above note 53), at p. 56; see also NNPC, *Corporate Information*, available at <https://www.nnpcgroup.com/About-NNPC/Pages/Corporate-Information.aspx> (last accessed 21 June 2020).

⁶⁰ Nigeria, *Nigerian National Petroleum Corporation Act*, 1 April 1977 (“*NNPC Act*”), section 5(1): **Annex CH/M-22**. See also above note 41.

⁶¹ *NNPC Act* (above note 60), section 1(2): **Annex CH/M-22**.

⁶² *NNPC Act* (above note 60), sections 1, 2 and 3: **Annex CH/M-22**.

⁶³ Nigeria, *Interpretation Act*, 20 January 1964, section 27(1): **Annex CH/M-23**.

⁶⁴ NNPC, *Joint Operating Agreement* (above note 54); K. Ifesinachi / E. Aniche, “Oil Joint Venture Partnerships and Nigerian Economy”, *University of Nigeria Journal of Political Economy*, Vol. 7, 2015, 1-24, at pp. 2-3.

⁶⁵ NNPC, *Joint Operating Agreement* (above note 64).

⁶⁶ *EEZ Act* (above note 42): **Annex CH/M-19**. See also above note 41.

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4. Applicability of criminal and civil laws, etc.

(1) Any act or omission which-

(a) takes place on, under or above an installation in a designated area or any waters within 200 meters of such an installation; and

(b) would, if taking place in any part of Nigeria, constitute an offence under the enactment in force in that part

shall be treated for the purposes of that law as taking place in Nigeria.⁶⁷

V. The Odudu field

1.33. The Odudu field is located in a shallow-water part of OML 100, to the south-east of the Niger Delta. It is located approximately 30 NM from the Nigerian coast and covers an area of approximately 339 square kilometres (**Figure 3**).

⁶⁷ *EEZ Act* (above note 42), Section 4(1): **Annex CH/M-19**.

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Figure 3. Location of the Odudu Terminal in Nigeria's EEZ

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1.34. The Odudu Terminal is located in the Odudu field. As of January 2018, the Odudu Terminal comprised of a Floating Storage and Offloading (“FSO”) unit (FSO UNITY)⁶⁸ and a CALM buoy (an offshore mooring point used by tankers primarily to load from the Terminal) (Figure 4).

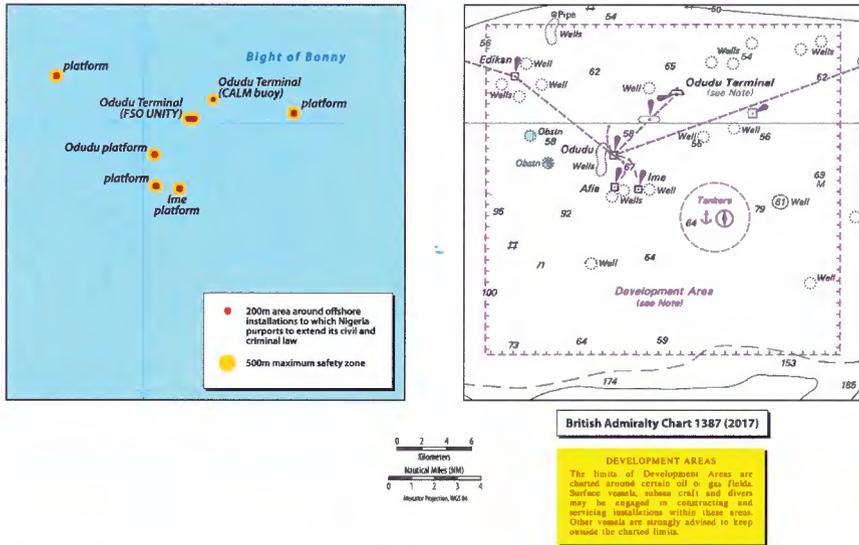


Figure 4. Depiction of the Odudu field and its installations

1.35. The Odudu Terminal is operated by Total E&P Nigeria Limited (“TEPNG”), an affiliate of Total SA.⁶⁹ TEPNG and the NNPC formed a joint venture in relation to which TEPNG holds a 40% interest and the NNPC holds a 60% interest.⁷⁰ This reflects the historical share in joint ventures between the NNPC and Elf, the latter having merged with Total SA in 2000.⁷¹ The Odudu Terminal is thus operated under the NNPC/TEPNG joint venture, ultimately controlled by the Nigerian Government through its majority 60% share. It follows that TEPNG acts in accordance with the wishes of the Nigerian Government and that the Nigerian Government has control over the rules and technical regulations applicable around the Odudu Terminal.⁷²

⁶⁸ Auke Visser, Photographs, Information and Characteristics Particulars of the “FSO UNITY”: **Annex CH/M-24.**

⁶⁹ Total, *Total in Nigeria*, available at nigeria.total.com/total-nigeria/total (“*Total in Nigeria*”) (last accessed 21 June 2020).

⁷⁰ *Total in Nigeria* (above note 69); see also Affidavit of Mr Nestola (above note 2), para. 34: **Annex CH/M-5.**

⁷¹ S. Ahmad Khan, *Nigeria: The Political Economy of Oil*, Oxford, Oxford University Press, 1994, at p. 73, Table 4.2.

⁷² As is the case for various pieces of evidence in the present case, only Nigeria has access to certain documents, be it the joint venture agreement referred to here, or other documents used in the administrative or criminal processes.

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1.36. The Odudu Security Boat (“**the Security Boat**”) provides further evidence of the relationship between the Nigerian Government and TEPNG being put into effect in practice. The Security Boat is responsible for patrolling the surroundings of the Odudu field and protecting it and nearby vessels against pirate and armed attacks.⁷³ The Master of the vessel has described seeing armed personnel on the Security Boat; the Managing Director of the Augusta Energy Group Ltd has stated that armed personnel on board such security vessels are members of the Nigerian Navy.⁷⁴ Thus, it would appear that the Security Boat is jointly operated/crewed by the Nigerian Navy and the security team at the Odudu field (“**Odudu Security**”).

1.37. The Nigerian Coastal and Inland Shipping (Cabotage) Act 2003 restricts the vessels that may deliver cargo and passengers to platforms or terminals operating in Nigeria’s EEZ, from another point in Nigeria or its EEZ, to vessels “wholly owned and manned by Nigerian citizens, built and registered in Nigeria”.⁷⁵ The delicate operations surrounding offshore platforms mean that their operators carefully vet approaching vessels. These vessels must be approved and have specialist equipment aboard.⁷⁶ In addition, the Nigerian Oil and Gas Industry Content Development Act 2010 mandates that minimum levels of local content (be it goods or services) are to be used and that such local content should be given priority in procurement contracts.⁷⁷ Terminal operators therefore contract local (Nigerian) companies to deliver gasoil. These companies are responsible for obtaining relevant clearances and import permits, paying applicable taxes and procuring the gasoil.⁷⁸ In the case of TEPNG, a small number of local companies are contracted on a rotating basis.⁷⁹ One of these is the Anosyke Group of Companies Ltd (“**Anosyke**”). The usual practice is for TEPNG to issue a purchase order to the local company whose turn it is at the time and for the local company to then reach out to suppliers for the purpose of concluding a cargo delivery contract.⁸⁰

1.38. As described below in paragraphs 2.2-2.3, in December 2017, Anosyke made contact with the cargo owner for the supply of gasoil. The gasoil was delivered under that contract by way of a series of STS transfers from the *M/T “San Padre Pio”* to three supply vessels operated by TEPNG, at a distance of approximately 3.1 NM from the Terminal. As a result of the practical and legislative arrangements described immediately above, foreign oil sellers do not sell directly to TEPNG nor deliver their oil cargoes directly to the Odudu Terminal. It is required by the Terminal operator (and therefore by the Nigerian Government, which has control over the technical operation of the platform through the NNPC’s majority stake in the

⁷³ Affidavit of the Master (above note 1), para. 14: **Annex CH/M-1**; Affidavit of the Chief Mate (above note 1), paras. 8-9: **Annex CH/M-2**; Affidavit of the 2nd Mate (above note 1), para. 9: **Annex CH/M-3**; Affidavit of the 3rd Mate (above note 1), para. 6: **Annex CH/M-4**; Affidavit of Mr Nestola (above note 2), para. 52: **Annex CH/M-5**.

⁷⁴ Affidavit of Mr Nestola (above note 2), para. 52: **Annex CH/M-5**; Affidavit of the Master (above note 1), para. 14: **Annex CH/M-1**.

⁷⁵ Nigeria, *Coastal and Inland Shipping (Cabotage) Act*, 30 April 2005 (“*Cabotage Act*”), sections 2-3: **Annex CH/M-25**.

⁷⁶ Affidavit of Mr Nestola (above note 2), para. 42: **Annex CH/M-5**.

⁷⁷ Nigeria, *Nigerian Oil and Gas Industry Content Development Act*, 22 April 2010, section 3: **Annex CH/M-26**.

⁷⁸ Affidavit of Mr Nestola (above note 2), para. 68(ii): **Annex CH/M-5**.

⁷⁹ Affidavit of Mr Nestola (above note 2), para. 40: **Annex CH/M-5**.

⁸⁰ Affidavit of Mr Nestola (above note 2), para. 42: **Annex CH/M-5**.

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joint venture)⁸¹ that there be a local contracting party and intermediary vessel(s) to transport gasoil to the Terminal or platform.⁸²

⁸¹ See above, paras. 1.30 and 1.35.

⁸² Affidavit of Mr Nestola (above note 2), paras. 65(iii) and 68(i): **Annex CH/M-5**.

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CHAPTER 2
THE INTERCEPTION, ARREST AND DETENTION OF
THE *M/T “SAN PADRE PIO”* AND HER CREW

2.1. This Chapter describes: the events that led up to the interception, arrest and detention of the *M/T “San Padre Pio”* in January 2018 (**Section I**); the various allegations and charges brought against the *M/T “San Padre Pio”* and her crew (**Section II**); the criminal proceedings that followed (**Section III**); and the current situation of the vessel (**Section IV**).

I. Events leading up to the arrest of the vessel and her crew

A. The contract for the sale of 5,000 MT of gasoil to Anosyke

2.2. In December 2017, the charterer was contacted by Anosyke, seeking the urgent supply of 5,000 MT of gasoil.⁸³ Anosyke is one of the local Nigerian companies which delivers gasoil to the Odudu Terminal.⁸⁴ A purchase order from TEPNG to Anosyke was forwarded to the cargo owner on 21 December 2017,⁸⁵ following which a contract was concluded on 22 December 2017 between Anosyke and the cargo owner for the sale of 5,000 MT of gasoil (“**the contract**”).⁸⁶ It was anticipated that the contract would be executed as follows:

- i. The *M/T “San Padre Pio”* was to approach the Odudu field, before being informed by Odudu Security of her designated anchoring point, away from the Odudu Terminal.⁸⁷
- ii. Thereafter, the *M/T “San Padre Pio”* would transfer 5,000 MT of gasoil to supply vessels operated by TEPNG through STS transfers.⁸⁸ These transfers would fulfil the contract between the cargo owner and Anosyke, transferring ownership of the gasoil to the latter and relinquishing the former’s control over the cargo.

2.3. At the time of the conclusion of the contract between Augusta and Anosyke, the *M/T “San Padre Pio”* was scheduled (under a separate contract) to deliver 5,000 MT of gasoil to Anosyke, for onward delivery to TEPNG at the Akpo field (which is also operated by TEPNG) on 28 December 2017.⁸⁹ Ultimately, Anosyke and TEPNG decided that the *M/T*

⁸³ Contract between Augusta Energy SA and Anosyke Group of Companies Ltd, concluded 23 December 2017 (“Contract between Augusta Energy SA and Anosyke”): **Annex CH/M-27**.

⁸⁴ See above, para. 1.37; Affidavit of Mr Nestola (above note 2), para. 40: **Annex CH/M-5**.

⁸⁵ Amended Purchase Order from Total E&P Nigeria Ltd to Anosyke Group of Companies Ltd, dated 22 December 2017 (“Purchase Order”): **Annex CH/M-28**; Affidavit of Mr Nestola (above note 2), paras. 61-65: **Annex CH/M-5**.

⁸⁶ Contract between Augusta Energy SA and Anosyke (above note 83): **Annex CH/M-27**.

⁸⁷ Affidavit of the Master (above note 1), para. 13: **Annex CH/M-1**; Affidavit of the Chief Mate (above note 1), para. 8: **Annex CH/M-2**; Affidavit of the 2nd Mate (above note 1), para. 6: **Annex CH/M-3**; Affidavit of the 3rd Mate (above note 1), paras. 5-6: **Annex CH/M-4**.

⁸⁸ Purchase Order (above note 85), at pp. 4 and 7: **Annex CH/M-28**; Affidavit of the Master (above note 1), para. 7: **Annex CH/M-1**; Affidavit of the Chief Mate (above note 1), para. 6: **Annex CH/M-2**; Affidavit of the 2nd Mate (above note 1), para. 5: **Annex CH/M-3**; Affidavit of the 3rd Mate (above note 1), para. 4: **Annex CH/M-4**; Affidavit of Mr Nestola (above note 2), para. 61: **Annex CH/M-5**.

⁸⁹ Affidavit of Mr Nestola (above note 2), paras. 62-64: **Annex CH/M-5**.

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“*San Padre Pio*” should be redirected to meet Anosyke’s obligations to supply the Odudu Terminal first. At that time, the M/T “*San Padre Pio*” did not have sufficient gasoil onboard to fulfil both deliveries.⁹⁰ It was therefore agreed that in December 2017 the vessel would make an initial delivery of approximately 1,650 MT of gasoil due under the contract to Anosyke at the Odudu field, before delivering 5,000 MT of gasoil at the Akpo field. The vessel would then reload at offshore Lomé, Togo, in January 2018 and supply Anosyke with the remaining balance of gasoil (around 3,350 MT).⁹¹

2.4. The gasoil to be delivered to Anosyke in January 2018 was purchased from a Swiss company, Vitol SA, one of the largest oil trading companies in the world and one of the NNPC’s trading partners, via a contract which specified that it would be loaded by STS transfer at offshore Lomé, Togo.⁹² Offshore Lomé is a centre of petroleum trade for refined fuels in the Gulf of Guinea. It acquired this status primarily due to safer conditions and better facilities compared to offshore Lagos.⁹³ Offshore Lagos was previously such a centre, due to the important oil demand in Nigeria. However, the degradation of security conditions caused by an increase in armed attacks and piracy in Nigeria’s waters and its EEZ led to a move towards Togo for oil companies.⁹⁴ Togolese authorities responded to this by creating a dedicated anchorage area where Togo’s Navy protects STS operations.⁹⁵ Specific rules regulate precisely the way in which this anchorage area is to be managed and made secure.⁹⁶ As a result, the most important oil trading companies in the region have large vessels and floating storage facilities stationed at offshore Lomé, and STS transfers there can be counted in the thousands each year.

2.5. “Gasoil” is a generic term used to refer to a refined petroleum product having the characteristics of a diesel fuel. The technical specifications of gasoil vary from country to country.⁹⁷ The gasoil cargo on board the M/T “*San Padre Pio*” to be delivered to Anosyke under the contract complied with the Distillate Marine A (“DMA”) standard.⁹⁸ This is a precisely defined grade of gasoil, specified in standard ISO 8217.⁹⁹ The term “gasoil” also includes other generically named fuel types, such as Marine Gas Oil (“MGO”) and Automotive Gas Oil (“AGO”). By contrast, those terms are not internationally standardised and can have different meanings depending upon the context in which they are used. Most

⁹⁰ Affidavit of Mr Nestola (above note 2), para. 62: **Annex CH/M-5**.

⁹¹ Contract between Augusta Energy SA and Anosyke (above note 83): **Annex CH/M-27**.

⁹² Contract between Vitol SA and Augusta Energy SA, dated 27 December 2017 (“Contract between Vitol SA and Augusta Energy SA”): **Annex CH/M-29**. See also below Figure 5, which shows the location of offshore Lomé.

⁹³ EnergyPost Africa *How offshore Lome threatens Nigeria’s petroleum sector* (31 January 2018), available at energypostafrika.net/2018/01/31/how-offshore-lome-threatens-nigerias-petroleum-sector/ (last accessed 21 June 2020).

⁹⁴ EnergyPost Africa, *How offshore Lome threatens Nigeria’s petroleum sector* (above note 93).

⁹⁵ EnergyPost Africa, *How offshore Lome threatens Nigeria’s petroleum sector* (above note 93).

⁹⁶ A recent regulation provides an example of such measures taken by Togo, see Togo, *Arrêté réglementant la circulation, l’accès à la rade et le mouillage dans les espaces maritimes sous juridiction togolaise*, 2018-001/PR/ONAEM/PREMAR, 11 September 2018: **Annex CH/M-30**; see also Chart of the Lomé Anchorage Area: **Annex CH/M-31**.

⁹⁷ Affidavit of Mr Nestola (above note 2), paras. 23-26: **Annex CH/M-5**.

⁹⁸ Bill of Lading, dated 12 January 2018 (“Bill of Lading”): **Annex CH/M-32**; Bureau Veritas Inspectorate, Master’s Receipt for Sealed Samples, dated 12 January 2018: **Annex CH/M-33**; Bureau Veritas Inspectorate, Certificate of Quality, dated 14 January 2018: **Annex CH/M-34**.

⁹⁹ Affidavit of Mr Nestola (above note 2), para. 27: **Annex CH/M-5**; International Organization for Standardization, *ISO 8217 2010 Fuel Standard for Marine Distillate Fuels*: **Annex CH/M-35**.

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MGO and some AGO may incidentally comply with the DMA standard, but it is not always the case.

B. The movements of the *M/T “San Padre Pio”* prior to arrest

2.6. In accordance with contractual obligations, the movements of the *M/T “San Padre Pio”* in the weeks prior to her arrest were as follows:

- i. On 28-29 December 2017, in the vicinity of the Odudu field, the vessel delivered approximately 1,126 MT of gasoil to Anosyke by STS transfer to vessels operated by TEPNG.¹⁰⁰ These STS transfers occurred without incident.
- ii. Thereafter, the vessel proceeded to the Akpo field, where approximately 5,000 MT of gasoil was delivered to Anosyke for onward delivery to TEPNG.¹⁰¹
- iii. Following this, the vessel sailed to offshore Lomé, with approximately 450 MT of gasoil remaining onboard.¹⁰² Between 12 and 18 January 2018, the vessel was repaired and loaded with 6,267.793 MT of gasoil by STS transfer from the *M/T “Torm Helene”*, the majority of which was intended for delivery to Anosyke in the vicinity of the Odudu field.¹⁰³ This gasoil was purchased from Vitol SA.¹⁰⁴ Upon leaving offshore Lomé, the *M/T “San Padre Pio”* was therefore carrying a total cargo of approximately 6,717.793 MT of gasoil.¹⁰⁵
- iv. Before leaving offshore Lomé, the gasoil transferred from the *M/T “Torm Helene”* was inspected and the *M/T “San Padre Pio”* received a Clearance Certificate from the Togolese authorities.¹⁰⁶

¹⁰⁰ Affidavit of Mr Nestola (above note 2), para. 70: **Annex CH/M-5**. The amount of gasoil ultimately delivered to Anosyke on 28-29 December 2017 was slightly less than originally anticipated.

¹⁰¹ Affidavit of Mr Nestola (above note 2), paras. 62-64: **Annex CH/M-5**.

¹⁰² ABC Maritime AG, Ullage Reports (Lomé Anchorage), dated 11 and 12 January 2018 (“Ullage Reports at Lomé”): **Annex CH/M-36**.

¹⁰³ Bill of Lading (above note 98): **Annex CH/M-32**; Bureau Veritas Inspectorate, Cargo Manifest, dated 12 January 2018: **Annex CH/M-37**; Bureau Veritas Inspectorate, Certificate of Quantity, dated 12 January 2018: **Annex CH/M-38**; Bureau Veritas Inspectorate, Certificate of Origin, dated 12 January 2018: **Annex CH/M-39**; Bureau Veritas Inspectorate, Certificate of Cargo Transfer, dated 12 January 2018 (“Certificate of Cargo Transfer”): **Annex CH/M-40**; Ullage Reports at Lomé (above note 102): **Annex CH/M-36**.

¹⁰⁴ Contract between Vitol SA and Augusta Energy SA (above note 92): **Annex CH/M-29**; NNPC, *Hyson (Nigeria) Limited*, available at <https://nnpcgroup.com/NNPC-Business/Subsidiaries/Pages/Hyson.aspx> (last accessed 21 June 2020).

¹⁰⁵ Upon leaving Togolese waters, the clearance certificate obtained by the *M/T “San Padre Pio”* indicated a total of 6,699.413 MT of gasoil onboard (Brightness Maritime Agency SARL, Clearance Certificate for the *M/T “San Padre Pio”*, Lomé Port – Offshore, dated 18 January 2018: **Annex CH/M-41**). See also the Affidavit of Mr Nestola, which explains why there may be minor discrepancies in the volume of gasoil indicated in the relevant documents: Affidavit of Mr Nestola (above note 2), paras. 29-30: **Annex CH/M-5**.

¹⁰⁶ Nigerian Navy Ship Pathfinder Verification Certificate to Receive/Supply/Load/Discharge Approved Products, dated 12 January 2018 (“Naval Clearance”): **Annex CH/M-42**; Affidavit of the Master (above note 1), paras. 8-10: **Annex CH/M-1**.

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- v. On 12 January 2018, the vessel also received (*via* local Nigerian agents) a copy of the Nigerian Navy Ship Pathfinder Verification Certificate to Receive / Supply / Load / Discharge Approved Products (“**the Naval Clearance**”) issued by the Nigerian Navy in relation to the STS transfers to be carried out under the cargo owner’s contract with Anosyke.¹⁰⁷
- vi. On 18 January 2018, the M/T “*San Padre Pio*” set sail from offshore Lomé for the Odudu field (**Figure 5**),¹⁰⁸ Of her cargo of approximately 6,717.793 MT of gasoil, 3,873.248 MT was intended for Anosyke, being the balance due under the contract.¹⁰⁹

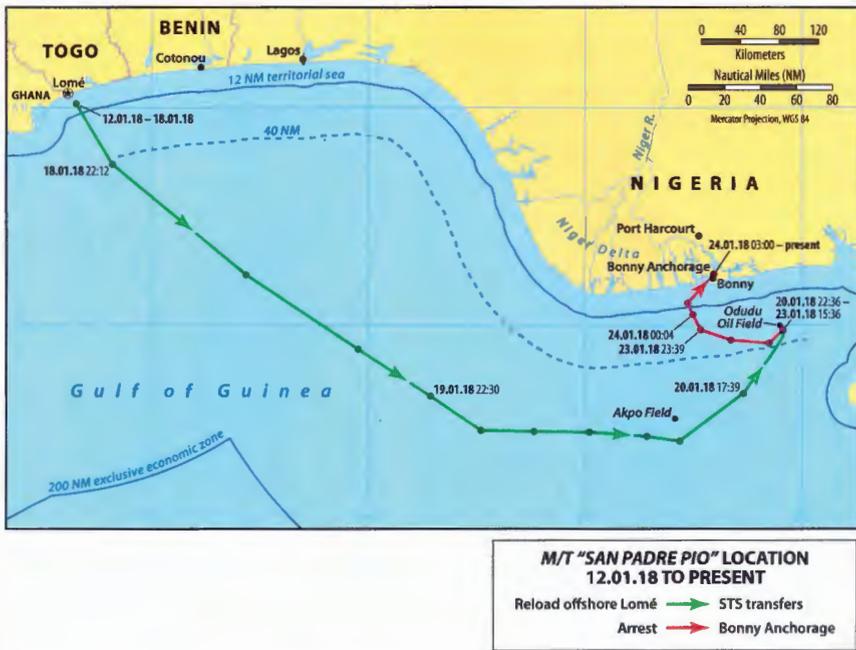


Figure 5. Location of the M/T “San Padre Pio” from 12 January 2018 to present

¹⁰⁷ Naval Clearance (above note 106): **Annex CH/M-42.**

¹⁰⁸ Affidavit of Mr Nestola (above note 2), para. 71: **Annex CH/M-5.**

¹⁰⁹ The gasoil that would remain on board the vessel following delivery to Anosyke at Odudu was not, at that time, destined for any particular buyer. The charterer anticipated further order(s) in the vicinity; maintaining a certain level of cargo would allow for prompt and efficient operations.

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2.7. Upon entering Nigeria's EEZ on 18-19 January 2018, the *M/T "San Padre Pio"* initially maintained a distance of 40 NM from the Nigerian coast, in compliance with the "West Africa Clause" of the charterparty.¹¹⁰ The *M/T "San Padre Pio"* was providing a service of international voyage from the territorial sea of a third State, Togo, ending with STS transfers in Nigeria's EEZ. The necessary permits for the importation of gasoil were to be obtained by Anosyke because, under Nigerian law, Anosyke was the party importing the gasoil.¹¹¹ Moreover, under the terms of the purchase order from TEPNG, Anosyke was responsible for ensuring that, upon delivery of the gasoil to TEPNG, it was cleared for import and all applicable taxes and duties had been paid.¹¹²

2.8. At 19:30 on 20 January 2018, the *M/T "San Padre Pio"* sent a two-hour pre-arrival report to FSO UNITY at the Odudu field.¹¹³ The *M/T "San Padre Pio"* then reported to Odudu Security, which green-lit the anchorage position at 21:30.¹¹⁴ From this point, all operations of the *M/T "San Padre Pio"* and their timing were dictated by Odudu Security.¹¹⁵ At 22:00, the vessel entered the anchorage area¹¹⁶ and at 22:24 dropped anchor at the designated anchorage position, located 2.2 NM away from the nearest platform (Ime platform) and 3.1 NM from the FSO UNITY, and gave a notice of readiness to Odudu Security.¹¹⁷ The Security Boat then proceeded to inspect the *M/T "San Padre Pio"* (**Figure 6**).¹¹⁸

¹¹⁰ Charterparty (above note 24), para. 4 and Rider clause 9(6): **Annex CH/M-13**.

¹¹¹ Letter from the Head of Shipping Development at the Nigerian Maritime Administration and Safety Agency to the Chief of Naval Staff, dated 6 February 2018 ("Letter from NIMASA to the Chief of Naval Staff"): **Annex CH/M-43**.

¹¹² Purchase Order (above note 85), at p. 4: **Annex CH/M-28**; Affidavit of Mr Nestola (above note 2), para. 68(ii): **Annex CH/M-5**.

¹¹³ Email from the *M/T "San Padre Pio"* to the Charterer enclosing the Master's Statement of Facts for 20-23 January 2018, timed 15:46, 23 January 2018 ("Master's SOF for 20-23 January 2018"): **Annex CH/M-44**.

¹¹⁴ Master's SOF for 20-23 January 2018 (above note 113): **Annex CH/M-44**; Deck logbook of the *M/T "San Padre Pio"*, 20-24 January 2018, ("Logbook"), at p. 11: **Annex CH/M-45**.

¹¹⁵ Affidavit of the Master (above note 1), paras. 12-13, 17-18: **Annex CH/M-1**; Affidavit of the Chief Mate (above note 1), paras. 8-9: **Annex CH/M-2**; Affidavit of the 2nd Mate (above note 1), paras. 6, 8: **Annex CH/M-3**; Affidavit of the 3rd Mate (above note 1), paras. 6-7: **Annex CH/M-4**.

¹¹⁶ Master's SOF for 20-23 January 2018 (above note 113): **Annex CH/M-44**; Logbook (above note 114), at p. 11: **Annex CH/M-45**.

¹¹⁷ Notice of Readiness, dated 20 January 2018: **Annex CH/M-46**; Master's SOF for 20-23 January 2018 (above note 113): **Annex CH/M-44**; Logbook (above note 114), at p. 11: **Annex CH/M-45**.

¹¹⁸ Affidavit of the Master (above note 1), para. 14: **Annex CH/M-1**.

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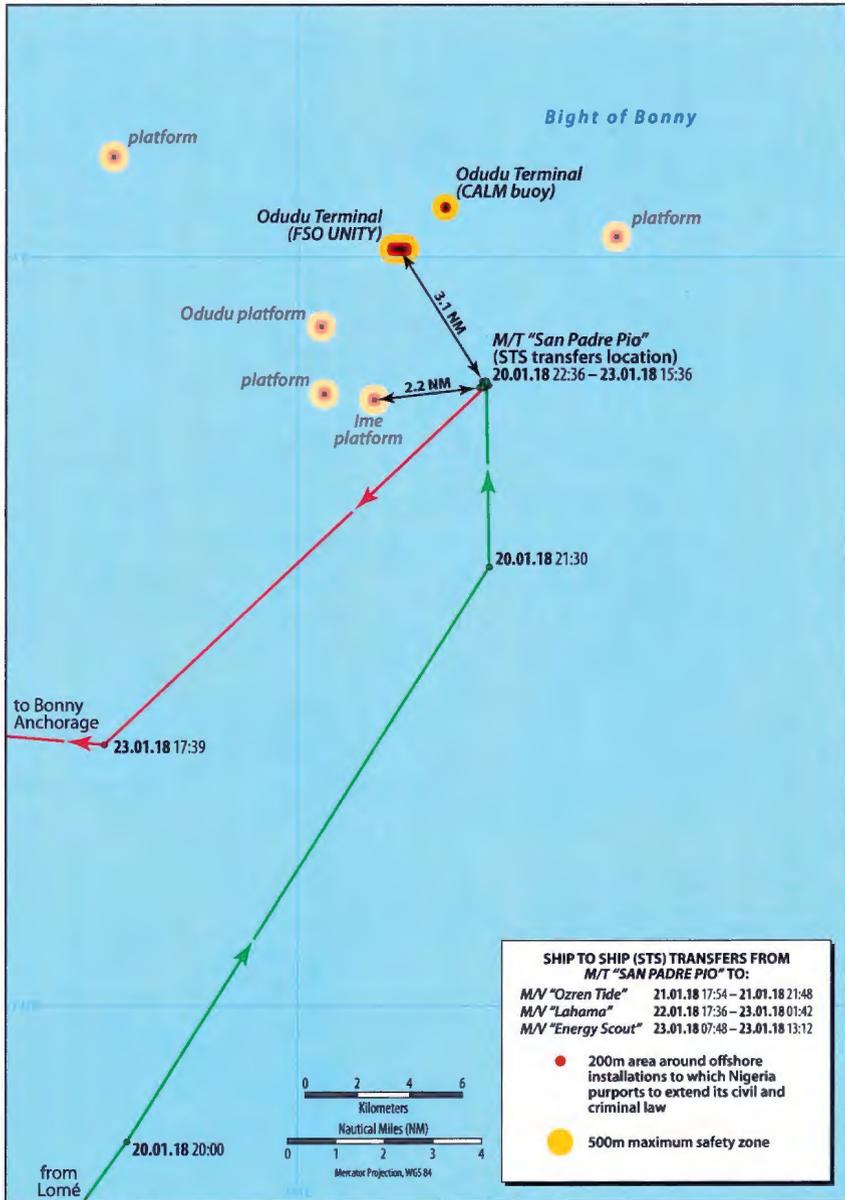


Figure 6. Movements of the M/T "San Padre Pio" on 20-23 January 2018

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C. The STS operations on 21-23 January 2018

2.9. A first STS transfer of 273.416 MT of gasoil from the *M/T "San Padre Pio"* to the *M/V "Ozren Tide"* took place on 21 January 2018.¹¹⁹ This transfer was green-lit by Odudu Security at 16:30 and the *M/V "Ozren Tide"* approached the *M/T "San Padre Pio"* at 17:06. The hose connection started at 17:54. The transfer was completed at 21:48 and the *M/V "Ozren Tide"* cast off at 23:18.¹²⁰

2.10. On 22-23 January 2018, there was a second STS transfer of 787.09 MT from the *M/T "San Padre Pio"* to the *M/V "Lahama"*.¹²¹ On 22 January at 16:12, the STS transfer was green-lit by Odudu Security and the *M/V "Lahama"* approached the *M/T "San Padre Pio"* at 16:54. The hose connection started at 17:36. The transfer was completed at 01:42 on 23 January and the *M/V "Lahama"* cast off at 03:06.¹²²

2.11. In relation to the two STS transfers to the *M/V "Ozren Tide"* and the *M/V "Lahama"*, the Master of the *M/T "San Padre Pio"* has stated that Odudu Security expressly granted permission for them to be completed after sunset.¹²³ The vessel's Chief Mate, responsible for cargo operations, confirms that "[a]ll of the instructions to start and stop STS operations came from Odudu Security" and that "[t]he Security Boat was always patrolling nearby."¹²⁴ This is further corroborated by the 2nd and 3rd Mates.¹²⁵ To ensure the safety of STS operations, the Chief Mate prepared and adopted checklists in accordance with the International Safety Guide for Oil Tankers and Terminals (ISGOTT) and the STS Transfer Guide of the Oil Companies International Marine Forum (OCIMF).¹²⁶ There was also a surveyor on board the vessel from the Odudu Terminal to monitor STS operations and ensure that "these were performed in accordance with applicable laws, rules and regulations."¹²⁷

¹¹⁹ Tidewater, Information Sheet for the *M/V "Ozren Tide"* ("Information Sheet for the *M/V "Ozren Tide"*"): **Annex CH/M-47**; Augusta Energy SA, Bunker Receipt Relating to the Transfer to the *M/V "Ozren Tide"*, dated 21 January 2018: **Annex CH/M-48**; Master's SOF for 20-23 January 2018 (above note 113): **Annex CH/M-44**.

¹²⁰ Master's SOF for 20-23 January 2018 (above note 113): **Annex CH/M-44**; Logbook (above note 114), at pp. 13: **Annex CH/M-45**.

¹²¹ LATC Marine Ltd, Information Sheet for the *M/V "Lahama"* ("Information Sheet for the *M/V "Lahama"*"): **Annex CH/M-49**; Augusta Energy SA, Bunker Receipt Relating to the Transfer to the *M/V "Lahama"*, dated 23 January 2018: **Annex CH/M-50**; Master's SOF for 20-23 January 2018 (above note 113): **Annex CH/M-44**.

¹²² Master's SOF for 20-23 January 2018 (above note 113): **Annex CH/M-44**; Logbook (above note 114), at pp. 15, 17: **Annex CH/M-45**.

¹²³ Affidavit of the Master (above note 1), para. 18: **Annex CH/M-1**.

¹²⁴ Affidavit of the Chief Mate (above note 1), para. 9: **Annex CH/M-2**.

¹²⁵ Affidavit of the 2nd Mate (above note 1), para. 9: **Annex CH/M-3**; Affidavit of the 3rd Mate (above note 1), para. 6: **Annex CH/M-4**.

¹²⁶ Affidavit of the Chief Mate (above note 1), para. 11: **Annex CH/M-2**.

¹²⁷ Affidavit of the Chief Mate (above note 1), para. 10: **Annex CH/M-2**.

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2.12. On 23 January 2018, there was a third (and final) STS transfer of 579.837 MT from the *M/T “San Padre Pio”* to the *M/V “Energy Scout”*.¹²⁸ This transfer was green-lit by Odudu Security at 06:18 and the *M/V “Energy Scout”* approached the vessel at 07:06.¹²⁹

2.13. Early that same morning, a Nigerian Navy vessel, the *NNS “Sagbama”*, made contact with TEPNG, stating that the Navy intended to board the *M/T “San Padre Pio”*.¹³⁰ The *NNS “Sagbama”* asked TEPNG to see a licence from the Nigerian Maritime Administration and Safety Agency (“NIMASA”) and a Cabotage Licence.¹³¹

2.14. As a result, TEPNG contacted the *M/T “San Padre Pio”*, requesting the documents sought by the *NNS “Sagbama”*. At 07:17, the Master of the vessel sent an email to the charterer (copying *inter alia* the cargo owner) stating that:

ODUDU coordinator needs following docs ASAP [as soon as possible]:

1. NIMASA license
2. CABOTAGE LICENSE (Coastal and Inland Shipping License)¹³²

2.15. In parallel, the hose connection with the *M/V “Energy Scout”* was commenced at 07:48.¹³³ At 08:42, following the instructions it received from TEPNG, the *M/T “San Padre Pio”* temporarily halted the STS transfer to the *M/V “Energy Scout”*.¹³⁴

2.16. At 08:50, a representative of the cargo owner sent an email to the Master stating that:

Pls advise who is requesting some documents which we don't need

Is that the navy or a logistic person from Total?

Pls advise his name and position urgently.¹³⁵

¹²⁸ Golden Energy Offshore Services AS, Information Sheet for the *M/V “Energy Scout”* (“Information Sheet for the *M/V “Energy Scout”*”): **Annex CH/M-51**; Augusta Energy SA, Bunker Receipt Relating to the Transfer to the *M/V “Energy Scout”*, dated 23 January 2018: **Annex CH/M-52**; Master’s SOF for 20-23 January 2018 (above note 113): **Annex CH/M-44**.

¹²⁹ Master’s SOF for 20-23 January 2018 (above note 113): **Annex CH/M-44**; Logbook (above note 114), at p. 17: **Annex CH/M-45**.

¹³⁰ Note of the Criminal Proceedings in the Federal High Court of Nigeria at Port Harcourt of 26 September 2018, Charge No. FHC/PH/24C/2018 (“Record of Proceedings of 26 September 2018”), at p. 2: **Annex CH/M-53**; Federal High Court of Nigeria, Port Harcourt, *Judgment of 28 November 2019*, Charge No. FHC/PH/24C/2018, issued on 2 December 2019 (“Federal High Court Judgment”), at p. 5: **Annex CH/M-54**.

¹³¹ Record of Proceedings of 26 September 2018 (above note 130), at p. 2: **Annex CH/M-53**; Affidavit of the Master (above note 1), para. 19: **Annex CH/M-1**.

¹³² Email from the *M/T “San Padre Pio”* to the Charterer, timed 08:19, 23 January 2018: **Annex CH/M-55**.

¹³³ Master’s SOF for 20-23 January 2018 (above note 113): **Annex CH/M-44**; Logbook (above note 114), at p. 17: **Annex CH/M-45**.

¹³⁴ Email from the *M/T “San Padre Pio”* to the Charterer, timed 09:11, 23 January 2018: **Annex CH/M-56**; Email from the *M/T “San Padre Pio”* to the Charterer and the Cargo Owner, timed 10:24, 23 January 2018 (“Email of 23 January 2018, 10:24”): **Annex CH/M-57**; Master’s SOF for 20-23 January 2018 (above note 113): **Annex CH/M-44**.

¹³⁵ Email from the Cargo Owner to the *M/T “San Padre Pio”*, timed 09:51, 23 January 2018: **Annex CH/M-58**.

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2.17. At 09:22, the STS transfer to the *M/V "Energy Scout"* was allowed to resume.¹³⁶ In the meantime, at 10:24, the Master responded to the cargo owner's email above, providing the name of the person requesting the documents as "Henry Nwankwoala", the Offshore Logistics Co-ordinator for the Odudu field.¹³⁷ The charterer promptly responded to TEPNG's request, providing the vessel's Certificate of Registry, showing that the vessel was not flying the Nigerian flag and that the documents sought were not required.¹³⁸ As the vessel was conducting an international voyage, she was not subject to the Nigerian Coastal and Inland Shipping (Cabotage) Act 2003, and did not require a licence from NIMASA.¹³⁹ The STS transfer to the *M/V "Energy Scout"* was completed at 13:12.¹⁴⁰

2.18. The vessel did not deliver any gasoil to the Odudu Terminal. All of the gasoil supplied to Anosyke was delivered by STS transfer to three vessels operated by TEPNG (the *M/V "Ozren Tide"*, the *M/V "Lahama"*, and the *M/V "Energy Scout"*). The vessel had no say in what happened to the gasoil after it was delivered to Anosyke upon its transfer to the three supply vessels. Those on board the *M/T "San Padre Pio"* had no control over the final destination of the gasoil transferred to the three vessels operated by TEPNG. All three STS transfers took place at a distance of at least 2.2 NM from the nearest platform (Ime Platform) and at least 3.1 NM from the FSO UNITY, a component of the Odudu Terminal.¹⁴¹

D. The arrest

2.19. At 14:06, shortly after completion of the third STS transfer to the *M/V "Energy Scout"*, the Navy contacted the *M/T "San Padre Pio"* by radio to inform the crew of the vessel's arrest and ordered the vessel to proceed to Bonny Anchorage.¹⁴² An entry in the vessel's logbook by the 2nd Mate records:

14:06 [received] order from NNS Sagbama [to] proceed to Bonny Anchorage.¹⁴³

2.20. The crew prepared the vessel for the voyage and the *M/V "Energy Scout"* cast off at 14:30.¹⁴⁴ The Master's contemporaneous Statement of Facts ("SOF") states that:

¹³⁶ Master's SOF for 20-23 January 2018 (above note 113): **Annex CH/M-44**; Logbook (above note 114), at p. 17: **Annex CH/M-45**.

¹³⁷ Email of 23 January 2018, 10:24 (above note 134): **Annex CH/M-57**.

¹³⁸ Email from the Cargo Owner to Odudu Security, timed 11:30, 23 January 2018 ("Email of 23 January 2018, 11:30"): **Annex CH/M-59**.

¹³⁹ Email of 23 January 2018, 11:30 (above note 138), at pp. 10-14: **Annex CH/M-59**; Note of the Criminal Proceedings in the Federal High Court of Nigeria at Port Harcourt of 30 October 2018, Charge No. FHC/PH/24C/2018: **Annex CH/M-60**.

¹⁴⁰ Email of 23 January 2018, 10:24 (above note 134): **Annex CH/M-57**; Master's SOF for 20-23 January 2018 (above note 113): **Annex CH/M-44**; Logbook (above note 114), at p. 17: **Annex CH/M-45**.

¹⁴¹ This is confirmed by the GPS coordinates of the *M/T "San Padre Pio"* (see above Figure 6). The arresting officer himself acknowledged a distance of around 2 NM during the domestic proceedings; see Federal High Court Judgment (above note 130), at p. 7: **Annex CH/M-54**; Record of Proceedings of 26 September 2018 (above note 130), at p. 4: **Annex CH/M-53**.

¹⁴² Affidavit of the Master (above note 1), para. 22: **Annex CH/M-1**.

¹⁴³ Logbook (above note 114), at p. 17: **Annex CH/M-45**.

¹⁴⁴ Master's SOF for 20-23 January 2018 (above note 113): **Annex CH/M-44**; Logbook (above note 114), at p. 17: **Annex CH/M-45**.

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15:30 RECEIVED ORDER FROM NNS SAGBAMA HEAVE UP ANCHOR. COMMENCED HEAVE UP ANCHOR

15:36 ANCHOR AWEIGHT. ORDER FROM NNS SAGBAMA PROCEED TO BONNY RIVER ANCHORAGE¹⁴⁵

2.21. The *M/T “San Padre Pio”*’s Master and the three other officers (the Chief Mate, 2nd Mate and 3rd Mate) have all provided affidavits setting out their account of the arrest and their subsequent detention. The Master states that the Navy threatened to board the vessel if the order to proceed to Bonny Anchorage was not complied with.¹⁴⁶

2.22. At the time of her interception and arrest, the vessel was approximately 32 NM from the closest point of Nigeria’s coast, within its EEZ but not within any safety zone of any artificial island, installation or other structure.¹⁴⁷

2.23. The *M/T “San Padre Pio”* arrived at Bonny Outer Anchorage in the early morning of 24 January 2018 and dropped anchor at 02:18.¹⁴⁸ She was then ordered to move to Bonny Inner Anchorage at 14:00.¹⁴⁹ She dropped anchor there at 19:00¹⁵⁰ and at 19:57 was boarded by approximately seven members of the Navy, at least four of whom were armed with large guns, despite the vessel’s prompt compliance with orders.¹⁵¹ Navy officers inspected, and took copies of, paperwork on board the vessel and explained that an investigation would be carried out on the basis that the vessel “did not have a NIMASA certificate and a cabotage licence.”¹⁵²

2.24. Due to the arrest and detention of the *M/T “San Padre Pio”*, none of the other planned STS transfers could take place.¹⁵³ At the time of her arrest, the vessel had a cargo of approximately 5,070 MT of gasoil remaining onboard, valued at around USD 3,060,000. Since her arrest and detention, the vessel has used approximately 1 MT of gasoil per day to maintain her basic functioning. As of 8 June 2020, around 4,201.5 MT of gasoil remained onboard.

¹⁴⁵ Master’s SOF for 20-23 January 2018 (above note 113): **Annex CH/M-44**.

¹⁴⁶ Affidavit of the Master (above note 1), para. 24: **Annex CH/M-1**.

¹⁴⁷ See above Figure 6.

¹⁴⁸ Logbook (above note 114), at p. 19: **Annex CH/M-45**; Email from the *M/T “San Padre Pio”* to the Charterer enclosing the Master’s Statement of Facts for 24 January 2018, timed 23:04, 24 January 2018 (“Master’s SOF for 24 January 2018”): **Annex CH/M-61**; Affidavit of the Master (above note 1), para. 26: **Annex CH/M-1**.

¹⁴⁹ Logbook (above note 114), at p. 19: **Annex CH/M-45**; Master’s SOF for 24 January 2018 (above note 148): **Annex CH/M-61**; Affidavit of the Master (above note 1), para. 27: **Annex CH/M-1**.

¹⁵⁰ Logbook (above note 114), at p. 19: **Annex CH/M-45**; Master’s SOF for 24 January 2018 (above note 148): **Annex CH/M-61**; Affidavit of the Master (above note 1), para. 27: **Annex CH/M-1**.

¹⁵¹ Logbook (above note 114), at p. 19: **Annex CH/M-45**; Master’s SOF for 24 January 2018 (above note 148): **Annex CH/M-61**; Affidavit of the Master (above note 1), para. 28: **Annex CH/M-1**; Affidavit of the Chief Mate (above note 1), para. 16: **Annex CH/M-2**; Affidavit of the 2nd Mate (above note 1), para. 12: **Annex CH/M-3**; Affidavit of the 3rd Mate (above note 1), para. 10: **Annex CH/M-4**; Vanguard, *Navy arrest 16 Ukrainians, vessel for illegal entry on Nigeria’s waters* (20 May 2020), available at www.vanguardngr.com/2018/03/navy-arrest-16-ukrainians-vessel-illegal-entry-nigerias-waters/ (last accessed 21 May 2020).

¹⁵² Affidavit of the Master (above note 1), para. 28: **Annex CH/M-1**.

¹⁵³ The Naval Clearance covered a total of 12 vessels; see Naval Clearance (above note 106): **Annex CH/M-42**.

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2.25. Up to the point of her arrest, the *M/T "San Padre Pio"* was engaged in a routine commercial activity. The vessel, her crew and all the companies involved acted in accordance with Nigeria's requirements and demands. The vessel's movements within Nigeria's EEZ had been approved by the Nigerian Navy by way of the Naval Clearance dated 12 January 2018.¹⁵⁴ All permits and documents required by Nigerian authorities in relation to the STS transfers had been obtained at each step of the process by the relevant commercial party.¹⁵⁵ When ordered by the Nigerian Navy to proceed to Bonny Anchorage, the vessel complied without delay and did not attempt to resist, despite the unlawfulness of the arrest and order.¹⁵⁶

2.26. The *M/T "San Padre Pio"* remains in detention at Bonny Inner Anchorage to this day, approximately 1 NM from shore.¹⁵⁷

II. The allegations and charges brought against the *M/T "San Padre Pio"* and her crew and their detention

A. The allegations made at the time of arrest and shortly thereafter

2.27. The reasons given for the arrest of the *M/T "San Padre Pio"* and her crew have constantly changed. Initially, the Navy's stated reason for arrest was that:

The vessel was arrested on 23 January 2018 for operating in Nigerian waters without authorization which is a violation of Nigerian Cabotage Trade Law. Preliminary investigation revealed that at the point of arrest, MT SAN PADRE PIO was without Nigerian Maritime Administration and Safety Agency approval to engage in cabotage trade in Nigeria waters. It was also gathered that the vessel had no proof of payment of the 3 per cent Import levy, sea protection and offshore oil reception facility levies at the point of arrest.¹⁵⁸

2.28. The reference to "Cabotage Trade Law" appears to be a reference to the Coastal and Inland Shipping (Cabotage) Act 2003 ("**Cabotage Act**")¹⁵⁹ As to the "3 per cent Import levy" and the "sea protection and offshore oil reception facility levies", these appear to fall under the Nigerian Maritime Administration and Safety Agency Act 2007 ("**NIMASA Act**")¹⁶⁰ and the Marine Environment (Sea Protection Levy) Regulations 2012 ("**Sea Protection Levy Regulations**").¹⁶¹ For the reasons explained immediately below, none of these domestic law

¹⁵⁴ Naval Clearance (above note 106): **Annex CH/M-42**.

¹⁵⁵ Nigerian Ministry of Petroleum Resources, Petroleum Products Import Permit for Anosyke Group of Companies Ltd, PMB No. 12650 (Lagos), dated 13 December 2017: **Annex CH/M-62**.

¹⁵⁶ Logbook (above note 114), at pp. 17, 19: **Annex CH/M-45**.

¹⁵⁷ Affidavit of the Master (above note 1), para. 27: **Annex CH/M-1**; Affidavit of the 3rd Mate (above note 1), para. 9: **Annex CH/M-4**.

¹⁵⁸ Report of the Chief of Naval Staff to the Acting Chairman of the Economic and Financial Crimes Commission on the Arrest of the *M/T "San Padre Pio"*, dated 23 February 2018 ("Report on the arrest of the *M/T "San Padre Pio"*"), at p. 1: **Annex CH/M-63**.

¹⁵⁹ *Cabotage Act* (above note 75): **Annex CH/M-25**.

¹⁶⁰ Nigeria, *Nigerian Maritime Administration and Safety Agency Act*, 25 May 2007 ("**NIMASA Act**"): **Annex CH/M-64**.

¹⁶¹ Nigeria, *Marine Environment (Sea Protection Levy) Regulations*, 8 June 2012 ("**Sea Protection Levy Regulations**"): **Annex CH/M-65**.

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instruments provide a legal basis for the arrest and prosecution of the vessel and her crew and the detention of the vessel, her crew and cargo.¹⁶²

1. *The Coastal and Inland Shipping (Cabotage) Act 2003*

2.29. As noted in paragraph 1.37 above, the Cabotage Act “restrict[s] the use of Foreign vessels in Domestic Coastal trade”.¹⁶³ The terms “coastal trade” or “cabotage” are defined in section 2(a), as follows:

The carriage of goods by vessel, or any other mode of transport, *from one place in Nigeria or above Nigeria waters to any other place in Nigeria or above Nigeria waters*, either directly or via a place outside Nigeria and includes the carriage of goods in relation to the exploration, exploitation or transportation of the mineral or non-living natural resources of Nigeria whether in or under Nigerian waters...¹⁶⁴

2.30. Under the Cabotage Act, “Nigerian waters” are defined as “inland waters, territorial waters or waters of the exclusive Economic Zone”.¹⁶⁵ Crucially, as is made clear from the terms of section 2(a), the Cabotage Act is only applicable to the transport of goods *between two points within Nigerian waters* (“from one place in Nigeria or above Nigeria waters to any other place in Nigeria or above Nigeria waters”). It follows that the Cabotage Act could not apply to the *M/T “San Padre Pio”* because, immediately prior to her arrest, the vessel was transporting gasoil on an international voyage from offshore Lomé to a point in Nigeria’s EEZ.

2. *The Nigerian Maritime Administration and Safety Agency Act 2007*

2.31. The NIMASA Act established the Nigerian Maritime Administration and Safety Agency (“NIMASA”). The Navy (and later the EFCC) accused the *M/T “San Padre Pio”* and her crew of breaching section 15(a) of the NIMASA Act,¹⁶⁶ which provides that:

The Agency shall be funded by monies accruing to the Agency from the following sources-

(a) 3% of gross freight on all international in-bound and out-bound cargo from ships or shipping companies *operating in Nigeria* to be collected and paid over to the Agency to meet its operational costs...¹⁶⁷

2.32. The NIMASA Act does not expressly define the term “operating *in Nigeria*” for the purposes of the levies imposed under section 15(a). However, the NIMASA Act does, in other sections, expressly clarify when it purportedly applies to Nigeria’s EEZ (as opposed to “in Nigeria” or within Nigeria’s territory) by expressly referring to the EEZ or by using the terms “Nigerian Waters” or the “Nigerian Maritime Zone”. These terms are defined in

¹⁶² See also above note 41.

¹⁶³ *Cabotage Act* (above note 75), preamble: **Annex CH/M-25**.

¹⁶⁴ *Cabotage Act* (above note 75), section 2(a): **Annex CH/M-25** (emphasis added).

¹⁶⁵ *Cabotage Act* (above note 75), section 2: **Annex CH/M-25**.

¹⁶⁶ *NIMASA Act* (above note 160): **Annex CH/M-64**. See also above note 41.

¹⁶⁷ *NIMASA Act* (above note 160), section 15(a): **Annex CH/M-64** (emphasis added).

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section 64 as including: “inland waters, territorial waters or waters of the Executive Economic Zone (respectively, together or any combination thereof)...”.¹⁶⁸ Therefore, the words “operating in Nigeria” in section 15(a) of the NIMASA Act cannot be read as encompassing Nigeria’s EEZ. It follows that, as a matter of Nigerian domestic law, the 3% levy should not have been applied to the *M/T “San Padre Pio”* because neither the vessel, nor its owner, cargo owner or charterer were “operating in Nigeria” at the relevant time. In any event, as explained in paragraph 4.25 below, the imposition of a 3% levy on the vessel pursuant to section 15(a) of the NIMASA Act is incompatible with the Convention. Customs and tax laws cannot be imposed by the coastal State on foreign vessels in the EEZ.

2.33. In an attempt to secure the prompt release of the vessel and her crew, the cargo owner decided, nevertheless, to pay the levies imposed by NIMASA, despite the fact that these were unlawfully applied to the vessel.¹⁶⁹ This was a commercial decision based on pragmatic (as opposed to legal) considerations.¹⁷⁰

3. *The Marine Environment (Sea Protection Levy) Regulations 2012*

2.34. The Sea Protection Levy Regulations are secondary legislation made under powers conferred by the NIMASA Act. Their objective, as stated in regulation 1, is “to impose levies on all commercially operating vessels of 100GT [gross registered tonnage] and above in Nigerian waters and also on oil installations and pipelines.” As in the NIMASA Act, the term “Nigerian waters” is broadly defined to include the EEZ, while “Nigeria” does not.¹⁷¹

2.35. Regulation 5 provides, in part, that:

(1) Where a foreign ship to which these Regulations apply calls at a port, terminal, jetty or utilises an offshore installation in Nigeria, it shall pay a sea protection levy on a per-call basis, if it has on board not less than 10 tons of oil in bulk.

(2) *For foreign ships on commercial service that do not call at the ports but are otherwise trading in Nigerian waters, a sea protection levy shall apply as follows-*

(a) *in the case of oil tankers, every loading or discharge operation shall qualify as a call for the purposes of these Regulations;*

(b) *in the case of service vessels, every week of hire shall be considered to be a call;*

(c) *where there is otherwise no evidence of a call as described in paragraph (a) or (b) of this sub-regulation, a flat rate shall be*

¹⁶⁸ *NIMASA Act* (above note 160), section 64: **Annex CH/M-64** (emphasis added). It is presumed that the term “Executive Economic Zone” refers to Nigeria’s EEZ.

¹⁶⁹ Nigerian Maritime Administration and Safety Agency, Ship Clearance Certificate for the *M/T “San Padre Pio”*, dated 24 January 2018 (“NIMASA Ship Clearance Certificate”): **Annex CH/M-66**; Letter from NIMASA to the Chief of Naval Staff (above note 111): **Annex CH/M-42**.

¹⁷⁰ Affidavit of Mr Nestola (above note 2), para. 92: **Annex CH/M-5**.

¹⁷¹ *Sea Protection Levy Regulations* (above note 161), regulation 11: **Annex CH/M-65**.

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imposed and payable in accordance with the Schedule to these Regulations.¹⁷²

2.36. Thus, the Sea Protection Levy Regulations purport to apply levies on vessels engaged in STS operations in the EEZ. As will be shown in paragraphs 4.36-4.38 below, this levy is incompatible with the Convention. Vessels carrying oil are required to pay a levy calculated on their deadweight tonnage.¹⁷³ However, regulation 7(1) specifies that:

Where a levy in respect of a ship becomes payable because the ship has called at a port or place in the country or has otherwise been engaged in commercial service within Nigerian waters within the meaning of regulation 5(2) of these Regulations, *the levy shall be paid before the ship departs the port, place or location within Nigerian waters where it has been engaged.*¹⁷⁴

2.37. It follows that, in any event, no liability could have attached to the vessel and her crew under the Sea Protection Levy Regulations because the vessel had not yet departed from her anchorage position at the Odudu field at the time of arrest. Moreover, there is no power under the Sea Protection Levy Regulations authorising the arrest and detention of a vessel in the EEZ. Under the terms of regulation 9(1), enforcement powers are expressly limited to detention of vessels “at any port or jetty in Nigeria until the Levy is paid”.¹⁷⁵

B. The assault against the crew and their detention at the EFCC facility

2.38. Following payment of levies¹⁷⁶ and the issuance of a certificate from NIMASA,¹⁷⁷ it was expected that the vessel, her crew and cargo would be allowed to leave Nigeria. On 5 February 2018, the cargo owner sent the relevant Ship Clearance Certificate to the Navy.¹⁷⁸ The Navy further requested a letter from NIMASA confirming that the “cabotage [was] not to be issued”.¹⁷⁹ NIMASA duly sent a letter to the Navy dated 6 February 2018 confirming that the vessel had conducted “international voyages” only, that she had complied with the payment of NIMASA statutory levies and that the Navy “may therefore release her”.¹⁸⁰ However, the Navy did not release the vessel and all crew members remained in detention onboard, under armed guard.

¹⁷² Emphasis added.

¹⁷³ *Sea Protection Levy Regulations* (above note 161), regulation 6(2)(b): **Annex CH/M-65**.

¹⁷⁴ Emphasis added.

¹⁷⁵ *Sea Protection Levy Regulations* (above note 161), regulation 6(2)(b): **Annex CH/M-65**. See also above note 41.

¹⁷⁶ See above, para. 2.32.

¹⁷⁷ NIMASA Ship Clearance Certificate (above note 169): **Annex CH/M-66**.

¹⁷⁸ Letter from the Cargo Owner to the Director of Shipping and Development at the Nigerian Maritime Administration and Safety Agency, dated 5 February 2018 (“Letter from the Cargo Owner of 5 February 2018”): **Annex CH/M-67**.

¹⁷⁹ Letter from the Cargo Owner of 5 February 2018 (above note 178): **Annex CH/M-67**.

¹⁸⁰ Letter from NIMASA to the Chief of Naval Staff (above note 111): **Annex CH/M-42**. See also Letter from the Deputy Director of Legal Services at the Nigerian Maritime Administration and Safety Agency to the Head of Operations of the Economic and Financial Crimes Commission, dated 13 April 2018: **Annex CH/M-68**.

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2.39. On 9 March 2018 – after a month and a half of detention on board the vessel¹⁸¹ and without any notification to Switzerland – the vessel and her crew were handed over by the Navy to the EFCC for further detention and preliminary investigation.¹⁸² In the handover document of the same date drawn up by the Navy and the EFCC, it was stated that the vessel and her crew were arrested “for allegedly operating illegally in Nigerian waters against the provisions of the Cabotage Trade Law”.¹⁸³ The same day, EFCC and Navy officers boarded the vessel together with a TV crew.¹⁸⁴ In his affidavit, the Master states that:

On 9 March 2018, approximately 30 people came onboard the SPP, including from the Navy, the Economic and Financial Crimes Commission (“EFCC”) and individuals with TV equipment. They took video footage and photographs. The EFCC posted information about their investigation on the EFCC Facebook page, photographing and naming all 16 crew members and accusing us of being “oil thieves” (**Appendix 2**).

After the TV crew disembarked, I was told that the whole crew must go ashore for an investigation.¹⁸⁵

2.40. The cargo owner invited the crew of the *M/T “San Padre Pio”* to wait for a message from the manager (their employer) as to whether they should all leave the vessel as requested by the EFCC. The cargo owner did not have the authority to make this decision and the safety of the vessel requires a minimum crew level.¹⁸⁶ The representative of the cargo owner instructed the crew to “keep very calm with people on board”.¹⁸⁷ The Master’s affidavit goes on to explain that:

After consulting with [the manager], I proposed that only half the crew go ashore, and then swap places with the other half. This proposal was not well received. EFCC representatives and Navy officers began to beat crew members, including me, with large sticks. I was hit on the head and left arm. I had a bump on my head as a result.¹⁸⁸

¹⁸¹ Affidavit of the 2nd Mate (above note 1), paras. 13 and 15: **Annex CH/M-3**.

¹⁸² Affidavit of Mr Aminu Ismaila of the Nigerian Economic and Financial Crimes Commission in Port Harcourt (Affidavit in Support of the EFCC’s Motion on Notice of 15 May 2018), dated 10 May 2018, para. 4: **Annex CH/M-69**.

¹⁸³ Handover Letter from the Nigerian Navy to the Nigerian Economic and Financial Crimes Commission, dated 9 March 2018: **Annex CH/M-70**.

¹⁸⁴ Affidavit of the Master (above note 1), para. 31: **Annex CH/M-1**; Affidavit of the Chief Mate (above note 1), para. 17: **Annex CH/M-2**; Affidavit of the 2nd Mate (above note 1), para. 13: **Annex CH/M-3**; Affidavit of the 3rd Mate (above note 1), para. 11: **Annex CH/M-4**.

¹⁸⁵ Affidavit of the Master (above note 1), paras. 31-32: **Annex CH/M-1**.

¹⁸⁶ Swiss Maritime Navigation Office, Minimum Safe Manning Document for the *M/T “San Padre Pio”*, dated 2 November 2016 (“Minimum Safe Manning Document”): **Annex CH/M-71**.

¹⁸⁷ Email from the Cargo Owner to the *M/T “San Padre Pio”*, timed 14:18, 9 March 2018: **Annex CH/M-72**.

¹⁸⁸ Affidavit of the Master (above note 1), para. 32: **Annex CH/M-1**.

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2.41. The Master’s affidavit also contains photographs of some of the physical injuries suffered by the crew. The Chief Mate’s account of events is that:

Several crew members were beaten up by Navy guards and EFCC representatives using wooden sticks. All of us were scared and stressed. Some crew members had bruises.¹⁸⁹

2.42. On 9 March 2018, all 16 crew members were forcibly transported to an EFCC facility in Port Harcourt. EFCC officers took statements from the crew. The crew members requested the assistance of a lawyer but this was refused.¹⁹⁰ The Master’s affidavit explains that:

From around 16:30, all 16 crew members were transported to an EFCC facility where written statements were taken. I asked for a lawyer to help us with these statements, but this was refused. I was told not to worry and that we would soon be returned to the [vessel]. However, the whole crew was kept in jail at the EFCC facility for 11 days, from 9 March until 20 March 2018.¹⁹¹

2.43. The conditions of detention at the EFCC facility were very difficult, as reflected in the affidavits of the Master and the three other officers.¹⁹² The crew were initially all held together in one small cell, along with other prisoners. Provision of the most basic necessities had to be arranged by the manager.¹⁹³ A representative from P&I Insurance (the vessel’s protection and indemnity insurance provider) visited the crew on 12 March 2018 and reported that: “[t]he Captain and crew are held in one room with total 28 occupants with only rotten old mattresses to sleep on.”¹⁹⁴

C. The first set of charges against the vessel and her crew

2.44. Seven weeks after their arrest, on 12 March 2018, the EFCC brought criminal charges against all 16 crew members and the vessel. The charges were not, however, brought under the Cabotage Act, the NIMASA Act, or the Sea Protection Levy Regulations (the legislative instruments initially relied upon to justify the arrest).¹⁹⁵ Instead, much more serious charges

¹⁸⁹ Affidavit of the Chief Mate (above note 1), para. 17: **Annex CH/M-2**.

¹⁹⁰ Affidavit of the Master (above note 1), para. 33: **Annex CH/M-1**; Affidavit of the 2nd Mate (above note 1), para. 15: **Annex CH/M-3**; Affidavit of the 3rd Mate (above note 1), para. 13: **Annex CH/M-4**.

¹⁹¹ Affidavit of the Master (above note 1), para. 33: **Annex CH/M-1**.

¹⁹² Affidavit of the Master (above note 1), para. 35: **Annex CH/M-1**; Affidavit of the Chief Mate (above note 1), para. 19: **Annex CH/M-2**; Affidavit of the 2nd Mate (above note 1), para. 15: **Annex CH/M-3**; Affidavit of the 3rd Mate (above note 1), para. 14: **Annex CH/M-4**.

¹⁹³ Email from the Local Representative of the Protection and Indemnity Agency of the *M/T “San Padre Pio”*, timed 17:31, 12 March 2018 (“Email from the Local Representative of 12 March 2018”): **Annex CH/M-73**; Affidavit of the Master (above note 1), para. 35: **Annex CH/M-1**; Affidavit of the Chief Mate (above note 1), para. 20: **Annex CH/M-2**.

¹⁹⁴ Email from the Local Representative of 12 March 2018 (above note 193): **Annex CH/M-73**. Thankfully, the crew was supported by a diligent manager, which continuously supported the crew through the hardship inflicted upon them by Nigeria, contrasting with the approach of many other companies, see for instance K. McVeigh for The Guardian, *Abandoned at sea: the crews cast adrift without food, fuel or pay* (12 April 2020), available at www.theguardian.com/global-development/2019/apr/12/abandoned-at-sea-the-crews-cast-adrift-without-food-fuel-or-pay (last accessed 21 June 2020).

¹⁹⁵ Report on the arrest of the *M/T “San Padre Pio”* (above note 158), at p. 1: **Annex CH/M-63**.

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were brought under the Miscellaneous Offences Act 1983,¹⁹⁶ attracting a maximum penalty of life imprisonment.¹⁹⁷ There were two counts alleging that, on 23 January 2018, the 16 crew members and the vessel:

... did conspire among yourselves to commit felony to wit: without lawful authority or appropriate licence distributes or deal with petroleum product and thereby committed an offence contrary to Section 3(6) and punishable under section 1(17) both of the Miscellaneous Offences Act...

... did without lawful authority or appropriate licence distributes or deal with petroleum product to wit: about 4998.343 Metric Tons of Automotive Gas conveyed (A.G.O) in **MT. SAN PADRE PIO** and thereby committed an offence contrary to section 1(17)(a) and punishable under Section 1(17) both of miscellaneous Offences Act...¹⁹⁸

D. Amended charges

2.45. The criminal charges were amended one week later, on 19 March 2018, to apply only to the Master, the three other officers and the vessel.¹⁹⁹

2.46. Almost two months after the arrest of the *MT "San Padre Pio"*, and after 11 days in prison at the EFCC facility, 12 crew members were returned to the vessel on 20 March 2018. Despite the charges against them being dropped on 19 March 2018, they remained in detention on the vessel under armed guard and were prevented from leaving Nigeria for another four months.

E. The detention of the Master and the three other officers at the Port Harcourt Maximum Security Prison

2.47. On 23 March 2018, the Master and the three other officers were taken to the Federal High Court in Port Harcourt and assured by a representative of the EFCC that they would be returned to the vessel immediately following the hearing.²⁰⁰ However, after the hearing they

¹⁹⁶ Nigeria, *Miscellaneous Offences Act*, 31 December 1983 ("*Miscellaneous Offences Act*"): **Annex CH/M-74**.

¹⁹⁷ Section 1(17) of the *Miscellaneous Offences Act* reads:

(17) Any person who without lawful authority or an appropriate licence –

- (a) imports, exports, sells, offers for sale, distributes or otherwise deals with or in any crude oil, petroleum or petroleum product in Nigeria;
- (b) does any act for which a licence is required under the Petroleum Act, shall be guilty of an offence and liable on conviction to be sentenced to imprisonment for life, and in addition, any vehicle, vessel, aircraft or other conveyance used in connection therewith shall be forfeited to the Federal Government. (*Miscellaneous Offences Act* (above note 196): **Annex CH/M-74**)

¹⁹⁸ Federal High Court of Nigeria, Port Harcourt, Charges against the 16 Crew Members and *MT "San Padre Pio"*, dated 12 March 2018: **Annex CH/M-75**.

¹⁹⁹ Federal High Court of Nigeria, Port Harcourt, Charges the Master and the three other Officers of the *MT "San Padre Pio"* and the Vessel, dated 19 March 2018: **Annex CH/M-76** (emphasis added). Although Count 2 states that *MT "San Padre Pio"* is also known as *MT "Torm Helene"*, this appears to be a misunderstanding of the situation by the EFCC, as the *MT "Torm Helene"* was the vessel from which gasoil was loaded offshore Lomé. The *MT "Torm Helene"* is currently flying the Singaporean flag (Steffen Wiedner, Information Sheet for the *MT "Torm Helene"*): **Annex CH/M-77**).

²⁰⁰ Affidavit of the Master (above note 1), para. 36: **Annex CH/M-1**; Affidavit of the 3rd Mate (above note 1), para. 15: **Annex CH/M-4**.

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were immediately taken to the Port Harcourt Maximum Security Prison (“**the maximum-security prison**”), where they were detained for a further three weeks.²⁰¹ The Master describes this experience in the following terms:

The maximum-security prison had more than 4,000 inmates and the conditions were very difficult. We were held in a cell but spent all day outdoors, from 9am to 6pm. There were a lot of mosquitos. As Ukrainians, we attracted a lot of attention from other prisoners. We became acquainted with two other Ukrainian detainees from a different vessel. They had been in detention for more than six months. I found it difficult because I had never been in prison before and did not know how long we would be detained there. I remember a prosecutor in court mentioning a potential prison sentence of five to seven years. I was terrified that I might spend years in the maximum-security prison without seeing my wife, my two sons and my daughter. It was a terrible experience.²⁰²

2.48. The accounts of the three other officers are as follows:

Chief Mate

Conditions in the maximum-security prison were dire. [A representative from P&I Insurance] again had to arrange for food and water to be delivered. We were kept in a cell block with approximately 40 other prisoners. There was one toilet and one shower. Some of us developed stomach problems and headaches. When we visited the medical facility in the prison, only Paracetamol was available. My parents, my wife and my son were all very worried about me.²⁰³

2nd Mate

It was extremely difficult and the most terrible period of my life. There were almost 4,000 prisoners, including killers, hijackers, pirates and terrorists. I was scared and feared for my life.²⁰⁴

3rd Mate

It was awful and horrible. I had never been to prison before. It was like being in another world. There were pirates, murderers and members of Boko Haram inside. Every day I waited for news of when we would be released. A representative from P&I Insurance (the *M/T “San Padre Pio”*’s protection and indemnity insurance provider) brought us food, water and

²⁰¹ Affidavit of the Master (above note 1), para. 36: **Annex CH/M-1**; Affidavit of the Chief Mate (above note 1), para. 21: **Annex CH/M-2**; Affidavit of the 2nd Mate (above note 1), para. 16: **Annex CH/M-3**; Affidavit of the 3rd Mate (above note 1), para. 16: **Annex CH/M-4**; Photograph of the Port Harcourt Maximum Security Prison (undated): **Annex CH/M-78**.

²⁰² Affidavit of the Master (above note 1), para. 37: **Annex CH/M-1**.

²⁰³ Affidavit of the Chief Mate (above note 1), para. 21: **Annex CH/M-2**.

²⁰⁴ Affidavit of the 2nd Mate (above note 1), para. 17: **Annex CH/M-3**.

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some pocket money to buy basic necessities. We were detained in the maximum security prison for three weeks, until 13 April 2018.

At the time of my imprisonment in Nigeria, I was 23 years old. Those 35 days in jail at the EFCC facility and at the maximum security prison were the worst of my life. I think it was even more difficult for my parents, my sister and my girlfriend. There were long periods during which I could not contact them, so they did not know where I was, what was happening to me, or even if I was alive.²⁰⁵

2.49. The harsh conditions at the maximum-security prison have been acknowledged in graphic terms by the Nigerian Vice-President. After visiting the facility less than two months before the Master and the three other officers were transferred there, the Vice-President stated:

There is no room for prisoners and *anybody who goes into that place as a human being is coming out as an animal*. If I have to say all that I saw at the Port Harcourt prisons, the media would feast on it. But, to say the least, it is very disturbing and we must do something about the prisons.²⁰⁶

2.50. On 13 April 2018, after more than a month in prison, the Master and the three other officers were finally released from the maximum-security prison, following the payment of bail in the amount of ₦ 10,000,000 for each defendant and another ₦ 10,000,000 of surety per defendant (amounting to an overall sum of ₦ 80,000,000, or approximately USD 222,000 at the time). This was paid through a lawyer to the Federal High Court, in accordance with a court order dated 23 March 2018.²⁰⁷ The passports of the Master and the three other officers were retained by the Nigerian authorities and they were ordered not to leave Nigeria.²⁰⁸

2.51. After undergoing medical tests and contacting their families, the Master and the three other officers rejoined the 12 crew members on board the vessel, where they all remained in detention under armed guard.²⁰⁹ They were not permitted to leave the vessel without prior authorisation from the EFCC and the Navy. The process of obtaining such authorisation proved difficult, even in cases of medical emergency.²¹⁰ Contrary to the claims made by Nigeria during the hearing in the Provisional Measures case,²¹¹ going ashore was not a mere

²⁰⁵ Affidavit of the 3rd Mate (above note 1), para. 16: **Annex CH/M-4**.

²⁰⁶ The Punch, *Nigerian prisons turn inmates to animals – Osinbajo* (2 February 2018): **Annex CH/M-79** (emphasis added).

²⁰⁷ Federal High Court of Nigeria, Port Harcourt, *Order of 23 March 2018*, Charge No. FHC/PH/24C/2018 (“Bail order of 23 March 2018”): **Annex CH/M-80**. Despite the dismissal of the charges against the vessel, the Master and the three other officers, these amounts have not been reimbursed as of June 2020.

²⁰⁸ Bail order of 23 March 2018 (above note 207): **Annex CH/M-80**.

²⁰⁹ Affidavit of the Master (above note 1), para. 38: **Annex CH/M-1**; Affidavit of the 3rd Mate (above note 1), para. 19: **Annex CH/M-4**.

²¹⁰ Correspondence with the Nigerian Economic and Financial Crimes Commission Seeking Authorisation for Crew Members to Receive Medical Treatment, dated 28 May 2018 to 1 June 2018: **Annex CH/M-81**.

²¹¹ *M/T “San Padre Pio” (Switzerland v. Nigeria)*, *Provisional Measures, Verbatim Record of 22 June 2019*, at 3 p.m., ITLOS/PV.19/C27/4, at p. 13, lines 14-23.

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formality, nor were the crew free to do so, even to attend the hearings.²¹² In addition, going ashore entailed significant costs for the manager, more than USD 10,000 per trip.²¹³

2.52. On 23 July 2018, after prolonged and complex negotiations (and four months after all charges against them had been dropped), 12 crew members were finally allowed to leave Nigeria.²¹⁴ To ensure that the vessel had sufficient crew onboard, as needed for safety and basic maintenance, the crew were replaced – and are still regularly replaced – at considerable expense to the manager.²¹⁵

F. The 3rd amended charge

2.53. On 24 April 2019, the charges against the Master, the three other officers and the vessel were further amended to add four new counts. The charges now included accusations of falsification of the Bill of Lading and Cargo Manifest. The “3rd Amended Charge” sets out the following six counts:

Count 1

That you VASKOV ANDRIY, GARCHEV MYKHAYLO, SHULGA VLADYSLAV, ORLOVSKYI IVAN, MT. SAN PADRE PIO, and others now at large on or about the 23rd day of January, 2018 at Odudu Field/Terminal in Bonny area within the jurisdiction of this Honorable Court did conspire among yourselves to commit felony to wit: without lawful authority or appropriate licence imports, distributes or deal in/with petroleum product and thereby committed an offence contrary to Section 3(6) and punishable under section 1(17) both of the Miscellaneous Offences Act CAP M17 of the Revised Edition (Law of the Federation of Nigeria) Act 2007.

Count 2

That you VASKOV ANDRIY, GARCHEV MYKHAYLO, SHULGA VLADYSLAV, ORLOVSKYI IVAN, MT. SAN PADRE PIO, and others now at large on or about the 23rd day of January, 2018 at Odudu Field/Terminal in Bonny area within the jurisdiction of this Honorable Court did without lawful authority or appropriate licence imports, distributes or deal in/with petroleum product to wit: about *7488,484 CBM of Gasoil* (also known as Automotive Gas Oil (A.G.O) conveyed in MT. SAN PADRE PIO with about 4998.343 Metric Tons as Remnant on Board as at 9/3/2018 and thereby committed an offence contrary to section 1(17) (a) and punishable under section 1(17) both of miscellaneous Offences Act

²¹² Affidavit of Mr Udoka Ezeobi (Lawyer Acting for the Manager) in Support of the Defendants’ Motion of 26 June 2018, dated 26 June 2018, para. 3: **Annex CH/M-82**.

²¹³ Affidavit of the Chief Mate (above note 1), para. 24: **Annex CH/M-2**; Affidavit of the 2nd Mate (above note 1), para. 20: **Annex CH/M-3**.

²¹⁴ Letter from the Lawyers acting for the Manager to the Head of Operations at the Nigerian Economic and Financial Crimes Commission, dated 11 May 2018: **Annex CH/M-83**; Letter from the Lawyers acting for the Manager to the Zonal Head of Operations at the Nigerian Economic and Financial Crimes Commission, dated 29 June 2018: **Annex CH/M-84**; Internal Email from the Manager, timed 12:04, 16 July 2018: **Annex CH/M-85**.

²¹⁵ Minimum Safe Manning Document (above note 186): **Annex CH/M-70**.

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CAP M17 of the Revised Edition (Law of the Federation of Nigeria) Act 2007.

Count 3

That you VASKOV ANDRIY, MT. SAN PADRE PIO and AUGUSTA ENERGY SA (*now at large*) and others at large on or about January, 2018 at Odudu Oil Field/Terminal in Bonny area within the jurisdiction of this Honorable Court did make a document to wit: *Bill of Lading* where the *Gas Oil also known as Automotive Gas (A.G.O)* purportedly loaded in MT. SAN PADRE PIO (Ex MT Torm Helene) or been imported, discharged/distributed at Nigeria offshore, Odudu oilfield is stated to be 4,626.865CBM with intent that it may be acted upon as genuine, which you knew to be false and thereby committed an offence contrary to section 1 (2) (c) of the Miscellaneous Offences Act CAP M 17 of the Revised Edition (Laws of the Federation of Nigeria) 2007 and punishable under section 1 (2) of the same Act.

Count 4

That you VASKOV ANDRIY, MT. SAN PADRE PIO and AUGUSTA ENERGY SA (*now at large*) and others at large on or about the 22nd day of January, 2018 did utter to Lt. Mohammed Ibrahim Hanifa (a Naval officer) a forged document to wit: *Bill of Lading* where the *Gas Oil also known as Automotive Gas (A.G.O)* purportedly loaded in MT. SAN PADRE PIO (Ex MT Torm Helene) or been imported, discharged/distributed at Nigeria offshore, Odudu oilfield is stated to be 4,626.865CBM with intent that it may be acted upon as genuine, which you knew to be false and thereby committed an offence contrary to section 1 (2) (c) of the Miscellaneous Offences Act CAP M 17 of the Revised Edition (Laws of the Federation of Nigeria) 2007 and punishable under section 1 (2) of the same Act.

Count 5

That you VASKOV ANDRIY, MT. SAN PADRE PIO and AUGUSTA ENERGY SA (*now at large*) and others at large on or about January, 2018 at the Odudu Oil Field/Terminal in Bonny area within the jurisdiction of this Honorable Court did make a document to wit: *Cargo Manifest* where the *Gas Oil also known as Automotive Gas (A.G.O)* purportedly loaded in MT. SAN PADRE PIO (Ex MT Torm Helene) or been imported, discharged/distributed at Nigeria offshore, Odudu oilfield is stated to be 4,626.865CBM with intent that it may be acted upon as genuine, which you knew to be false and thereby committed an offence contrary to section 1 (2) (c) of the Miscellaneous Offences Act CAP M 17 of the Revised Edition

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(Laws of the Federation of Nigeria) 2007 and punishable under section 1 (2) of the same Act.

Count 6

That you That you VASKOV ANDRIY, MT. SAN PADRE PIO and AUGUSTA ENERGY SA (*now at large*) and others at large on or about the 24th day of January, 2018 did utter to Lt. Mohammed Ibrahim Hanifa (a Naval officer) a forged document to wit: *Cargo Manifest* where the *Gas Oil also known as Automotive Gas (A.G.O)* purportedly loaded in MT. SAN PADRE PIO (Ex MT Torm Helene) or been imported, discharged/distributed at Nigeria offshore, Odudu oil field is stated to be 4,626.865CBM with intent that it may be acted upon as genuine, which you knew to be false and thereby committed an offence contrary to section 1 (2) (c) of the Miscellaneous Offences Act CAP M 17 of the Revised Edition (Laws of the Federation of Nigeria) 2007 and punishable under section 1 (2) of the same Act.²¹⁶

2.54. In the period between their return to the vessel in April 2018 and the eventual judgement of the Federal High Court on 28 November 2019, the Master and the three other officers were detained on board the vessel under armed guard at all times, except when arrangements could be made allowing them to go ashore for medical treatment or to attend court hearings.

III. The court proceedings in Nigeria

2.55. On 28 November 2019, after hearing nine prosecution witnesses, the Honourable Justice Amadu Turaki Mohammed of the Nigerian Federal High Court sitting in Port Harcourt (“**the High Court**”) delivered his Judgement Order in the case against the Master, the three other officers and the *M/T “San Padre Pio”*. The High Court acquitted the Master, the three other officers and the vessel on all counts.²¹⁷

2.56. The Court heard from one of the arresting officers, Lieutenant Mohammed Ibrahim Hanifa, that the vessel had not been “involved in the movement of cargo within ports in Nigeria.”²¹⁸ The Lieutenant also accepted that at the time of her arrest, the vessel was about “2 Nautical miles from the [Odudu] terminal.”²¹⁹ Lieutenant Hanifa told the Court that he was not aware of Anosyke, nor that the gasoil had been purchased to supply TEPNG.²²⁰

2.57. The Court also heard evidence from the Assistant Director of NIMASA, Mr Zailain Musa Attah. Mr Attah admitted that “if a vessel is involved in International movement of

²¹⁶ Federal High Court of Nigeria, Port Harcourt, 3rd Amended Charge brought against the Master and the three other Officers of the *M/T “San Padre Pio”*, the Vessel and the Charterer, dated 24 April 2018: **Annex CH/M-86**. As far as Switzerland has been able to ascertain, Nigeria has not pursued the charges against the charterer, see Federal High Court Judgment (above note 130), at pp. 1, 56: **Annex CH/M-54**.

²¹⁷ Federal High Court of Nigeria, Port Harcourt, *Judgment Order of 28 November 2018*, Charge No. FHC/PH/24C/2018, at p. 4 (“Federal High Court Judgment Order”): **Annex CH/M-87**.

²¹⁸ Federal High Court Judgment (above note 130), at p. 7: **Annex CH/M-54**.

²¹⁹ Federal High Court Judgment (above note 130), at p. 7: **Annex CH/M-54**.

²²⁰ Federal High Court Judgment (above note 130), at p. 8: **Annex CH/M-54**.

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cargo [it] is not obliged to register for cabotage operation.”²²¹ He stated that the payments of NIMASA levies “are collected from the shipping company or agent.”²²² Mr Attah also testified that he was aware that “a ship can be managed by the owner, managing owner or the charterer and that the process of payment is either the owner or the charterer to instruct the local agent to process the payment” and that “levies are not paid by the crew of the ship and that the [Master and the three other officers] are not responsible for payment of the levies”.²²³

2.58. The Court further heard from Mr Aminu Ismaila, of the EFCC Counter Terrorism and General Investigation Section in Port Harcourt, who stated that he was “not aware that the 3% NIMASA levy was not payable by the [the Master and the three other officers]”.²²⁴ Mr Ismaila also acknowledged that the cargo on board the vessel was obtained from offshore Lomé.²²⁵

2.59. The Judge first addressed Count 2 and noted that the samples analysed were “tested for AGO [Automotive Gas Oil] using the various parameters which were compared to the specifications set for the particular product issued by Government”.²²⁶ However, the Judge recognised that the cargo on board the *M/T “San Padre Pio”* (DMA) was “not a product available in Nigeria and they don’t analyse it in Nigeria”.²²⁷ For these reasons, the Judge considered that the Prosecution had “failed to prove that what was found on the [vessel] was scientifically proved to be Petroleum Product as required by law”.²²⁸ The Judge evidently understood the distinction between AGO, as tested by the Nigerian authorities, and the ISO 8217-compliant gasoil carried by the *M/T “San Padre Pio”*.²²⁹

2.60. Addressing the question whether the defendants lacked licences, the Judge held that:

For the above reason, and by virtue of the sale agreement between AUGUSTA Energy and ANOSYKE Group of Companies, the amended purchase order, all attached to Exhibit G3, together with evidence of [Prosecution Witness 6] under cross-examination, who admitted that the DPR import permit is valid, *I have no doubt that the Prosecution has failed to prove that the Defendants had no licence or authority to deal in Petroleum Product.*²³⁰

2.61. Turning to Count 1, the Judge found that:

It is clear both from Exhibit A1 and the DPR permit, that the company in whose favour the approvals were granted is ANOSYKE Group of Companies. Similarly, as I have held above that the Prosecution has failed

²²¹ Federal High Court Judgment (above note 130), at p. 13: **Annex CH/M-54**.

²²² Federal High Court Judgment (above note 130), at p. 13: **Annex CH/M-54**.

²²³ Federal High Court Judgment (above note 130), at p. 13: **Annex CH/M-54**.

²²⁴ Federal High Court Judgment (above note 130), at p. 24: **Annex CH/M-54**.

²²⁵ Federal High Court Judgment (above note 130), at p. 25: **Annex CH/M-54**.

²²⁶ Federal High Court Judgment (above note 130), at p. 44: **Annex CH/M-54**.

²²⁷ Federal High Court Judgment (above note 130), at p. 44: **Annex CH/M-54**.

²²⁸ Federal High Court Judgment (above note 130), at p. 44: **Annex CH/M-54**.

²²⁹ Affidavit of Mr Nestola (above note 2), paras. 23-27: **Annex CH/M-5**; Federal High Court Judgment (above note 130), at pp. 42-44: **Annex CH/M-54**; see above, para. 2.5.

²³⁰ Federal High Court Judgment (above note 130), at p. 48: **Annex CH/M-54** (emphasis added).

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to prove Count 2 of the charge against the Defendants, I am equally unable to infer, from the entire evidence adduced by the prosecution, how [the Master, three other officers and the vessel] conspired with each other to, without lawful authority or appropriate licence import, distribute or deal in/with Petroleum Product as contained in Count 1.²³¹

2.62. With respect to Counts 3, 4, 5 and 6, the Judge found that the amount contained in the Bill of Lading (7,488.484 cubic metres at 15°C)²³² “could not have been possible or rather impossible to be declared because it was not available at the time of the arrest of the Defendants”.²³³ That was because this amount corresponded to the amount loaded at offshore Lomé. Upon her arrest, the *M/T “San Padre Pio”* could not have been expected to declare the same amount, since she had already completed three STS transfers. In other words, the amount of gasoil indicated on the Bill of Lading could not possibly have been declared upon arrest, because the cargo of gasoil on board the vessel was reduced following the three STS transfers on 21-23 January 2018. The Judge further held that:

For the above reason and by virtue of the admission of [Prosecution Witness 2] to the effect that he is aware that all levies have been paid, I have no doubt in my mind that the Prosecution has failed to prove the allegations contained in COUNTS 3, 4, 5 and 6 against the 1st and 5th Defendants beyond reasonable doubt and in accordance with Section 135 of the Evidence Act, 2011.²³⁴

2.63. The Judge concluded that:

Accordingly therefore, 1st, 2nd, 3rd, 4th and 5th Defendants are found not guilty as charged and are hereby discharged and acquitted.²³⁵

2.64. In a notice purportedly dated 29 November 2019,²³⁶ the EFCC filed a notice of appeal against the High Court judgment to the Nigerian Federal Court of Appeal (“**the Court of Appeal**”).²³⁷ The EFCC also filed a motion, dated 2 December 2019, requesting the High Court to “stay[...] the execution” of the High Court judgment “pending the hearing and determination” of the appeal.²³⁸

²³¹ Federal High Court Judgment (above note 130), at p. 49: **Annex CH/M-54**.

²³² Bill of Lading (above note 98): **Annex CH/M-32**. This amount is equivalent to approximately 6,260 MT.

²³³ Federal High Court Judgment (above note 130), at p. 55: **Annex CH/M-54**.

²³⁴ Federal High Court Judgment (above note 130), at p. 56: **Annex CH/M-54**.

²³⁵ Federal High Court Judgment (above note 130), at p. 56: **Annex CH/M-54**.

²³⁶ References to dates appearing on EFCC documents should not be construed as acceptance by Switzerland that such documents were indeed filed and/or served on that date.

²³⁷ It is unclear how the EFCC filed its notice of appeal on 29 November 2019, bearing in mind that the High Court’s reasoned Judgment was not made available to the parties until early December 2019 (Federal High Court Judgment (above note 130): **Annex CH/M-54**). Only a brief Judgment Order was made available on the day of the final hearing, on 28 November 2019 (Federal High Court Judgment Order (above note 217): **Annex CH/M-87**).

²³⁸ Federal High Court of Nigeria, Port Harcourt, Economic and Financial Crimes Commission’s Motion on Notice Brought Pursuant to Order 32, Rule 1&2 of the Rules of this Honourable Court, Section 6 of the

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2.65. It would appear that Nigeria’s efforts to overturn to the High Court judgment have – to some extent at least – been influenced by the present proceedings before ITLOS. In a note dated 6 January 2020, the EFCC’s Head of Legal and Prosecution Department at Port Harcourt urged the Director of Organisational Support to make funds available for an appeal and noted that:

It is expedient we prosecute the appeal to send a strong message to the Court and Litigants alike that the [EFCC] will not sleep over its right any day, *so well so that this is the case that the Republic of Switzerland sued the Federal Republic of Nigeria to International Court of Law of the Sea in Germany.*²³⁹

2.66. On 28 January 2020, the EFCC’s motion for a stay of execution was refused and struck out by the High Court.²⁴⁰ On 19 March 2020, the Court of Appeal dismissed the EFCC’s appeal against High Court’s judgment on the basis that:

It is clearly obvious that the notice was filed since on 29/11/2019. Ever since then the Appellant [the EFCC] has gone in to a deep slumber. The appeal has not been entered up to this moment.

Hence the appeal is deemed abandoned and it is thereby dismissed for non-diligent prosecution.²⁴¹

2.67. By notice dated 13 April 2020,²⁴² the EFCC has now appealed this decision (the Court of Appeal’s dismissal of the appeal) to the Nigerian Supreme Court (“**the Supreme Court**”). The appeal to the Supreme Court is premised on an alleged “serious miscarriage of justice” and infringement of Nigeria’s “right to a fair hearing”.²⁴³ For reasons that remain unclear, the EFCC has also (simultaneously) filed a motion at the Court of Appeal seeking to restore and re-list its appeal against the High Court judgment. While this motion is purportedly dated 25 March 2020, it appears that the Court of Appeal did not receive it until 27 April 2020.²⁴⁴

2.68. Despite the EFCC’s numerous attempts to overturn and stay the execution of the High Court’s judgment, as of the date of this Memorial, there are no longer any pending criminal charges against the vessel or any of her crew. It follows that the High Court’s acquittal of the vessel, the Master and the three other officers remains in effect. It is unclear on what basis –

Constitution of the Federal Republic of Nigeria as Amended and the Inherent Powers of this Honourable Court, dated 2 December 2019: **Annex CH/M-88**.

²³⁹ Memorandum from the Head of Legal & Prosecution Department at the Economic and Financial Crimes Commission to the Director of Organisational Support at the Economic and Financial Crimes Commission, dated 6 January 2020: **Annex CH/M-89** (emphasis added).

²⁴⁰ Federal High Court of Nigeria, Port Harcourt, *Order of 17 January 2020*, Charge No. FHC/PH/24C/2018: **Annex CH/M-90**.

²⁴¹ Court of Appeal, Port Harcourt, *Decision of 19 March 2020*, Appeal No. CA/PH/21MCR/2020: **Annex CH/M-91**.

²⁴² See above note 236

²⁴³ Supreme Court of Nigeria, Economic and Financial Crimes Commission’s Notice of Appeal, Appeal No. CA/PH/21MCR 2020, dated 13 April 2020: **Annex CH/M-92**.

²⁴⁴ Court of Appeal, Port Harcourt, Economic and Financial Crimes Commission’s Motion on Notice Pursuant to Section 36 of the 1999 Constitution and under the Inherent Jurisdiction of the Hon. Court, dated 25 March 2020: **Annex CH/M-93**.

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under domestic law – Nigerian authorities continue to detain the vessel, more than seven months after the High Court dismissed all charges against the vessel and her crew.

IV. The situation of the vessel, her crew and cargo

2.69. On 30 November 2019, following their acquittal and thanks to the manager’s continued and direct involvement, the Master and the three other officers were able to leave Nigeria. Despite a formal request of 20 December 2019 for a copy of the High Court judgment,²⁴⁵ Nigeria has never provided one to Switzerland, the flag State. Nor did it inform Switzerland that the Master and the three other officers had left its territory on 30 November 2019, despite the obvious relevance of this information to the present proceedings.

2.70. Throughout their detention, both in prison and on board the vessel under armed guard (six months in the case of 12 crew members and more than 22 months in the case of the Master and the three other officers), the crew faced many hardships. Crew members developed medical conditions, ranging from dental problems requiring the extraction of teeth to typhoid fever, diabetes, insomnia, hypertriglyceridemia, skin infection and loss of vision.²⁴⁶ Many of these will have a lifelong effect, not to mention the psychological consequences of the stressful situation.²⁴⁷ Two of the four officers have young children and were kept away from their families for almost two years.²⁴⁸

2.71. Nigerian authorities have kept the *M/T “San Padre Pio”* in detention at Bonny Inner Anchorage since 24 January 2018.²⁴⁹ At this location, the vessel, her crew and cargo have faced a range of serious dangers. The proximity to the coast results in a real risk of armed attacks.²⁵⁰ During the first few weeks of detention, the Nigerian Navy stationed four armed guards on the vessel. Thereafter, only two Navy guards remained onboard, with only one gun between them. At 21:20 on 15 April 2019 the *M/T “San Padre Pio”* and her crew were attacked by four armed assailants.²⁵¹ At least two assailants boarded the vessel armed with machine guns. The two Navy guards stationed on the *M/T “San Padre Pio”* were only just

²⁴⁵ Letter from the Director of the Swiss Directorate of International Law at the Federal Department of Foreign Affairs to the Director of the International and Comparative Law Department at the Nigerian Ministry of Justice, dated 19 December 2019: **Annex CH/M-94**.

²⁴⁶ Emergency Healthcare International Ltd, Medical Reports of the Master and the three other Officers of the *M/T “San Padre Pio”*, dated 8 August 2019 (“Medical Reports”): **Annex CH/M-95**; Affidavit of the Master (above note 1), para. 43: **Annex CH/M-1**; Affidavit of the Chief Mate (above note 1), para. 28: **Annex CH/M-2**; Affidavit of the 2nd Mate (above note 1), para. 18: **Annex CH/M-3**; Affidavit of the 3rd Mate (above note 1), para. 25: **Annex CH/M-4**.

²⁴⁷ Medical Reports (above note 246): **Annex CH/M-95**; Affidavit of the Master (above note 1), para. 43: **Annex CH/M-1**; Affidavit of the Chief Mate (above note 1), para. 30: **Annex CH/M-2**; Affidavit of the 3rd Mate (above note 1), paras. 17, 27: **Annex CH/M-4**.

²⁴⁸ The officers’ children were born between 1998 and 2013. The youngest child was barely four years old when his father was arrested, Affidavit of the Chief Mate (above note 1), para. 29: **Annex CH/M-2**.

²⁴⁹ Logbook (above note 114), at pp. 17, 19: **Annex CH/M-45**; Master’s SOF for 24 January 2018 (above note 148): **Annex CH/M-61**.

²⁵⁰ See above, paras. 1.18-1.24.

²⁵¹ Affidavit of the Master (above note 1), para. 41: **Annex CH/M-1**; Affidavit of the Chief Mate (above note 1), para. 25: **Annex CH/M-2**; Affidavit of the 2nd Mate (above note 1), para. 22: **Annex CH/M-3**; Affidavit of the 3rd Mate (above note 1), para. 23: **Annex CH/M-4**.

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able to repel this attack. One of the guards was shot in the face and gravely wounded, avoiding death by a matter of centimetres.²⁵² The Chief Mate describes the attack as follows:

On the evening of 15 April 2019, the SPP was attacked by pirates. I was in my cabin at the time and when I came downstairs I saw one of the Navy guards had been shot in the face (right cheek). There were two pirates on the poop deck. I notified the bridge by radio and called for the medical officer (the 2nd Mate) to give first aid to the injured Navy guard. An alarm was activated and we all went to the citadel, which is a panic room near the engine room. It was a scary and stressful experience. The injured Navy guard was evacuated to hospital. After the pirate attack, the number of Navy guards was increased back to four.²⁵³

2.72. The continued detention of the *M/T "San Padre Pio"* at the same location in Bonny Inner Anchorage means that the vessel and her current crew remain at considerable risk of further attacks.²⁵⁴

2.73. The ongoing detention of the vessel also puts both her and the environment at high risk. Whereas the vessel's book value was estimated at around USD 10,500,000 in December 2017,²⁵⁵ this has now diminished considerably and will continue to diminish for as long as she remains detained. The Master and the three other officers have all described a material deterioration in the condition of the vessel.²⁵⁶ Due to the vessel's ongoing immobility over more than 29 months and the difficulties associated with sourcing equipment and spare parts, it has been impossible for the crew to carry out the high level of maintenance required in such humid climatic conditions. Maintenance work has also been delayed because Nigeria has imposed an administrative approval process.²⁵⁷ The *M/T "San Padre Pio"* was not built to remain at anchor for so long without dry docking.²⁵⁸ On account of her class status, multiple revisions or works are due on the vessel.²⁵⁹ In addition, an assessment made in December 2019 showed that the hull was then covered by 30 centimetres of barnacles.²⁶⁰ This led to extensive vibrations of the propeller and shaft, as well as a greatly diminished cooling capacity, because the barnacles obstruct the underwater inlet. It is uncertain how long the vessel will remain in a condition which makes it possible to avoid harm to the environment, in particular due to the continued contact of the vessel's paint with the water and the lack of

²⁵² Photographs of the Injured Nigerian Navy Guard and the *M/T "San Padre Pio"* following the Armed Attack of 15 April 2019: **Annex CH/M-96 (Warning: Graphic)**.

²⁵³ Affidavit of the Chief Mate (above note 1), para. 25: **Annex CH/M-2**.

²⁵⁴ See above, paras. 1.18-1.24.

²⁵⁵ Bayside Services, Valuation of the *M/T "San Padre Pio"* as of 8 December 2017: **Annex CH/M-97**. It should be noted that this valuation dates to before the vessel's detention. It therefore cannot be relied upon to determine the value of the vessel today, which will have decreased due to degradation caused by the prolonged state of detention.

²⁵⁶ Affidavit of the Master (above note 1), para. 45: **Annex CH/M-1**; Affidavit of the Chief Mate (above note 1), para. 27: **Annex CH/M-2**; Affidavit of the 2nd Mate (above note 1), para. 24: **Annex CH/M-3**; Affidavit of the 3rd Mate (above note 1), para. 28: **Annex CH/M-4**.

²⁵⁷ Emails Concerning Repairs to the *M/T "San Padre Pio"*, dated 2-5 December 2019: **Annex CH/M-98**.

²⁵⁸ Affidavit of the 2nd Mate (above note 1), para. 24: **Annex CH/M-3**.

²⁵⁹ Bureau Veritas Marine & Offshore, VeriSTAR Info Survey Status Report on the *M/T "San Padre Pio"*, dated 2 June 2020: **Annex CH/M-99**.

²⁶⁰ See also Affidavit of the 3rd Mate (above note 1), para. 28: **Annex CH/M-4**.

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regular protective repainting of the hull. The integrity of the hull therefore cannot be guaranteed as it would be under normal circumstances. The 3rd Mate has noted that:

By the time I left the SPP, the vessel was in a bad condition. There was a problem with the main engine. I was told by one of the engineers that the engine temperature was rising too fast and spare parts were needed. As a result, the [vessel] is suffering from a loss of power. When we tried to change the anchorage position, the [vessel] was unable to overcome a tidal current of just 3 knots. There are also a lot of barnacles accumulating on the hull and specialist divers will be needed to remove them.²⁶¹

2.74. As of June 2020, Nigeria is still denying access to the vessel for a routine annual survey.²⁶² Despite Nigeria’s claims to the contrary,²⁶³ its own actions put the environment at grave risk.

2.75. The risk to the vessel and the environment is compounded by her location in close proximity to other vessels detained by Nigerian authorities. This gives rise to a real and demonstrable threat of collision. On 15 June 2019, the *M/T “San Padre Pio”* was hit twice by the *M/T “Invictus”*, also detained by Nigerian authorities and left to drag her anchor in bad weather.²⁶⁴ Thereafter, the *M/T “San Padre Pio”* was hit by a security boat.²⁶⁵ A third collision occurred when the Master was at a court hearing.²⁶⁶ There was also a fourth collision on 2 April 2020, when the Tug Boat “*Sharon 1*” was towing a barge close to the *M/T “San Padre Pio”* and the barge collided with the vessel.²⁶⁷ The *M/T “San Padre Pio”* continues to be stationed in a dangerous location, in contravention of Nigeria’s obligations under the Convention.²⁶⁸

2.76. As to the cargo on board the vessel, it has reduced in quantity and, presumably, in quality since the arrest and detention of the *M/T “San Padre Pio”*. The vessel has used approximately 1 MT of gasoil per day to maintain her basic functioning, meaning that as of 8 June 2020, around 4,201.5 MT of gasoil remained onboard, compared to about 5,075 MT at the time of the arrest on 23 January 2018. It is also assumed (but cannot be verified due to Nigeria’s actions)²⁶⁹ that there has been a deterioration in the quality of the gasoil cargo on

²⁶¹ Affidavit of the 3rd Mate (above note 1), para. 28: **Annex CH/M-4**.

²⁶² Letter from Blueseas Maritime Services Nigeria Ltd to the Manager, dated 12 June 2020 (“Letter from Blueseas Maritime Services Nigeria Ltd to the Manager”): **Annex CH/M-100**.

²⁶³ *Statement in Response* (above note 9), at p. 20, para. 3.16.

²⁶⁴ Affidavit of the Master (above note 1), para. 44: **Annex CH/M-1**; Affidavit of the Chief Mate (above note 1), para. 26: **Annex CH/M-2**; Affidavit of the 2nd Mate (above note 1), para. 23: **Annex CH/M-3**; Affidavit of the 3rd Mate (above note 1), para. 24: **Annex CH/M-4**.

²⁶⁵ Affidavit of the Master (above note 1), para. 44: **Annex CH/M-1**.

²⁶⁶ The Master provides this account of collisions with other vessels: “During my time in detention in Nigeria, I can recall at least three occasions during which other vessels collided with the [*M/T “San Padre Pio”*]. In June 2019, the vessel was hit by the *M/T “Invictus”*, a tanker which was also under detention at Bonny Anchorage. This was due to the *M/T “Invictus”* drifting during a storm. Second, the [vessel] was struck by a security boat, which quickly left the area soon after the collision. The third occasion happened during a court hearing. The *M/T “San Padre Pio”*’s chief engineer reported that there had been a collision with another vessel. This resulted in a dent on the port side of the [vessel].” (Affidavit of the Master (above note 1), para. 44: **Annex CH/M-1**).

²⁶⁷ Email from the Manager to the Swiss Federal Department of Foreign Affairs, dated 3 April 2020: **Annex CH/M-101**.

²⁶⁸ See below, paras. 6.2-6.10.

²⁶⁹ Nigeria has regularly restricted access to the vessel, see for instance: Letter from Blueseas Maritime Services Nigeria Ltd to the Manager (above note 262): **Annex CH/M-100**.

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board the vessel due to climatic conditions in the area and the duration of the vessel's detention.

2.77. Due to the detention of the *M/T "San Padre Pio"* in Nigeria for more than two and half years, the vessel owner has encountered significant financial difficulties. All the other companies involved, as well as Switzerland itself, have also suffered losses and are likely to continue to do so for as long as the vessel remains detained in Nigeria.

MEMORIAL OF SWITZERLAND**PART II: THE LAW**

This Part explains that the treatment imposed by Nigeria on the vessel and her crew violated and is still violating the Convention including the rights of Switzerland as a flag State.

Chapter 3 explains that the EEZ is a zone subject to a specific legal regime, in which the coastal State’s prescriptive jurisdiction and enforcement jurisdiction are limited to those expressly provided for in the Convention. In the present case, Switzerland enjoys freedom of navigation and exclusive flag State jurisdiction over the activities of the *M/T “San Padre Pio”*.

Chapter 4 shows that Nigeria had no grounds for exercising the prescriptive jurisdiction it purported to enjoy in relation to the vessel’s STS operations in its EEZ on 21-23 January 2018. In doing so, it violated Switzerland’s rights under the Convention.

Chapter 5 demonstrates that, even if Nigeria had been entitled to exercise prescriptive jurisdiction over the *M/T “San Padre Pio”*, *quod non*, it did not, in the circumstances of this case, have the right to exercise enforcement jurisdiction against the vessel.

Chapter 6 explains that, in any event, Nigeria: (1) breached the Convention’s enforcement safeguards; (2) failed to have due regard to Switzerland’s rights and duties; (3) acted in a manner that lacked humanity and was not reasonable or proportionate vis-à-vis the *M/T “San Padre Pio”* and her crew; and (4) breached Article 300 of the Convention.

Chapter 7 sets out the remedies sought by Switzerland for the damage suffered as a result of Nigeria’s breaches of the Convention.

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CHAPTER 3

**SWITZERLAND ENJOYED FREEDOM OF NAVIGATION AND
EXCLUSIVE JURISDICTION IN RELATION TO THE ACTIVITIES OF THE
M/T “SAN PADRE PIO”**

3.1. The EEZ is a zone of a functional nature subject to a specific legal regime. Within the EEZ, the coastal State is granted sovereign rights for specific purposes, but none of these provided a legal basis for Nigeria’s actions in respect of the activities of the *M/T “San Padre Pio”* at issue in this case (**Section I**). The activities of the *M/T “San Padre Pio”* which formed the purported basis for her interception, arrest and detention by Nigeria fell exclusively within the freedom of navigation or the other internationally lawful uses of the sea related to freedom of navigation within the meaning of Articles 58(1) and 87(1) of the Convention. They are to be regulated exclusively by the flag State (i.e., Switzerland) (**Section II**).

I. The EEZ is a zone subject to a specific legal regime

3.2. Article 55 of the Convention provides:

The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.

3.3. The EEZ is not part of the territorial sea. It is “an area beyond and adjacent to the territorial sea”. High seas freedoms generally apply within the EEZ. Article 58 of the Convention provides as follows:

1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy the relevant provisions of the Convention, *the freedoms referred to in article 87 of navigation* and overflight and of the laying of submarine cables and pipelines, and *other internationally lawful uses of the sea related to these freedoms*, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.
2. Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.
3. In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.²⁷⁰

²⁷⁰ Emphasis added.

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3.4. The rights, jurisdiction, duties and freedoms in the EEZ are expressly set out in Part V of the Convention and supplemented by other provisions of the Convention. Article 56 describes “the general nature of the rights, jurisdiction and duties of the coastal State in the zone”.²⁷¹ It reads as follows:

1. In the exclusive economic zone, the coastal State has:
 - (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
 - (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
 - (i) the establishment and use of artificial islands, installations and structures;
 - (ii) marine scientific research;
 - (iii) the protection and preservation of the marine environment;
 - (c) other rights and duties provided for in this Convention.
2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.
3. The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI.

3.5. By virtue of Article 56(1)(a), a coastal State has “sovereign rights” only for the purpose of exploring and exploiting, conserving and managing natural resources, while under Article 56(1)(b), the coastal State is granted “jurisdiction as provided for in the relevant provisions of this Convention” in a limited number of areas. The precise scope of these sovereign rights and jurisdiction is set out in the relevant provisions of the Convention and, in the case of the seabed and subsoil, their exercise is to be in accordance with Part VI of the Convention on the continental shelf.

3.6. The extent of *sovereign rights* is specified in Articles 61 to 73 of the Convention with regard to living resources (except for sedentary species on the continental shelf).²⁷² With regard to non-living resources, as set out in Article 56(3), the extent of *sovereign rights* is

²⁷¹ “Article 56”, in M. H. Nordquist *et al.*, *The United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. II, Dordrecht, Martinus Nijhoff Publishers, 1993, at p. 525, para. 56.1.

²⁷² See A. Proelß, “Article 56”, in A. Proelß (ed.), *The United Nations Convention on the Law of the Sea: A Commentary*, Nördlingen, C. H. Beck, 2017, at p. 420, para. 1; “Article 56”, in M. H. Nordquist *et al.* (above note 271), at p. 542, para. 56.11(b); “Article 73”, in M. H. Nordquist *et al.*, *The United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. II, Dordrecht, Martinus Nijhoff Publishers, 1993, at p. 794, para. 73.10(a).

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indicated in Part VI on the continental shelf. The intertwined nature of rights relating to the EEZ and the continental shelf was noted by the International Court of Justice in the *Continental Shelf (Libyan Arab Jamahiriya/Malta) case*:

Although the institutions of the continental shelf and the exclusive economic zone are different and distinct, the rights which the exclusive economic zone entails over the sea-bed of the zone are defined by reference to the régime laid down for the continental shelf.²⁷³

3.7. As to the scope of the *jurisdiction* of the coastal State, Article 56(1)(b) makes it clear that it is determined by the “relevant provisions” of the Convention on the establishment and use of artificial islands, installations and structures, by Part XII for the protection and preservation of the marine environment and by Part XIII in relation to marine scientific research.

3.8. Finally, as provided for in Article 56(1)(c), the coastal State has “*other rights and duties* provided for in this Convention”.²⁷⁴ This paragraph is usually understood to refer to rights such as those related to the contiguous zone or that of hot pursuit under Article 111 of the Convention.²⁷⁵

3.9. It is evident from the text of the Convention, its negotiating history and State practice that the coastal State is only entitled to exercise sovereign rights, jurisdiction and other rights which are expressly granted by Article 56 and the associated provisions described above.²⁷⁶ The EEZ is not subject to the sovereignty of any State. The coastal State’s prescriptive jurisdiction and enforcement powers are strictly limited to what is expressly provided for in the Convention.

II. The activities of the *M/T “San Padre Pio”* fell within Switzerland’s freedom of navigation and exclusive flag State jurisdiction

3.10. When enforcing its laws and regulations in relation to the *M/T “San Padre Pio”*, Nigeria claimed that it was exercising its sovereign rights and obligations pursuant to Articles 56, 208 and 214 of the Convention.²⁷⁷ For the reasons set out in Chapters 4 and 5 below, Nigeria did not have any legal basis for exercising prescriptive jurisdiction and enforcement jurisdiction over the activities undertaken by the *M/T “San Padre Pio”* in its EEZ.²⁷⁸

3.11. The activities of the *M/T “San Padre Pio”* in Nigeria’s EEZ on 21-23 January 2018 fell within Switzerland’s right to freedom of navigation, as provided for under Article 58(1) read together with Article 87(1) of the Convention. Freedom of navigation lies at the heart of

²⁷³ *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, ICJ Reports 1985, p. 13, at p. 33, para. 34.

²⁷⁴ Emphasis added.

²⁷⁵ A. Proelß, “Article 56” (above note 272), at p. 429, para. 22.

²⁷⁶ D. Rothwell / T. Stephens, *The International Law of the Sea*, 2nd ed., Oxford, Hart Publishing, 2016, at p. 94.

²⁷⁷ *Statement in Response* (above note 9), at p. 20, para. 3.16, at p. 22, para. 3.22; *M/T “San Padre Pio” (Switzerland v. Nigeria)*, Provisional Measures, Verbatim Record of 21 June 2019, at 3p.m., ITLOS/PV.19/C27/2 (“*Second Verbatim Record*”), at p. 3, lines 13-15.

²⁷⁸ A State’s jurisdictional competence falls broadly under two categories: “the power to make laws, decisions, or rules (*prescriptive jurisdiction*)” and “the power to take executive or judicial action in pursuance of or consequent on the making of decisions or rules (respectively *enforcement or adjudicative jurisdiction*)” (see further J. Crawford, *Brownlie’s Principles of Public International Law*, 9th ed., Oxford, Oxford University Press, 2019, at p. 440) (emphasis original).

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the law of the sea and encompasses not only the freedom of vessels to travel from one place to another but, more generally, to undertake any activity not expressly prohibited by the Convention or other rules of international law. This is reflected in Article 58(1) of the Convention:

In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.

3.12. The words “other internationally lawful uses of the sea related to these freedoms”, together with the examples that follow these words, were intended by the drafters to indicate a non-restrictive interpretation of high seas freedoms. This was confirmed by the Tribunal in the *M/V “Norstar”* case, where it was recognised that bunkering²⁷⁹ (other than the bunkering of vessels engaged in fishing) falls within the freedom of the high seas:

The Tribunal recalls its findings in the *M/V “Virginia G”* Case that, while ‘the bunkering of foreign vessels engaged in fishing in the exclusive economic zone is an activity which may be regulated by the coastal State concerned’, the coastal State does not have such competence ‘with regard to other bunkering activities, unless otherwise determined in accordance with the Convention’ (*M/V “Virginia G” (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, p. 4, at p. 70, para. 223). In the view of the Tribunal, bunkering on the high seas is part of the freedom of navigation to be exercised under the conditions laid down by the Convention and other rules of international law.²⁸⁰

3.13. Nigeria argued in the Provisional Measures case that Switzerland had failed to take into account the requirement, under Article 58(1) of the Convention, of compatibility with the other provisions of the Convention.²⁸¹ However, as will be shown in more detail in Chapter 4 below, this assertion is incorrect. Switzerland’s exercise of exclusive flag State jurisdiction over the activities of the *M/T “San Padre Pio”* in Nigeria’s EEZ is fully compatible with all provisions of the Convention. Bar the very limited provision of prescriptive jurisdiction in Article 211 concerning the protection of the marine environment, which does not apply in the present case (as explained below), there is no provision in the Convention empowering the coastal State to adopt laws and regulations regarding transfers of gasoil between vessels, including STS transfers, in the EEZ. Outside the fisheries context,²⁸² the regime relevant to

²⁷⁹ Bunkering is the act of transferring fuel directly to the bunkers of another vessel for that vessel’s own use, as was the case in the *M/V “Norstar”* case (see also Affidavit of Mr Nestola (above note 2), para. 18: **Annex CH/M-5**). The situation in this case is distinct in that STS transfers took place by which gasoil was transferred from ship to ship as cargo.

²⁸⁰ *M/V “Norstar” (Panama v. Italy), Judgment, ITLOS Reports 2018-2019*, to be published (“*M/V “Norstar”*”), at p. 61, para. 219.

²⁸¹ *Second Verbatim Record* (above note 277), at p. 21, lines 16-20.

²⁸² See below the discussion of the *M/V “Virginia G”* case in Chapter 4, at paras. 4.11-4.17.

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such operations is that which is applicable on the high seas, as set out in Articles 88 to 115 of the Convention.²⁸³

3.14. According to Article 58(2) of the Convention, the relevant provisions of Part VII on the high seas, Articles 88 to 115 are applicable in the EEZ. Among these, Article 92(1), which codifies a long-standing rule of customary international law,²⁸⁴ prescribes that:

Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas...

3.15. The Arbitral Tribunal in *Arctic Sunrise arbitration* confirmed that, under Article 58(2) of the Convention, the exclusive jurisdiction enjoyed by the flag State applies in the EEZ as well as the high seas:

Articles 92(1) and 58(2) of the Convention provide for the exclusive jurisdiction of a State over ships flying its flag in the EEZ, which include ships used for the exercise of the right to protest. As a result of the exclusive jurisdiction of the flag State over ships in the EEZ, a coastal State may only exercise jurisdiction, including law enforcement measures, over a ship, with the prior consent of the flag State...²⁸⁵

3.16. Switzerland's exclusive jurisdiction over the *M/T "San Padre Pio"* covers not only enforcement action, but also prescriptive jurisdiction, as was expressly recognised by the Tribunal in the *M/V "Norstar"* case:

As no State may exercise jurisdiction over foreign ships on the high seas, in the view of the Tribunal, any act of interference with navigation of foreign ships or any exercise of jurisdiction over such ships on the high seas constitutes a breach of the freedom of navigation, unless justified by the Convention or other international treaties. It goes without saying that physical or material interference with navigation of foreign ships on the high seas violates the freedom of navigation.

However, even acts which do not involve physical interference or enforcement on the high seas may constitute a breach of the freedom of navigation. ...

²⁸³ *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999*, p. 10 ("*M/V "SAIGA" (No. 2)*"), paras. 130-131, 136.

²⁸⁴ The *S.S. Lotus* reflects the fact that Art. 92 of the Convention codifies a long-standing rule of customary international law:

It is certainly true that – apart from certain special cases which are defined by international law – vessels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them. (*S.S. Lotus (France v. Turkey), Judgement of 7 September 1927, PCIJ, Series A, No. 10*, at p. 25).

²⁸⁵ *The Arctic Sunrise Arbitration (Netherlands v. Russia), Merits, Award of 14 August 2015, PCA Case No 2014-02 ("Arctic Sunrise Arbitration, Merits")*, at p. 55, para. 231.

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The Tribunal already stated, in paragraphs 216, 217 and 218, that the principle of exclusive flag State jurisdiction is an inherent component of the freedom of navigation under article 87 of the Convention. This principle prohibits not only the exercise of enforcement jurisdiction on the high seas by States other than the flag State but also the extension of their prescriptive jurisdiction to lawful activities conducted by foreign ships on the high seas. The Tribunal, therefore, cannot accept Italy's arguments that article 87 is not concerned with territoriality or extraterritoriality but rather with interference with navigation and that extraterritoriality is not the test to assess a breach of article 87. On the contrary, if a State applies its criminal and customs laws to the high seas and criminalizes activities carried out by foreign ships thereon, it would constitute a breach of article 87 of the Convention, unless justified by the Convention or other international treaties. This would be so, even if the State refrained from enforcing those laws on the high seas.²⁸⁶

3.17. In conclusion, Switzerland enjoyed freedom of navigation and exclusive flag State jurisdiction in relation to the activities of the *M/T "San Padre Pio"* in Nigeria's EEZ. By adopting and enforcing laws and regulations relating to such activities, which fall squarely under the freedom of the high seas, Nigeria has breached Switzerland's rights under Article 58(1), read with Articles 87(1) and 92(1) of the Convention.

²⁸⁶ *M/V "Norstar"* (above note 280), at pp. 62-63, paras. 222-223 and 225.

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CHAPTER 4

NIGERIA HAD NO BASIS TO EXERCISE PRESCRIPTIVE JURISDICTION
VIS-À-VIS STS TRANSFERS IN ITS EEZ

4.1. Under the Convention, prescriptive jurisdiction may be exercised by the coastal State over certain defined activities in the EEZ. In this case, neither Article 56(1)(a) (**Section I**), nor Articles 56(1)(b)(i) and 80, read with Article 60 (**Section II**), or Articles 56(1)(b)(iii), 208 and 211 of the Convention (**Section III**) provide a basis for Nigeria to exercise prescriptive jurisdiction in relation to STS transfers in its EEZ. In exercising such prescriptive jurisdiction, Nigeria violated Switzerland's rights under the Convention.

I. Article 56(1)(a) of the Convention did not grant Nigeria sovereign rights over the activities of the *M/T "San Padre Pio"*

4.2. Nigeria has claimed that it had the sovereign right under Articles 56(1)(a) to exercise its jurisdiction "over the bunkering incident in question".²⁸⁷

4.3. Under Article 56(1)(a) of the Convention, a coastal State, in its EEZ, enjoys "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living ... of the seabed and its subsoil".

4.4. The exploitation of the non-living resources of the EEZ, which in the oil industry mainly consists of natural gas and crude oil, is undertaken from fixed or floating production units (i.e., that can be moved to positions where they are then fixed). It consists largely of drilling, a mechanical process by which a wellbore is drilled below the seabed, in order to extract those resources from beneath it.

4.5. As described in paragraphs 2.9-2.17 above, at no time was the *M/T "San Padre Pio"* engaged or involved in the exploration or exploitation of non-living resources. It was merely one vessel in a chain of commercial transactions that may have led to gasoil being delivered to the Odudu Terminal or nearby platforms. The gasoil was first transferred to the *M/T "Torm Helene"*, before moving to the *M/T "San Padre Pio"* by STS transfer at offshore Lomé, Togo. The *M/T "San Padre Pio"* subsequently engaged in STS transfers to three other vessels (the *M/V "Ozren Tide"*, the *M/V "Lahama"* and the *M/V "Energy Scout"*), none of which were themselves engaged in the exploration or exploitation of non-living resources. These three vessels, in turn, presumably transported the gasoil to the Odudu Terminal or nearby platforms.²⁸⁸

4.6. Two operations took place – wholly distinct in time, place and nature – first, the STS transfers between the *M/T "San Padre Pio"* and the three supply vessels; second, the three supply vessels delivering and transferring gasoil. This second operation in no way involved the *M/T "San Padre Pio"*. Once the gasoil left her cargo tanks, the *M/T "San Padre Pio"* had

²⁸⁷ *Statement in Response* (above note 9), at p. 18, para. 3.9; see also *Second Verbatim Record* (above note 277), at p. 3, lines 13-15.

²⁸⁸ It is presumed that the gasoil was delivered to the Terminal or nearby platforms but, in fact, the final destination or destinations of the cargo is not known to the vessel, the charterer, the vessel owner or the cargo owner. As noted above, under the contract, ownership and responsibility for the gasoil passed when it was transferred from the *M/T "San Padre Pio"* to the three supply vessels (Affidavit of Mr Nestola (above note 2), para. 68: **Annex CH/M-5**).

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no control whatsoever as to its destination and future use, and those onboard could not know where it was ultimately delivered.

4.7. The international regime applicable to STS transfers differentiates transfers between vessels from transfers directly to production units. This distinction is apparent from Chapter 8 of Annex I of MARPOL on the “Prevention of pollution during the transfer of oil cargo between oil tankers at sea”,²⁸⁹ which consists of three regulations (Regulations 40-42).

4.8. Regulation 40, “Scope of application”, provides in its relevant parts as follows:

1. The regulations contained in this chapter apply to oil tankers of 150 gross tonnage and above engaged in the transfer of oil cargo between oil tankers at sea (STS operations) and their STS operations conducted on or after 1 April 2012.
2. The regulations contained in this chapter shall not apply to oil transfer operations associated with fixed or floating platforms including drilling rigs; floating production, storage and offloading facilities (FPSOs) used for the offshore production and storage of oil; and floating storage units (FSUs) used for the offshore storage of produced oil^[290].

4.9. Hence, STS operations within the meaning of Regulation 40(1) are not “oil transfer operations associated with fixed or floating platforms including drilling rigs; floating production, storage and offloading facilities (FPSOs) used for the offshore production and storage of oil; and floating storage units (FSUs) used for the offshore storage of produced oil”.²⁹¹ The negotiating records show that the exclusion of these oil transfer operations was deliberate:

A large number of delegations supported the view that bunkering operations and FPSOs and FSUs should be excluded from the scope of chapter 8. ... With regard to FPSOs and FSUs it was pointed that these vessels have been regulated as marine terminal operations which are significantly different to oil tankers, often involving specialized vessels and equipment.²⁹²

4.10. The transfer of gasoil cargo between the *M/T “San Padre Pio”* and the *M/V “Ozren Tide”*, the *M/V “Lahama”* and the *M/V “Energy Scout”* were “STS operations” within the meaning of Regulation 40(1) and within the scope of application of Chapter 8. All three transfers were related to an oil cargo within the meaning of Annex I; they took place at sea, between two vessels, not between a vessel and a fixed or floating platform, an FPSO or an

²⁸⁹ IMO, *Amendments to the Annex of the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships*, 1973, IMO Doc. Resolution MEPC.186(59) (17 July 2009) (“Chapter 8 of Annex I of MARPOL”).

²⁹⁰ Footnote 1 to Regulation 40(2) of Chapter 8 of Annex I of MARPOL reads: “Revised Annex I of MARPOL, chapter 7 (resolution MEPC.117(52)) and UNCLOS Article 56 are applicable and govern these operations.”

²⁹¹ Regulation 40(1) and (2) of Chapter 8 of Annex I of MARPOL. On this, see J. A. Roach / R. W. Smith, *Excessive Maritime Claims*, 3rd ed., Leiden, Martinus Nijhoff Publishers, 2012, at pp. 409-412.

²⁹² IMO Sub-Committee on Bulk Liquids and Gases, *Report to the Maritime Safety Committee and the Marine Environment Protection Committee*, IMO Doc. BLG 12/17 (20 February 2008), para. 8.9.

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FSU;²⁹³ the *M/T “San Padre Pio”*, the *M/V “Ozren Tide”*, the *M/V “Lahama”* and the *M/V “Energy Scout”* were all above 150 gross tonnage (“GT”), and at least three of them were “oil tankers” within the meaning of Annex I.²⁹⁴

4.11. Nigeria, in the Provisional Measures case, relied on the decision of the Tribunal in *M/V “Virginia G”* to argue that it had the sovereign right to regulate the activities of the *M/T “San Padre Pio”*. It contended that the Tribunal’s finding, according to which the coastal State had the sovereign right to regulate the bunkering of fishing vessels in the EEZ,²⁹⁵ applies equally to the bunkering of oil and gas exploitation installations, and that any distinction between the two “is without relevance”.²⁹⁶ This is incorrect for at least four reasons.

4.12. First, this case concerns STS transfers, not bunkering. These are two different types of activities subject to distinct legal regimes.

4.13. Second, the case of *M/V “Virginia G”* provides no support for Nigeria’s proposition that it may regulate STS transfers, or even the bunkering of vessels not engaged in fishing in its EEZ. It only “supports the general proposition that the bunkering of vessels engaged in fishing in an exclusive economic zone can be regulated and enforced against by the coastal state”.²⁹⁷ The Tribunal did not make any determination concerning the coastal State’s jurisdiction in relation to bunkering activities in the EEZ of vessels not engaged in fishing. It was in fact careful to limit the wider implications of its ruling by expressly stating that the coastal State “does not have such competence with regard to other bunkering activities, unless otherwise determined in accordance with the Convention.”²⁹⁸

4.14. Third, the Tribunal found that there was a “direct connection” between bunkering fishing vessels and coastal State rights. This direct connection was due to the fact that bunkering “enables [foreign fishing vessels] to continue their activities without interruption at sea”, whereas they would otherwise need to return to port.²⁹⁹ There is no comparable “direct connection” between STS transfers at sea of oil cargoes and exploration and exploitation of non-living resources.

4.15. Fourth, there are important differences in the legal regimes in the Convention governing fishing and the exploitation of non-living resources. In the *M/V “Virginia G”* case, the Tribunal’s reasoning turned not only on Article 56(1) but also and more specifically on

²⁹³ The “*FSO UNITY*” is an FPSO without the processing capability.

²⁹⁴ See Regulation 1(5) read with 1(8) of Chapter 8 of Annex 1 of MARPOL. The *M/V “Energy Scout”* is described as a multipurpose field supply, platform supply vessel of 2,152 GT; the *M/V “Lahama”* is described as a platform supply vessel of 3,050 GT; the *M/V “Ozren Tide”* is described as an anchor handling tug supply vessel of 2,538 GT. They are all ships designed to carry either oil or solid cargoes in bulk: see Information Sheet for the *M/V “Lahama”* (above note 121): **Annex CH/M-49**; Information Sheet for the *M/V “Energy Scout”* (above note 128): **Annex CH/M-51**; Information Sheet for the *M/V “Ozren Tide”* (above note 119): **Annex CH/M-47**.

²⁹⁵ *Second Verbatim Record* (above note 277), at p. 19, lines 39-40.

²⁹⁶ *Second Verbatim Record* (above note 277), at p. 19, lines 40-42.

²⁹⁷ *M/T “San Padre Pio” (Switzerland v. Nigeria), Provisional Measures, Separate Opinion of Judge ad hoc Murphy*, *ITLOS Reports 2018-2019*, to be published, at p. 7, para. 17, referring to *M/V “Virginia G” (Panama/Guinea-Bissau), Judgment*, *ITLOS Reports 2014*, p. 4 (“*M/V “Virginia G”*”), at p. 69, para. 217.

²⁹⁸ *M/V “Virginia G”* (above note 297), at p. 60, para. 204.

²⁹⁹ *M/V “Virginia G”* (above note 297), at p. 63, para. 215.

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Article 62(4), “[u]tilization of the living resources”, which, in the words of the Tribunal, entitles the coastal State “to adopt laws and regulations establishing the terms and conditions for access by foreign fishing vessels to its exclusive economic zone”.³⁰⁰ This provision lists a wide and non-exhaustive range of matters which may be regulated by the coastal State in conserving and managing its living resources.

4.16. The Convention does not contain an equivalent provision for the “[u]tilization of the non-living resources” in the EEZ or on the continental shelf. Article 77 largely replicates Article 56(1)(a) by stating that “[t]he coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources”. The Convention also sets out the extent to which the coastal State can regulate exploration and exploitation of non-living resources in Part V (Article 60) and in Part VI (Article 80, which applies Article 60 from Part V on the EEZ to the continental shelf, and Article 81). However, there is nothing in these provisions that confers jurisdiction on the coastal State to regulate STS transfers in its EEZ outside the safety zone of an installation. The absence of detailed provisions in the Convention on the scope of the coastal State’s entitlement to adopt laws and regulations relating to exploration and exploitation of non-living resources cannot be read as allowing the coastal State to regulate all activities in its EEZ relating to exploitation of non-living resources in any way it sees fit, including activities of vessels engaged in STS transfers of cargoes that may eventually be delivered to offshore platforms.

4.17. Moreover, the Tribunal in *M/V “Virginia G”* relied on the fact that several international instruments regulating fishing included bunkering within “fishing-related activities”.³⁰¹ The same cannot be said of international instruments regulating the maritime exploitation of non-living resources. International instruments dealing with offshore gas and oil exploration and exploitation provide narrow definitions of what constitutes such activities; they do not include the provision of gasoil or other supplies to a platform within the concept of exploitation,³⁰² let alone STS transfers of gasoil at sea that may ultimately be used in exploitation activities.

4.18. In light of the above, the STS transfers performed by the *M/T “San Padre Pio”* on 21-23 January 2018 did not fall within the scope of Article 56(1)(a) of the Convention. They did not amount to activities for the purpose of exploring or exploiting non-living resources in Nigeria’s EEZ. It follows that Article 56(1)(a) did not grant Nigeria sovereign rights over the *M/T “San Padre Pio”* and did not grant it prescriptive jurisdiction.

II. Articles 56(1)(b)(i) and 80 of the Convention, read with Article 60, did not grant Nigeria jurisdiction over the activities of the *M/T “San Padre Pio”*

4.19. According to Article 56(1)(b)(i) of the Convention, coastal States have “jurisdiction, as provided for in the relevant provisions of this Convention with regard to ... the establishment and use of artificial islands, installations and structures”.

³⁰⁰ *M/V “Virginia G”* (above note 297), at p. 62, para. 213.

³⁰¹ *M/V “Virginia G”* (above note 297), at p. 63, para. 216.

³⁰² See e.g., the Convention on the Protection of the Marine Environment of the Baltic Sea Area of 22 March 1974 (“Helsinki Convention”), 1507 UNTS 166, entered into force 3 May 1980, Annex VI on prevention of pollution from offshore activities; Convention for the Protection of the Marine Environment of the North-East Atlantic of 22 September 1992 (“OSPAR”), 2354 UNTS 67, entered into force 25 March 1998, Art. 1(j).

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4.20. Article 80 of the Convention provides that “Article 60 applies *mutatis mutandis* to artificial islands, installations and structures on the continental shelf.” Article 60, in its relevant part, states that:

1. In the exclusive economic zone, the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of:
 - (a) artificial islands;
 - (b) installations and structures for the purposes provided for in article 56 and other economic purposes;
 - (c) installations and structures which may interfere with the exercise of the coastal State in the zone.
2. The coastal State shall have exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations.
- ...
4. The coastal State may, where necessary, establish reasonable safety zones around such artificial islands, installations and structures in which it may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures.
5. The breadth of the safety zones shall be determined by the coastal State, taking into account applicable international standards. Such zones shall be designed to ensure that they are reasonably related to the nature and function of the artificial islands, installations or structures, and shall not exceed a distance of 500 metres around them, measured from each point of their outer edge, except as authorized by generally accepted international standards or as recommended by the competent international organization. Due notice shall be given of the extent of safety zones.

...

4.21. Article 60(4) of the Convention, in the words of the Arbitral Tribunal in the *Arctic Sunrise arbitration*:

allows the coastal State to take, in the safety zone, appropriate measures in the nature of the enactment of laws or regulations, and of the enforcement of such laws and regulations, provided that such measures are aimed at ensuring the safety of both navigation and the artificial islands, installations, or structures. These rights of the coastal State go beyond its rights in the EEZ at large.³⁰³

4.22. While Article 80 of the Convention, read with Article 60(2), entitles the coastal State to exercise jurisdiction over the structures themselves, the Convention only permits the coastal State to adopt regulations on a limited number of matters with regard to the waters immediately surrounding them. Such limited rights, in turn, only exist if a safety zone has

³⁰³ *Arctic Sunrise Arbitration, Merits* (above note 285), at p. 49, para. 211.

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been established and if it conforms to the Convention’s restrictions. The coastal State is, moreover, under the obligation to give due notice of the existence and extent of safety zones.³⁰⁴

4.23. The coastal State’s “exclusive right to construct and to authorize and regulate the construction, operation and use of” installations conferred by Article 80 of the Convention, read with Article 60(1), and the scope of the jurisdiction conferred by Article 80, read with Article 60(2) and (4), do not extend to the activities of the *M/T “San Padre Pio”* on 21-23 January 2018. These activities did not take place at the Odudu Terminal or any installation or structure, or within any safety zone established around the Terminal or any platforms. The STS transfers performed by the *M/T “San Padre Pio”* took place at a distance of at least 2.2 NM (i.e., over 3,700 metres) away from the closest structure and at least 3.1 NM (i.e., over 5,000 metres) away from the FSO UNITY, a component of the Odudu Terminal. Switzerland is not aware of any evidence that Nigeria has ever established any safety zones around its installations and structures.³⁰⁵ Even if it had done so, it has not given due notice of their existence and extent.

4.24. Nigeria may regulate the operation of its platforms and exercise jurisdiction within the limits of Article 80 of the Convention, read with Article 60, but the jurisdiction conferred by these provisions is confined to activities taking place *on* the platform. In addition, the coastal State may, where necessary and related to safety, take certain measures within a safety zone. In this case, Nigeria effectively seeks to extend the jurisdiction it enjoys specifically over platforms in its EEZ to the *whole* of its EEZ, in violation of the rights enjoyed by other States under the Convention. It has done so, in particular, by levying monetary taxes on the *M/T “San Padre Pio”*, including under section 15(a) of the NIMASA Act.³⁰⁶

4.25. To the extent that Nigeria has sought to impose levies, including the 3% NIMASA levy on the cargo of the *M/T “San Padre Pio”*, this is plainly unlawful under the Convention. Only in the territorial sea³⁰⁷ and on installations³⁰⁸ does the coastal State have jurisdiction to apply its customs and fiscal laws and regulations. The Convention confers no similar rights in the EEZ outside installations, as evidenced by the silence of the Convention in that respect. This has been confirmed by the Tribunal in its case-law: in *M/V “SAIGA” (No. 2)*, the Tribunal declared that, whereas the coastal State has jurisdiction to apply customs laws and regulations in respect of artificial islands, installations and structures, “the Convention does not empower a coastal State to apply its customs laws in respect of any other parts of the exclusive economic zone”.³⁰⁹ The Tribunal upheld this finding in *M/V “Virginia G”* and confirmed that it also applies to “laws on taxes”.³¹⁰

³⁰⁴ Art. 60(5) of the Convention.

³⁰⁵ According to its EEZ Act (see above, para. 1.32), Nigeria purports to extend the applicability of its criminal law to acts and omissions taking place within 200 meters of an installation. However, Nigeria has not given notice of this zone around installations as a safety zone. In any case, it would not be compliant with the Convention’s *ratione materiae* restrictions in Art. 60(4).

³⁰⁶ See above, paras. 2.27-2.28 and 2.31.

³⁰⁷ Art. 2, read together with Arts. 19 and 21 of the Convention.

³⁰⁸ Art. 60(2) of the Convention.

³⁰⁹ *M/V “SAIGA” (No. 2)* (above note 283), para. 127.

³¹⁰ *M/V “Virginia G”* (above note 297), at p. 67, para. 232.

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4.26. In light of the above, the STS transfers performed by the *M/T "San Padre Pio"* did not fall within the scope of Articles 56(1)(b)(i) and 80 of the Convention, read with Article 60 of the Convention. They did not fall within the geographical scope of any artificial island, installation or structure, or within a safety zone established under the Convention. It follows that Articles 56(1)(b)(i) and 80 of the Convention, read with Article 60, did not grant Nigeria prescriptive jurisdiction over the *M/T "San Padre Pio"*.

III. Articles 56(1)(b)(iii), 208 and 211 of the Convention did not grant Nigeria jurisdiction over the activities of the *M/T "San Padre Pio"*

4.27. Article 56(1)(b)(iii) of the Convention grants the coastal State in its EEZ "jurisdiction as provided for in the relevant provisions of this Convention with regard to the protection and preservation of the marine environment".

4.28. In the Provisional Measures case, Nigeria has contended that Article 208 of the Convention on "[p]ollution from seabed activities subject to national jurisdiction" is of particular relevance.³¹¹ Article 208(1) provides:

Coastal States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment arising from or in connection with seabed activities subject to their jurisdiction and from artificial islands, installations and structures under their jurisdiction, pursuant to articles 60 and 80.

4.29. As demonstrated above,³¹² the activities of the *M/T "San Padre Pio"* did not fall within the category of activities for the purpose of exploring and exploiting non-living resources and did not take place on an installation or structure, or within a safety zone. As a result, Article 208 of the Convention did not apply to the activities of the *M/T "San Padre Pio"* on 21-23 January 2018.

4.30. The only provision that was relevant, in principle, to the operations of the *M/T "San Padre Pio"* in the EEZ is Article 211 on the prescriptive powers of States regarding pollution by vessels. Paragraph 5 governs the adoption of laws and regulations by the coastal State for the prevention, reduction and control of vessel pollution in the EEZ. These laws and regulations must "*conform[...] to and giv[e] effect to generally accepted international rules and standards established through the competent international organization*".³¹³ This wording signifies that domestic laws and regulations cannot be stricter than generally accepted international rules and standards.³¹⁴

³¹¹ *Statement in Response* (above note 9), at p. 20, para. 3.16.

³¹² See above Chapter 4, Sections I and II.

³¹³ Emphasis added.

³¹⁴ "Article 211", in M. H. Nordquist *et al.*, *The United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. IV, Dordrecht, Martinus Nijhoff Publishers, 1993, at p. 204, para. 211.15(i); K. Bartenstein, "Article 211", in A. Proelß (ed.), *The United Nations Convention on the Law of the Sea: A Commentary*, Nördlingen, C. H. Beck, 2017, at p. 1428, para. 14.

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4.31. For the purpose of Article 211, the relevant generally accepted international rules and standards are recognised as being those developed by the IMO.³¹⁵ In 2009, the IMO adopted regulations governing STS transfers, in Chapter 8 to Annex I of MARPOL,³¹⁶ as referred to in paragraphs 4.7-4.10 above. Regulations 41 and 42, respectively entitled “General Rules on safety and environmental protection” and “Notification”, set out the relevant rules and standards on STS transfers as follows:

Regulation 41

General Rules on safety and environmental protection

1. Any oil tanker involved in STS operations shall carry on board a Plan prescribing how to conduct STS operations (STS operations Plan) not later than the date of the first annual, intermediate or renewal survey of the ship to be carried out on or after 1 January 2011. Each oil tanker’s STS operations Plan shall be approved by the Administration. The STS operations Plan shall be written in the working language of the ship.
2. The STS operations Plan shall be developed taking into account the information contained in the best practice guidelines for STS operations identified by the Organization. The STS operations Plan may be incorporated into an existing Safety Management System required by chapter IX of the International Convention for the Safety of Life at Sea, 1974, as amended, if that requirement is applicable to the oil tanker in question.
3. Any oil tanker subject to this chapter and engaged in STS operations shall comply with its STS operations Plan.
4. The person in overall advisory control of STS operations shall be qualified to perform all relevant duties, taking into account the qualifications contained in the best practice guidelines for STS operations identified by the Organization.
5. Records of STS operations shall be retained on board for three years and be readily available for inspection by a Party to the present Convention.

Regulation 42

Notification

1. Each oil tanker subject to this chapter that plans STS operations within the territorial sea, or the exclusive economic zone of a Party to the present Convention shall notify that Party not less than 48 hours in advance of the scheduled STS operations. Where, in an exceptional case, all of the information specified in paragraph 2 is not available not less than 48 hours in advance, the oil tanker discharging the oil cargo shall notify the Party to the present Convention, not less than 48 hours in advance that an STS operation will occur and the information specified in paragraph 2 shall be provided to the Party at the earliest opportunity.

³¹⁵ “Article 211”, in M. H. Nordquist *et al.* (above note 314), at pp. 201-202, para. 211.15(d); K. Bartenstein, “Article 211” (above note 314), at p. 1428, para. 14.

³¹⁶ Chapter 8 of Annex I of MARPOL (above note 289).

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2. The notification specified in paragraph 1 of this regulation shall include at least the following:

- .1 name, flag, call sign, IMO Number and estimated time of arrival of the oil tankers involved in the STS operations;
- .2 date, time and geographical location at the commencement of the planned STS operations;
- .3 whether STS operations are to be conducted at anchor or underway;
- .4 oil type and quantity;
- .5 planned duration of the STS operations;
- .6 identification of STS operations service provider or person in overall advisory control and contact information; and
- .7 confirmation that the oil tanker has on board an STS operations Plan meeting the requirements of regulation 41.

If the estimated time of arrival of an oil tanker at the location or area for the STS operations changes by more than six hours, the master, owner or agent of that oil tanker shall provide a revised estimated time of arrival to the Party to the present Convention specified in paragraph 1 of this regulation.

4.32. These Regulations, which represent the generally accepted international rules and standards established by the competent organisation, provide a basis for coastal States' jurisdiction over STS operations in the EEZ, to the extent specified. Accordingly, the coastal State has the right to require notification under Regulation 42. This is reflected in the practice of Parties to the Convention and/or MARPOL with significant offshore industries: by Canada, in its Vessel Pollution and Dangerous Chemicals Regulations (Regulation 39.1);³¹⁷ the United States of America, in the Oil and Hazardous Material Transfer Operations;³¹⁸ the United Kingdom's Merchant Shipping (Ship-to-Ship Transfers) Regulations 2020;³¹⁹ Norway's Regulation on Vessels' Notification Obligations Under the Harbour and Fairways Act, Chapter 6;³²⁰ and Australia's Protection of the Sea (Prevention of Pollution from Ships) Act 1983, Sections 11B-11G³²¹ and Marine Order 91 (Marine Pollution Prevention - Oil) 2014, Sections 24-29.³²²

³¹⁷ Canada, *Vessel Pollution and Dangerous Chemicals Regulations*, SOR/2012-69, 30 March 2012: **Annex CH/M-102**.

³¹⁸ United States of America, *Subchapter O (Pollution) of Title 33 (Navigation and Navigable Waters) of the Code of Federal Regulations*, 30 June 2017, Part 156.415: **Annex CH/M-103**.

³¹⁹ United Kingdom, *The Merchant Shipping (Ship-to-Ship Transfers) Regulations 2020*, 2020 No. 94, 31 January 2020, Regulations 4 and 12: **Annex CH/M-104**.

³²⁰ Norway, *Regulation on Vessels' Notification Obligations Under the Harbour and Fairways Act*, 21 December 2015, Chapter 6: **Annex CH/M-105**.

³²¹ Australia, *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*, No. 41, 1983, 16 June 2017, sections 11B-11G: **Annex CH/M-106**.

³²² Australia, *Marine Order 91 (Marine Pollution Prevention - Oil) 2014*, 13 December 2016: **Annex CH/M-106**.

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4.33. Nigeria’s laws and regulations exceed the jurisdiction conferred on coastal States by Chapter 8 of Annex I of MARPOL, and thus the Convention, over foreign-flagged vessels involved in STS transfers in the EEZ in several respects.

4.34. First, Nigeria not only requires *notification* of STS operations in its EEZ but also imposes a requirement to obtain *approval* from authorities in order to carry out STS operations in its EEZ through the issuance of permits.³²³ This goes beyond what is permitted by Regulation 42.

4.35. Second, foreign-flagged vessels carrying out STS operations in the EEZ are purportedly required to have a Naval Clearance issued by the Nigerian Navy.³²⁴ The Naval Clearance exceeds what the coastal State is entitled to require under Regulation 42(2), for example by:

- i. imposing limitations, such as the requirement that operations “be conducted between Sunrise and Sunset”;³²⁵
- ii. requiring an “OiC [Officer in Charge] to confirm approved products sample before discharge and same brought to base... in three sample bottles”;³²⁶
- iii. requiring an empty tank approval to be issued before the vessel is allowed to depart;³²⁷ and
- iv. threatening vessels with “severe sanctions” if all operation instructions are not complied with.³²⁸

4.36. Third, the sea protection levy, which seems to have been imposed under the Sea Protection Levy Regulations,³²⁹ exceeds the prescriptive powers of the coastal State in its EEZ. There is nothing in the Convention or in Chapter 8 of Annex I of MARPOL that entitles a coastal State to impose a marine protection levy on a foreign-flagged vessel carrying out an STS operation in its EEZ.

4.37. Even if the coastal State were entitled to impose a sea protection levy on STS operations in its EEZ under the generally accepted rules and standards (which it is not), a coastal State would have no right to apply its customs and fiscal laws and regulations in the EEZ outside its artificial islands, installations and structures, as already explained.³³⁰ The approach adopted by the Tribunal in *M/V “Virginia G”* to determine whether a coastal State is attempting to extend its tax and custom legislation to the EEZ is to examine how the fee

³²³ On the certificates required by the Nigerian authorities, see above, para. 2.25.

³²⁴ Naval Clearance (above note 106), paras. 1-2, 12(a): **Annex CH/M-42**; *Statement in Response* (above note 9), at p. 7, para. 2.8.

³²⁵ Naval Clearance (above note 106), para. 12(d): **Annex CH/M-42**.

³²⁶ Naval Clearance (above note 106), para. 14: **Annex CH/M-42**.

³²⁷ Naval Clearance (above note 106), para. 15: **Annex CH/M-42**.

³²⁸ Naval Clearance (above note 106), para. 12(f): **Annex CH/M-42**.

³²⁹ See above, paras. 2.34-2.37.

³³⁰ See above, para. 4.25.

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charged relates to the tax revenue that the coastal State could expect if the activity took place on land³³¹ and whether “the underlying objective [is] strictly of an environmental nature”.³³²

4.38. In this case, Nigeria’s Sea Protection Levy Regulations apply equally to vessels calling at port and to those involved in STS transfers in the EEZ.³³³ This demonstrates that Nigeria expects the same revenue from activities on its territory as from activities in its EEZ. Moreover, the levy is calculated per call (usually at a port) at a rate based on the tonnage of the ship (deadweight for vessels carrying oil).³³⁴ For the *M/T “San Padre Pio”*, the rate is USD 1 per gross ton of the ship per call. If the levy were genuinely related to implementing Nigeria’s environmental protection obligations as a coastal State in respect of STS operations in its EEZ, one would expect that the amount levied would reflect, for example, the administrative costs of receiving and processing a Regulation 42 notification and monitoring STS operations. Thus the levy would be the same for each vessel and each STS operation. Nigeria’s imposition of significant “sea protection levy” fees, based on considerations wholly unrelated to Regulation 42, appears to be a disguised revenue-gathering operation rather than an exercise of genuine environmental protection powers conferred by the Convention.

4.39. In light of the above, Article 208 of the Convention did not grant Nigeria prescriptive jurisdiction over the *M/T “San Padre Pio”*. While Nigeria may have limited prescriptive powers relating to STS transfers in its EEZ under Article 211, the laws and regulations it has adopted or interpreted as applying to the activities of the *M/T “San Padre Pio”* do not respect the limits set by the Convention. It follows that, in the present case, Articles 56(1)(b)(iii) and 211 did not grant Nigeria prescriptive jurisdiction over the *M/T “San Padre Pio”*.

4.40. In conclusion, Nigeria did not enjoy prescriptive jurisdiction in relation to the activities of the *M/T “San Padre Pio”* in its EEZ on 21-23 January 2018. In truth, Nigeria is attempting to extend its plenary territorial jurisdiction and the jurisdiction it enjoys over installations and structures in its EEZ to its entire EEZ. Nigeria’s creeping jurisdiction violates all other States’ rights and freedoms, and, specifically in this case, Switzerland’s freedom of navigation and Switzerland’s exclusive rights as the flag State.

³³¹ *M/V “Virginia G”* (above note 297), at p. 60, para. 204.

³³² *M/V “Virginia G”* (above note 297), at p. 59, para. 201.

³³³ *Sea Protection Levy Regulations* (above note 161), schedule para. 5: **Annex CH/M-65**.

³³⁴ *Sea Protection Levy Regulations* (above note 161), schedule para. 6: **Annex CH/M-65**.

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CHAPTER 5
NIGERIA WAS NOT ENTITLED TO EXERCISE ENFORCEMENT
JURISDICTION OVER THE M/T “SAN PADRE PIO”

5.1. Exclusive flag State jurisdiction and freedom of navigation establish a general prohibition on any other State to exercise not only prescriptive, but also enforcement jurisdiction over a foreign ship. This principle is subject to certain exceptions which, as stated in Article 92 of the Convention, constitute “exceptional cases expressly provided for in international treaties or in this Convention”.³³⁵

5.2. Nigeria cannot rely on any of these exceptions to justify the exercise of its enforcement jurisdiction over the *M/T “San Padre Pio”*. Nigeria has not pointed to any international treaty providing an exception to exclusive flag State jurisdiction relevant to the facts of the present case. Therefore, only the enforcement powers expressly provided for in the Convention may be exercised. This flows from the specific legal regime of the EEZ, whereby “[i]t is for the flag State to take the enforcement actions not entrusted to the coastal State by the Convention on the Law of the Sea”.³³⁶

5.3. Following Switzerland’s request for the prescription of provisional measures, Nigeria invoked a number of legal grounds for its actions against the *M/T “San Padre Pio”*. In particular, it claimed that it was exercising its sovereign rights and obligations to enforce its laws and regulations pursuant to Articles 56, 208 and 214 of the Convention.³³⁷ However, none of the exceptions provided for in the Convention were applicable to the situation of the *M/T “San Padre Pio”*. Neither Article 56(1)(a) (**Section I**) nor the exceptions provided for in Articles 56(1)(b)(i) and 80, read with Article 60 (**Section II**), or Articles 56(1)(b)(iii), 214 and 220 (**Section III**) of the Convention provide a legal basis for Nigeria’s enforcement actions against the *M/T “San Padre Pio”*.

I. Article 56(1)(a) of the Convention did not grant Nigeria enforcement jurisdiction over the activities of the M/T “San Padre Pio”

5.4. In the Provisional Measures case, Nigeria invoked Article 56(1)(a) of the Convention to support its actions. Nigeria asserted that it

was exercising its sovereign right to enforce its laws and regulations concerning the conservation and management of the non-living resources in its EEZ when it arrested and initiated judicial proceedings against the *M/T “San Padre Pio”* and its crew.³³⁸

5.5. This contention is unfounded. For the reasons set out in paragraphs 4.2-4.18 above, the activities of the *M/T “San Padre Pio”* on 21-23 January 2018 did not involve the exploration or exploitation of resources from the seabed and subsoil in Nigeria’s EEZ or on

³³⁵ Art. 92 of the Convention.

³³⁶ “*Arctic Sunrise*” (*Kingdom of the Netherlands v. Russian Federation*), *Provisional Measures, Joint separate opinion of Judges Wolfrum and Kelly*, *ITLOS Reports 2013*, p. 256, at p. 261, para. 13. Judges Wolfrum and Kelly also pointed out that, in the EEZ, “the enforcement jurisdiction of the coastal State is limited if it is not legitimized by one of the exceptions [of the Convention]” (*ibid.*).

³³⁷ *Statement in Response* (above note 9), at p. 20, para. 3.16 and at p. 22, para. 3.22; *Second Verbatim Record* (above note 277), at p. 3, lines 13-15.

³³⁸ *Statement in Response* (above note 9), at p. 20, para. 3.15.

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its continental shelf. The *M/T "San Padre Pio"* was engaged in transporting a gasoil cargo on an international voyage pursuant to directions given by the charterer and delivering that cargo to Anosyke by way of STS transfers at sea. Sovereign rights in the EEZ exist only "for the purpose of exploring and exploiting, conserving and managing the natural resources". Consequently, Article 56(1)(a) of the Convention was not applicable to the situation of the *M/T "San Padre Pio"*.

5.6. Even assuming, *quod non*, that the *M/T "San Padre Pio"* was engaged in exploiting non-living resources, Nigeria's claim would still be unfounded.

5.7. Switzerland does not dispute that a coastal State may take necessary enforcement measures against vessels flagged by other States in so far as they are expressly permitted by the Convention. As explained in paragraphs 4.2-4.18 above, Article 56(1)(a) itself does not constitute such a ground. Together with the other paragraphs of Article 56, Article 56(1)(a) "indicate[s] the general nature of the rights, jurisdiction and duties of the coastal State in the zone".³³⁹ It lists the various rights, jurisdiction and duties of the coastal State, the content of which is developed in other provisions of the Convention, in particular Parts V and VI.

5.8. An overview of these provisions shows that enforcement powers are attributed to coastal States only in a limited number of situations. Enforcement jurisdiction does not automatically flow from prescriptive jurisdiction, even where the latter is conferred. Part V of the Convention includes a provision entitled "Enforcement of laws and regulations of the coastal State" in Article 73(1), but this only confers enforcement jurisdiction in respect of *living* resources:

The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.

The present case does not concern living resources at all. Consequently, Article 73 of the Convention does not provide a legal basis for Nigeria's actions.

5.9. There is no provision equivalent to Article 73 for non-living resources of the seabed or subsoil in Parts V or VI of the Convention. This omission was intentional and not an oversight. States were aware of the lack of an enforcement provision for non-living resources in the regime of the continental shelf, which predated the EEZ by a number of decades. Nevertheless, they decided not to add one.³⁴⁰

5.10. Apart from the fact that it does not take into account the choice made in the negotiations, Nigeria's position is also problematic for other reasons. If Article 56(1)(a) of the Convention, which applies equally to living and non-living resources, provided a basis for

³³⁹ "Article 56", in M. H. Nordquist *et al.* (above note 271), at p. 525, para. 56.1.

³⁴⁰ See e.g., Third United Nations Conference on the Law of the Sea, *163rd Plenary meeting*, A/CONF.62/SR.163 (1982), at p. 54, para. 27; "Informal suggestion by Brazil, C.2/ Informal Meeting/12, 27 April 1978", in R. Platzöder (ed.), *Third United Nations Conference on the Law of the Sea: documents [1973-1982]*, Vol. VI, New York, Dobbs Ferry, 1982-1995, at p. 19; "Article 73", in M. H. Nordquist *et al.* (above note 272), at pp. 791-794, paras. 73.4-73-9.

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enforcement measures (*quod non*), there would have been no need to include Article 73. Yet the negotiating States did include an express provision governing enforcement (Article 73) and confined it to living resources. In accordance with general rules of treaty interpretation and the *effet utile* principle, Article 73 cannot be superfluous.³⁴¹ It follows that Article 56(1)(a) provides no legal basis for enforcement jurisdiction and enforcement powers are limited to sovereign rights for the purpose of conserving and managing living resources as expressly provided for in Article 73.

5.11. Furthermore, there is difficulty in the proposition that enforcement powers in relation to non-living resources would not be subject to specific safeguards under the Convention. Under Article 73(2)-(4), the enforcement powers of the coastal State in relation to living resources have clear limits.³⁴² It must promptly release arrested vessels and their crews upon the posting of a reasonable bond or other security. Failing that, it may face prompt release proceedings under Article 292. More significantly, the sanctions that a coastal State may impose for violations of fisheries laws and regulations are limited. They cannot include imprisonment.³⁴³ If – as Nigeria contends – Article 56(1)(a) forms a legal basis for enforcement powers in respect of non-living resources, there would be no such safeguards. This position is untenable. The absence of a provision in the Convention cannot be regarded as conferring enforcement jurisdiction, even less completely unfettered enforcement jurisdiction.

5.12. Another difficulty for Nigeria is that this interpretation of Article 56(1)(a) would give rise to two separate bases of enforcement jurisdiction for living resources, one with restrictions (Article 73) and one without (Article 56(1)(a)). This plainly cannot be the case.

5.13. In light of the above, Nigeria cannot rely on Article 56(1)(a) of the Convention as providing a legal basis for its exercise of enforcement jurisdiction against the *M/T “San Padre Pio”*.

II. Articles 56(1)(b)(i) and 80 of the Convention, read with Article 60, did not grant Nigeria enforcement jurisdiction over the activities of the *M/T “San Padre Pio”*

5.14. Nigeria could also not act on the basis of the jurisdiction conferred in relation to the creation and use of artificial islands, installations and structures.

5.15. Article 56(1)(b)(i) of the Convention states that the coastal State has jurisdiction in its EEZ, in accordance with the relevant provisions of the Convention, regarding the establishment and use of artificial islands, installations and structures.³⁴⁴ As demonstrated in paragraph 4.22 above, the coastal State has jurisdiction over the installations or structures

³⁴¹ The principle provides that each and every clause of a treaty is to be interpreted as meaningful rather than meaningless. See, inter alia, *Corfu Channel case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, *Merits, Judgment*, ICJ Reports 1949, p. 4, at p. 24; *Fisheries Jurisdiction (Spain v. Canada)*, *Jurisdiction, Judgment*, ICJ Reports 1998, p. 432, at p. 455, para. 52.

³⁴² See “*Monte Confurco*” (*Seychelles v. France*), *Prompt Release, Judgment*, ITLOS Reports 2000, p. 86, at p. 108, para. 70.

³⁴³ Art. 73(3) of the Convention.

³⁴⁴ Art. 56 of the Convention.

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themselves.³⁴⁵ In addition, the coastal State may establish safety zones around such installations and structures, in which it may take appropriate measures to ensure the safety of navigation and of the installations and structures.³⁴⁶

5.16. This basis for enforcement powers can be easily discarded in this case. As demonstrated in paragraphs 2.22 and 4.20-4.23 above, the *M/T "San Padre Pio"* was not at an installation or structure, or within a safety zone.

5.17. In light of the above, Nigeria cannot rely on Articles 56(1)(b)(i) and 80 of the Convention, read with Article 60, as providing a legal basis for its exercise of enforcement jurisdiction against the *M/T "San Padre Pio"*.

III. Articles 56(1)(b)(iii), 214 and 220 of the Convention did not grant Nigeria enforcement jurisdiction over the activities of the *M/T "San Padre Pio"*

5.18. During the Provisional Measures case, Nigeria invoked – for the very first time – the protection and preservation of the marine environment.³⁴⁷ This *ex post facto* justification is completely lacking in substance.

5.19. According to Article 56(1)(b)(iii) of the Convention, Nigeria may exercise in its EEZ “jurisdiction as provided for in the relevant provisions of this Convention with regard to ... the protection and preservation of the marine environment”. The “relevant provisions of the Convention” for this purpose are located in Part XII, on the “Protection and preservation of the marine environment”.

5.20. Nigeria relied on Article 214 of the Convention, which sets out coastal States’ enforcement jurisdiction in respect of pollution from seabed activities.³⁴⁸ Article 214 was not applicable to the situation of the *M/T "San Padre Pio"* for the same reasons that have been advanced in relation to Article 208.³⁴⁹ The STS transfers performed by the *M/T "San Padre Pio"* on 21-23 January 2018 did not fall within the scope of activities envisaged in that Article. They did not constitute seabed activities, nor were they connected with them.³⁵⁰

5.21. The only provisions applicable to the activities of the *M/T "San Padre Pio"* are those relating to pollution from vessels (i.e., Articles 211 and 220 of Part XII of the Convention). These provisions set out, respectively, the scope of coastal States’ prescriptive jurisdiction and enforcement jurisdiction. With regard to enforcement, the limits of the coastal State’s jurisdiction are as follows:

3. Where there are clear grounds for believing that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, committed a violation of applicable international rules and standards for the prevention, reduction and control of pollution from vessels or laws and regulations of that State conforming and giving

³⁴⁵ Art. 60(2) of the Convention.

³⁴⁶ Art. 80, read with 60(4) of the Convention.

³⁴⁷ *Statement in Response* (above note 9), at p. 1, para. 1.5.

³⁴⁸ *Statement in Response* (above note 9), at p. 20, paras. 3.16; *Second Verbatim Record* (above note 277), at p. 20, lines 14-15.

³⁴⁹ See above, para. 4.29.

³⁵⁰ See above, paras. 4.7-4.10, 4.29.

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effect to such rules and standards, that State may require the vessel to give information regarding its identity and port of registry, its last and its next port of call and other relevant information required to establish whether a violation has occurred.

...

5. Where there are clear grounds for believing that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, committed a violation referred to in paragraph 3 resulting in a substantial discharge causing or threatening significant pollution of the marine environment, that State may undertake physical inspection of the vessel for matters relating to the violation if the vessel has refused to give information or if the information supplied by the vessel is manifestly at variance with the evident factual situation and if the circumstances of the case justify such inspection.

6. Where there is clear objective evidence that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, committed a violation referred to in paragraph 3 resulting in a discharge causing major damage or threat of major damage to the coastline or related interests of the coastal State, or to any resources of its territorial sea or exclusive economic zone, that State may, subject to section 7, provided that the evidence so warrants, institute proceedings, including detention of the vessel, in accordance with its laws.³⁵¹

5.22. In this case, there was no discharge.³⁵² At no time has Nigeria ever claimed that the *M/T “San Padre Pio”* was responsible for vessel-source pollution. Hence, paragraphs 5 and 6 of Article 220 cannot possibly form a legal basis for Nigeria’s intervention. Similarly, with respect to paragraph 3, at no time did Nigeria either assert or invoke any ground for believing that the *M/T “San Padre Pio”* had committed a violation of the applicable rules and standards for the prevention, reduction and control of vessel-source pollution in the EEZ.

5.23. As indicated above, Nigeria presented such a justification *a posteriori*, solely for the purpose of its legal arguments during the Provisional Measures case, and not during the arrest or the subsequent charges and prosecution of the vessel and her crew. The only measure a coastal State may take under Article 220(3) of the Convention is to “require the vessel to give information regarding its identity and port of registry, its last and its next port of call and other relevant information required to establish whether a violation has occurred”. Under no circumstances does this provision allow for the arrest and detention of the vessel and her crew.

5.24. In light of the above, Nigeria cannot rely on Articles 56(1)(b)(iii), 214 or 220 of the Convention as providing a legal basis for its exercise of enforcement jurisdiction against the *M/T “San Padre Pio”*.

³⁵¹ Art. 220 of the Convention.

³⁵² Affidavit of the Master (above note 1), para. 17: **Annex CH/M-1**; Affidavit of the Chief Mate (above note 1), para. 11: **Annex CH/M-2**.

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5.25. In conclusion, there is no treaty applicable between Switzerland and Nigeria providing a basis for enforcement jurisdiction and none of the exceptions provided for in the Convention were applicable to the situation of the *MT "San Padre Pio"*. Neither Article 56(1)(a), nor the exceptions provided for in Articles 80, read with Article 60, 214 or 220 of the Convention provide Nigeria with a legal basis for its actions against the *MT "San Padre Pio"*. For all of these reasons, Nigeria was not entitled to exercise enforcement jurisdiction over the *MT "San Padre Pio"*.

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CHAPTER 6

NIGERIA BREACHED APPLICABLE ENFORCEMENT SAFEGUARDS

6.1. Under the Convention, the exercise of jurisdiction is limited by certain overarching requirements. Nigeria breached the Convention’s enforcement safeguards (**Section I**); failed to have due regard to the rights and duties of Switzerland (**Section II**); failed to respect principles of humanity, reasonableness and proportionality (**Section III**); and breached Article 300 of the Convention (**Section IV**). Whether or not Nigeria was entitled to exercise jurisdiction over the vessel, her crew and cargo (it was not), the manner in which jurisdiction was exercised violated these obligations.

I. Nigeria breached the Convention’s enforcement safeguards

A. Nigeria breached Article 225 of the Convention

6.2. Nigeria did not enjoy jurisdiction under the Convention entitling it to take enforcement actions against the *M/T “San Padre Pio”* for the reasons explained above in Chapter 5. In any case, Article 225 of the Convention embodies a number of safeguards limiting the way in which coastal States may exercise their powers of enforcement. It prescribes that:

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.

6.3. While Part XII, where this provision is found, relates to the protection and preservation of the environment, this is not the only context in which Article 225 of the Convention is applicable. In the *M/V “Virginia G”* case, the Tribunal held that,

... although article 225 of the Convention is found in Part XII of the Convention concerning protection and preservation of the marine environment, it has general application as it states that ‘[i]n the exercise under this Convention of their powers of enforcement against foreign vessels’, States shall observe the requirement of this article (...). It follows from article 225 that all these requirements are applicable to enforcement activities undertaken pursuant to [Article] 73, paragraph 1, of the Convention.³⁵³

6.4. A State may comply with the requirements of Article 225 by “adopting or refraining from adopting any measures that could result in endangering the safety of navigation or creating any hazard to a vessel”.³⁵⁴ The obligations found in this Article are based on prevention, not reparation after the event.

³⁵³ *M/V “Virginia G”* (above note 297), at p. 98, para. 373; *M/T “San Padre Pio”*, *Separate Opinion of Judge ad hoc Petrig* (above note 45), at p. 1, para. 2

³⁵⁴ V. Becker-Weinberg, “Article 225”, in A. Proelß (ed.), *The United Nations Convention on the Law of the Sea: A Commentary*, Nördlingen, C. H. Beck, 2017, at p. 1536, para. 8.

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6.5. In the present case, the *M/T "San Padre Pio"* has suffered at least four collisions (so far) during her detention in Nigeria.³⁵⁵ Congestion at anchorage points is a well-known problem in Nigeria, as emphasised by an EFCC press release of 10 January 2020:

Commodore Bura [of the Nigerian Navy] [had] ...appealed to the EFCC to expedite the prosecution of illegal oil bunkering cases to declutter anchorage areas and jetties. 'The vessels are taking up jetty space and anchorage area. You should consider releasing the vessels to the owners on bond while cases are going on in court to decongest the facilities,' he said.³⁵⁶

Four collisions in less than ten months underscores the perilous position of the *M/T "San Padre Pio"*.

6.6. Similarly, the armed attack of 15 April 2019 was the materialisation of another risk that is well-known to Nigeria. As shown in paragraphs 1.18-1.24 above, Nigeria's waters and EEZ suffer from rampant armed attacks and piracy. These events, such as the one suffered by the *M/T "San Padre Pio"* and her crew, are all too frequent.³⁵⁷

6.7. In light of these risks, Nigeria should not have ordered the vessel to anchor at Bonny Anchorage. Moreover, even after the first collision and the armed attack, Nigeria has kept the vessel detained at the same anchorage point. Nigeria breached Article 225 of the Convention by bringing the *M/T "San Padre Pio"* to an unsafe anchorage and then continuing to endanger the safety of the vessel.

6.8. In addition to these breaches of Article 225, Nigeria also exposed the marine environment to an "unreasonable" risk. The various problems experienced by the vessel, caused as a direct result of her prolonged detention, amount to such an "unreasonable" risk.³⁵⁸ The risk of collisions in Nigeria's crowded anchoring areas, in addition to the risk of further armed attacks, could lead to a spill of more than 4,000 MT of gasoil.³⁵⁹ As this risk was clearly foreseeable, Nigeria should have adopted measures in response, in particular releasing the vessel.

6.9. Switzerland has raised the risk of pollution with Nigeria.³⁶⁰ Nevertheless, Nigeria continued to put the marine environment at risk, despite having knowledge of the existing risk, and despite other options being available.

6.10. In light of the above, Nigeria breached, and continues to breach, Article 225 of the Convention because it brought the vessel to, and is keeping her at, an unsafe place of anchorage. Nigeria's actions endangered (and continue to endanger) the safety of navigation;

³⁵⁵ See above, para. 2.75.

³⁵⁶ Economic and Financial Crimes Commission, *EFCC Seeks Navy Support in Prosecuting Illegal Oil Bunkering Cases* (10 February 2020), available at efccnigeria.org/efcc/news/5456-efcc-seeks-navy-support-in-prosecuting-illegal-oil-bunkering-cases (last accessed 21 June 2020).

³⁵⁷ See above, paras. 1.18-1.24 and 2.71.

³⁵⁸ See above, para. 2.73.

³⁵⁹ See above, para. 2.25.

³⁶⁰ *M/T "San Padre Pio" (Switzerland v. Nigeria), Provisional Measures, Verbatim Record of 21 June 2019, at 10 a.m.*, ITLOS/PV.19/C27/1, at pp. 10, 31, 32.

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they exposed (and continue to expose) the vessel to a hazard; and they put (and continue to put) the marine environment at an unreasonable risk.

B. Nigeria breached Article 230 of the Convention

6.11. Under the Convention, actions based on the “the prevention, reduction and control of pollution of the marine environment”³⁶¹ are limited by safeguards found in Article 230 of the Convention. The relevant paragraphs read as follows:

1. Monetary penalties only may be imposed with respect to violations of national laws and regulations or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment, committed by foreign vessels beyond the territorial sea.

...

3. In the conduct of proceedings in respect of such violations committed by a foreign vessel which may result in the imposition of penalties, recognized rights of the accused shall be observed.

6.12. In the case of the *M/T “San Padre Pio”*, the whole crew was detained in prison for a period ranging from 11 days to more than a month. After being released from prison, the crew was detained on the vessel by the Nigerian authorities under armed guard. In addition, charges attracting a maximum penalty of life imprisonment were brought against the Master and three other officers.³⁶²

6.13. Certain well-recognised rights of the crew members were not observed by Nigeria, in particular:

- i. a TV crew filmed their arrest;
- ii. they were beaten;
- iii. they were interrogated without the assistance of a lawyer and were refused access to one;
- iv. their employer had to arrange the provision of basic necessities while they were in prison.

Nigeria’s breaches of the International Covenant on Civil and Political Rights (“**ICCPR**”) set out in paragraphs 6.53-6.58 below are further evidence of Nigeria’s violation of Article 230(3) of the Convention.³⁶³

³⁶¹ As claimed by Nigeria in *Statement in Response* (above note 9), at p. 1, para. 1.5; see also *ibid.*, at p. 20, para. 3.16 and at p. 22, para. 3.22; *Second Verbatim Record* (above note 277), at p. 3, lines 13-15.

³⁶² See above, para. 2.44.

³⁶³ “Article 230”, in M. H. Nordquist *et al.*, *The United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. IV, Dordrecht, Martinus Nijhoff Publishers, 1993, at p. 370, para. 230.9(c).

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6.14. In light of the above, Nigeria breached Article 230 of the Convention because it sought to impose and imposed non-monetary penalties and did not observe well-recognised rights of the accused.

C. Nigeria breached Article 231 of the Convention

6.15. Article 231 of the Convention is an important provision for the purposes of this case. It ensures that flag States are informed when measures are taken against vessels flying their flag. Article 231 reads, in relevant part, that:

States shall promptly notify the flag State and any other State concerned of any measures taken pursuant to section 6 against foreign vessels, and shall submit to the flag State all official reports concerning such measures. ... The diplomatic agents or consular officers and where possible the maritime authority of the flag State, shall be immediately informed of any such measures taken pursuant to section 6 against foreign vessels.

6.16. Coastal States are obliged to notify not only “arrest or detention”, but also “any measures taken pursuant to section 6” (on enforcement). They are also to submit “all official reports concerning such measures” to the flag State.

6.17. As explained above,³⁶⁴ Nigeria never notified Switzerland of the measures that were taken against the vessel and her crew. Nor did it submit any official report on these measures. Nigeria claimed in the Provisional Measures case that it took these measures pursuant to Article 214 of the Convention.³⁶⁵ Whether or not Nigeria was entitled to exercise enforcement jurisdiction under Section 6 of Part XII (it was not),³⁶⁶ it was in any event obliged under Article 231 of the Convention to notify Switzerland of the arrest of the *MT “San Padre Pio”* and her crew, and of the measures subsequently taken against them, and to submit official reports regarding these measures.

6.18. In light of the above, Nigeria breached Article 231 of the Convention because it failed to notify Switzerland, as the flag State, of the measures it took against the vessel and her crew and because it failed to submit the relevant reports.

D. Nigeria breached Article 226 of the Convention

6.19. Further to Nigeria’s contention that its actions towards the *MT “San Padre Pio”* are acts of prevention, reduction and control of pollution of the marine environment,³⁶⁷ additional safeguards exist as to the way in which enforcement jurisdiction may be exercised under the Convention. Article 226 of the Convention contains safeguards applicable to investigations of foreign vessels by coastal States under Articles 216, 218 and 220. As explained above, the relevant enforcement provision of the Convention for the purposes of STS operations in the

³⁶⁴ See above, para. 0.3; see also Diplomatic Interventions by Switzerland (above note 3): **Annex CH/M-6**.

³⁶⁵ *Statement in Response* (above note 9), at p. 20, para. 3.16.

³⁶⁶ See above, Chapter 5.

³⁶⁷ As claimed by Nigeria in *Statement in Response* (above note 9), at p. 1, para. 1.5; see also *ibid.*, at p. 20, para. 3.16 and at p. 22, para. 3.22; *Second Verbatim Record* (above note 277), at p. 3, lines 13-15.

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EEZ is Article 220, not Article 214 as claimed by Nigeria.³⁶⁸ Article 226 is therefore applicable to the present situation.

6.20. Under Article 226(1)(a) of the Convention, a first safeguard concerns circumstances and extent of the physical inspection of a vessel:

Any physical inspection of a foreign vessel shall be limited to an examination of such certificates, records or other documents as the vessel is required to carry by generally accepted international rules and standards or of any similar documents which it is carrying; further physical inspection of the vessel may be undertaken only after such an examination and only when

- (i) there are clear grounds for believing that the condition of the vessel or its equipment does not correspond substantially with the particulars of those documents;
- (ii) the contents of such documents are not sufficient to confirm or verify a suspected violation; or
- (iii) the vessel is not carrying valid certificates and records.

6.21. In this case, Nigerian authorities did not limit themselves to verifying the certificates, records and documents mentioned in Article 226. None of the grounds for further physical inspection of the vessel, as listed in (i) to (iii) above, applied to this case.

6.22. A second relevant safeguard is found in Article 226(1)(b) of the Convention, which provides:

If the investigation indicates a violation of applicable laws and regulations or international rules and standards for the protection and preservation of the marine environment, release shall be made promptly subject to reasonable procedures such as bonding or other appropriate financial security.

6.23. Independently of whether the investigation into the activities of the *M/T “San Padre Pio”* was legitimate under Article 226(1)(a) of the Convention (it was not), having alleged a breach, Nigeria should have subjected the matter to reasonable procedures and promptly released the vessel.

6.24. It is recalled that 12 crew members were prevented from leaving Nigeria for four months after all charges against them were dropped. Moreover, the Master and the three other officers were not released promptly either, even though a financial security amounting to USD 222,000 was posted on 6 April 2018 for their release.³⁶⁹ Almost 20 more months had to elapse before they could leave Nigeria. The vessel has still not been released. The procedures to which the vessel and her crew have been submitted were, and still are, not reasonable.

³⁶⁸ See above, paras. 5.20-5.21.

³⁶⁹ See above, para. 2.50.

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6.25. Article 226(1)(a) contains a third safeguard in that “States shall not delay a foreign vessel longer than is essential for purposes of the investigation provided for in articles 216, 218 and 220”.

6.26. In this case, more than 29 months after the arrest of the *M/T “San Padre Pio”*, Nigeria still refuses to release her. This is so notwithstanding the fact that there was no legal basis under the Convention for arresting and detaining the vessel and her crew in the first place. Moreover, as a result of the judgment of the Federal High Court, there is now no legal basis under Nigerian domestic law for the continued detention of the vessel.

6.27. In light of the above, Nigeria breached, and continues to breach, Article 226 of the Convention, because: it inspected the vessel in a manner that was excessive; it submitted the release of the Master and the three other officers to unreasonable procedures; and it delayed (and continues to delay) the departure of the vessel.

II. Nigeria failed to have due regard to Switzerland’s rights and duties

A. Nigeria failed to have due regard to Switzerland’s rights and duties because it did not cooperate to find a solution to the dispute

6.28. Article 56(2) of the Convention reads:

In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall *have due regard to the rights and duties of other States* and shall act in a manner compatible with the provisions of this Convention.³⁷⁰

6.29. Article 56(2) recognises that jurisdiction “cannot be held to be absolute”.³⁷¹ Among the indicia used by the Arbitral Tribunal in the *Chagos Marine Protected Area arbitration* to determine whether the obligation of due regard was complied with, diplomatic attempts to find a solution played an important role.³⁷² Failure to make such attempts in good faith resulted in a breach of the “due regard” obligation.³⁷³

6.30. In the present case, Nigeria did not notify the interception, arrest or detention of the *M/T “San Padre Pio”* to Switzerland. When the latter sought to discuss the issue and to find a solution, these attempts were met by silence.³⁷⁴

6.31. In light of the above, Nigeria breached its obligation to have due regard to Switzerland’s rights and duties under Article 56(2) of the Convention.

³⁷⁰ Emphasis added.

³⁷¹ A. Proelß, “Article 56” (above note 272), at p. 430, para. 23.

³⁷² *The Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, PCA Case No 2011-03 (“*Chagos arbitration*”), at pp. 202, 210, paras. 519 and 534-535.

³⁷³ *Chagos arbitration* (above note 372), at p. 215, para. 547.

³⁷⁴ See above, para. 0.3; see also Diplomatic Interventions by Switzerland (above note 3): Annex CH/M-6.

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B. Nigeria failed to have due regard to Switzerland’s duties

6.32. In addition, Article 94 of the Convention lists the flag State’s duties to which Nigeria was obliged to have due regard under Article 56(2). Article 94, in relevant parts, states that:

1. Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.
2. In particular every State shall:
 - ...
 - (b) assume jurisdiction under its internal law over each ship flying its flag and its master, officers and her crew in respect of administrative, technical and social matters concerning the ship.
3. Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, inter alia, to:
 - ...
 - (b) the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments;
 - ...
5. In taking the measures called for in paragraphs 3 and 4 each State is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance.³⁷⁵

6.33. In the circumstances of this case, Nigeria breached Article 56(2) of the Convention by failing to have due regard to Switzerland’s duties under Article 94 of the Convention, in connection with both the Maritime Labour Convention (“**MLC**”) and the International Covenant on Civil and Political Rights (“**ICCPR**”).

1. *Nigeria failed to have due regard to Switzerland’s duties under the MLC*

6.34. The MLC, adopted in 2006, “constitutes a further elaboration of the international maritime regulatory regime under the 1982 United Nations Convention on the Law of the Sea”.³⁷⁶ It is a good example of a treaty that puts flesh on the bones set out in the Convention.³⁷⁷ As one author aptly put it, the Convention “sets out the legal framework within which detailed norms to regulate the various uses of the sea may be developed and applied”.³⁷⁸ The MLC is one such application, offering a concrete implementation of the

³⁷⁵ Emphasis added.

³⁷⁶ M. L. McConnell *et al.*, *The Maritime Labour Convention, 2006: A Legal Primer to an Emerging International Regime*, Leiden, Martinus Nijhoff Publishers, 2011, at p. 6.

³⁷⁷ M. L. McConnell *et al.*, (above note 376), at pp. 6, 23.

³⁷⁸ R. Churchill, “The 1982 Convention on the Law of the Sea” in D. Rothwell *et al.* (eds.), *The Oxford Handbook of the Law of the Sea*, Oxford, Oxford University Press, 2015, at p. 30.

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obligations relating to seafarers provided for by the Convention.³⁷⁹ This is further confirmed by the preamble of the MLC itself:

Recalling that the United Nations Convention on the Law of the Sea, 1982, sets out a general legal framework within which all activities in the oceans and seas must be carried out and is of strategic importance as the basis for national, regional and global action and cooperation in the marine sector, and that its integrity needs to be maintained, and

Recalling that Article 94 of the United Nations Convention on the Law of the Sea, 1982, establishes the duties and obligations of a flag State with regard to, *inter alia*, labour conditions, crewing and social matters on ships that fly its flag, ...

6.35. Switzerland is the flag State of the *M/T "San Padre Pio"*. For this reason, Swiss law applies on board the vessel. This includes the MLC, because international agreements form part of Switzerland's legal system.³⁸⁰ Switzerland is a Party to the MLC, which it ratified on 21 February 2011. Nigeria ratified the MLC on 18 June 2013, so these rules should come as no surprise.

6.36. The MLC entails several obligations. Article IV obliges Parties to give practical effect to the crew members' employment and social rights. Among these rights, Article IV(1), (3) and (4) impose obligations on the flag State, to ensure that the seafarer's rights are respected:

1. Every seafarer has the right to a safe and secure workplace that complies with safety standards.
3. Every seafarer has a right to decent working and living conditions on board ship.
4. Every seafarer has a right to health protection, medical care, welfare measures and other forms of social protection.

6.37. The MLC also envisions another ground for the flag States' obligation to enforce the rights laid out in Article IV(1) to (4). Article V(1) of the MLC prescribes:

Each Member shall implement and enforce laws or regulations or other measures that it has adopted to fulfil its commitments under this Convention with respect to ships and seafarers under its jurisdiction.

³⁷⁹ The MLC is conceived as the "fourth pillar" of the international maritime regulatory regime, along with the three IMO key conventions, STCW, SOLAS and MARPOL (M. L. McConnell *et al.*, "The Maritime Labour Convention, 2006 Consolidates Seafarers' Labour Instruments", *American Society of International Law Insights*, Vol. 10, 2006).

³⁸⁰ Art. 5(4) of the Swiss Constitution reads: "The Confederation and the Cantons shall respect international law.", *Swiss Constitution* (above note 37): **Annex CH/M-15**. This Article reflects the monist approach of Swiss law.

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Under this provision, a State Party is bound not only to implement laws,³⁸¹ regulations or other methods to fulfil its commitments under the Convention with respect to ships and seafarers under its jurisdiction, but also to ensure the *enforcement* of such laws, regulations or measures. Absence of enforcement would mean that Switzerland is not meeting its international obligations.

6.38. Following the arrest of the *M/T “San Padre Pio”*, one would be hard-pressed to argue that crew members enjoyed “decent working and living conditions”, “health protection, medical care, welfare measures and other forms of social protection” and “a safe and secure workplace”.

6.39. The inability to return home for over 22 months for the Master and the three other officers is far removed from the standards of “decent working conditions” set by the MLC. So too is the impossibility of leaving Nigeria for the 12 crew members against whom the charges had been dropped four months prior.³⁸² Standard A2.5.1, para. 1(c) states that:

Each Member shall ensure that seafarers on ships that fly its flag are entitled to repatriation in the following circumstances: ... when the seafarers are no longer able to carry out their duties under their employment agreement or cannot be expected to carry them out in the specific circumstances.

Also under Standard A2.5.1, para. 2(b), of the MLC, seafarers should have a *right* to be repatriated every 12 months. These standards could not be met throughout the period of the crew members’ detention in Nigeria. Switzerland was prevented by Nigeria from providing “decent working conditions” to the crew members of the *M/T “San Padre Pio”*.

6.40. Similarly, as a consequence of the prolonged detention in prison and on the vessel, and as a result of the stressful situation, crew members developed serious medical conditions, in relation to which treatment was, at times, unduly delayed by the Nigerian authorities.³⁸³ As a result of Nigeria’s actions, Switzerland was unable to ensure that the crew enjoyed “health protection, medical care, welfare measures and other forms of social protection” as envisioned by the Convention.

6.41. Finally, the armed attack of 15 April 2019 and the collisions suffered by the *M/T “San Padre Pio”* between 15 June 2019 and 2 April 2020 show what a dangerous situation the crew members – past and present – find themselves in. Statistical information relating to the geographical area where the vessel and her crew are detained shows that these events were predictable.³⁸⁴ In these circumstances, Switzerland was precluded from providing the “safe and secure workplace” to which crew members were entitled.

6.42. The rights of crew members could not be assured following the arrest of the *M/T “San Padre Pio”*. This is through no fault of Switzerland; it was so despite Switzerland’s repeated

³⁸¹ Switzerland implemented the MLC directly through Art. 9(1)(h) of its Ordinance on Maritime Navigation (Switzerland, *Ordonnance sur la navigation maritime*, RS 747.301, 20 November 1956, Art. 9(1)(h): **Annex CH/M-108**).

³⁸² See above, paras. 2.45-2.46.

³⁸³ See above, para. 2.70.

³⁸⁴ See above, para. 2.70.

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efforts to remedy the appalling conditions faced by crew members in Nigeria.³⁸⁵ This situation resulted from Nigeria's failure to have due regard to Switzerland's duties under Article 56(2) of the Convention read together with the MLC.

6.43. In light of the above, Nigeria, by preventing Switzerland from effectively fulfilling its duties as a flag State, according to Article 94 of the Convention read in the light of the MLC, breached its obligation of having due regard to Switzerland's duties as required by Article 56(2) of the Convention.

2. *Nigeria failed to have due regard to Switzerland's duties under the ICCPR*

6.44. The ICCPR was adopted in 1966 and has been described as the "most important human rights treaty in the world".³⁸⁶ That is so, in part, because of its near-universal ratification.³⁸⁷ Since there is a link between labour conditions and human rights, and on account of its widespread acceptance, the ICCPR can be considered a set of "generally accepted international regulations, procedures and practices" regarding "the manning of ships, labour conditions" under Article 94(3) and (4) of the Convention.

6.45. As was the case for the MLC, the Swiss laws applicable on board the *M/T "San Padre Pio"* include the ICCPR. Switzerland must, for instance, provide security to crew members, in accordance with Article 9 of the ICCPR, which provides that:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

³⁸⁵ Diplomatic Interventions by Switzerland (above note 3): **Annex CH/M-6**.

³⁸⁶ S. Joseph / M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 3rd ed., Oxford, Oxford University Press, 2013, at p. 3.

³⁸⁷ Switzerland ratified the ICCPR on 18 September 1992. Nigeria did so on 29 July 1993. As of 22 May 2020, 173 countries are Parties to the ICCPR (the full list of Parties is available at treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en (last accessed 21 June 2020)).

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6.46. The obligation under Article 9 of the ICCPR has been the focus of General Comment No. 35, in which the United Nations Human Rights Committee stated that:

The right to security of person protects individuals against intentional infliction of bodily or mental injury, regardless of whether the victim is detained or non-detained.³⁸⁸

6.47. Similarly, Article 7 of the ICCPR prescribes that: “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” This obligation is developed in General Comment No. 20, which states that: “[t]he prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim”.³⁸⁹ The United Nations Human Rights Committee further noted that:

... it is not sufficient for the implementation of article 7 to prohibit such treatment or punishment or to make it a crime. States parties should inform the Committee of the legislative, administrative, judicial and other measures they take to prevent and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction.³⁹⁰

6.48. In other words, States must actively enforce the prohibition; it is not sufficient merely to adopt legislation to that effect.

6.49. In light of the above, Nigeria undermined Switzerland’s efforts to meet its duties stemming from the ICCPR. While Switzerland does not argue that its obligations under the MLC and the ICCPR are the same, they overlap to some extent and are “relevant rules of international law applicable in the relations between the parties” for the purpose of the interpretation of these treaties and the Convention under Article 31(3)(c) of the Vienna Convention on the Law of Treaties.³⁹¹ As a result of the detention of crew members in Nigeria, Switzerland was prevented from complying with its flag State duties arising from the ICCPR. In so doing, Nigeria failed to have due regard to the duties of Switzerland and hence breached Article 56(2) of the Convention.

C. Nigeria failed to have due regard to Switzerland’s rights

6.50. In the present situation, not only did Nigeria fail to have due regard to Switzerland’s duties under the ICCPR, it also failed to have due regard to Switzerland’s rights under the ICCPR. The obligation to have due regard to the rights and duties of other States found in Article 56(2) of the Convention extends to rights and duties that do not directly stem from it. Article 56(2) refers to the “rights and duties of other States” without qualification. By contrast, Article 56(1) refers to “rights and duties *provided for in this Convention*”.³⁹² Had

³⁸⁸ UN Human Rights Committee, *General Comment No. 35: Right to Liberty and Security of Persons*, UN Doc. CCPR/C/GC/35 (16 December 2014), para. 9.

³⁸⁹ UN Human Rights Committee, *General Comment No. 20: Prohibition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. HRI/GEN/1/Rev.9 (10 March 1992) (“*General Comment No. 20*”), para. 5.

³⁹⁰ *General Comment No. 20* (above note 389), para. 8.

³⁹¹ Vienna Convention on the Law of Treaties of 23 May 1969, 1155 UNTS 331, entered into force 27 January 1980.

³⁹² Emphasis added.

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the drafters intended to limit the scope of Article 56(2) to the rights and duties found in the Convention, they would have said so.

6.51. Article 56(2) of the Convention provides an independent obligation, without the need for the Tribunal to exercise jurisdiction over claims outside of the Convention. However, those other rights and duties are relevant to the assessment of a breach of Article 56(2).

6.52. The ICCPR grants rights to individuals. It also grants rights to States Parties stemming from its *erga omnes partes* effects. Switzerland acceded to the ICCPR on 18 June 1992 and Nigeria on 29 July 1993. Since then, each of them has a right that the ICCPR be upheld by the other States Parties. This was acknowledged by the International Court of Justice in the *Barcelona Traction* case.³⁹³ A breach of the ICCPR by Nigeria necessarily implies a violation of a right of Switzerland.

6.53. Throughout the detention of the crew members, Nigeria committed violations of the ICCPR. In doing so, it failed to “have due regard to the rights” of Switzerland.

6.54. First, Article 7 of the ICCPR prohibits torture or cruel, inhuman or degrading treatment or punishment. As shown in paragraph 6.47 above, this provision is not limited to physical harm, but also encompasses mental harm. In this case, the crew was beaten, and the EFCC filmed and took photos of the crew during their arrest. These photos were then published on the internet, treating them in a humiliating and degrading manner by suggesting their guilt even before any charges were brought. The crew was further subjected to distressing situations with long-lasting effects.³⁹⁴ In doing so, Nigeria violated Article 7 of the ICCPR.

6.55. Second, Nigeria did not respect the crew members’ right to liberty and security enshrined in Article 9 of the ICCPR. It put crew members in harm’s way by requiring the *MT “San Padre Pio”* to anchor in a dangerous zone. Nigeria disregarded the need for safety and security of crew members by detaining them in a dangerous location. This resulted in a real and demonstrable risk to their lives. Nigeria could not have been oblivious to the fact that it was necessary for the vessel to be manned at all times to ensure her safe operation and that those onboard would be exposed to grave danger.

6.56. Third, Article 9 of the ICCPR enshrines a right to liberty, which is closely linked to the principle of legality:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. *No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*³⁹⁵

This means that Nigeria could only deprive the crew members of their liberty to the extent that Nigerian law actually provided for such possibility.³⁹⁶ However, Nigeria’s actions in this

³⁹³ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962), Preliminary Objections, Judgment, ICJ Reports 1970*, p. 3, at p. 32, para. 33; see also *ibid.*, para. 34.

³⁹⁴ See above, paras. 2.40-2.41, 2.70.

³⁹⁵ Art. 9(1) of the ICCPR (emphasis added).

³⁹⁶ Assuming that the Convention granted Nigeria jurisdiction to do so, *quod non*.

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situation did not conform to the principle of legality. In addition, the principle of legality, *nullum crimen, nulla poena sine lege*, one of the basic general principles of criminal law, provides that no one shall be convicted in the absence of a law to that effect.³⁹⁷ One of its components is the notion of *nullum crimen sine lege certa*, which prescribes not only that law must exist, but also that it must be clear and foreseeable.³⁹⁸ That was plainly not the case for the crew members of the *M/T “San Padre Pio”*. Nigeria’s criminal law is not generally applicable in the EEZ, and nor should it be.³⁹⁹ Moreover, the content of the criminal offences invoked in the Nigerian criminal proceedings is not clear. An ever-changing variety of charges were brought against the vessel and her crew. The acquittal of the vessel, the Master and the three other officers demonstrates the failure by the EFCC properly to understand and apply Nigerian criminal law.⁴⁰⁰

6.57. Fourth, Article 12(2) of the ICCPR prescribes that “[e]veryone shall be free to leave any country, including his own”. This right was not respected by Nigeria in this case. To begin with, Nigeria should never have detained the crew at all.⁴⁰¹ Moreover, even if there had been a lawful basis for their initial arrest and detention, *quod non*, there was no possible basis for preventing the 12 crew members from leaving Nigeria for four months after all criminal charges against them were dropped.⁴⁰²

6.58. In light of the above, Nigeria violated Articles 7, 9 and 12(2) of the ICCPR. These include the right to liberty, the right to security, and the prohibition of cruel, inhuman or degrading treatment. In doing so, Nigeria failed to have due regard to the rights of Switzerland and hence breached Article 56(2) of the Convention.

III. Nigeria’s enforcement actions were contrary to the principle of humanity, and were neither reasonable nor proportionate

6.59. As the Tribunal held in its first case, “[c]onsiderations of humanity must apply in the law of the sea, as they do in other areas of international law”.⁴⁰³ In the *Arctic Sunrise arbitration*, the Arbitral Tribunal stated that:

... if necessary, it may have regard to general international law in relation to human rights in order to determine whether law enforcement action such as the boarding, seizure, and detention of the *Arctic Sunrise* and the arrest and detention of those on board was reasonable and proportionate. This

³⁹⁷ *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, Advisory Opinion of 4 December 1935, PCIJ, Series A/B, No 65*, at p. 56.

³⁹⁸ C. Kreß, “Nulla Poena, Nullum Crimen Sine Lege”, in *The Max Planck Encyclopedia of Public International Law*, 2010, paras. 29-31, available at opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e854 (last accessed 22 May 2020); T. Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, Cham, Springer, 2017, at p. 20.

³⁹⁹ See above, para. 1.32.

⁴⁰⁰ It appears that even Nigerian officials, such as Mr Aminu Ismaila from the EFCC, are not clear as to the content and scope of applicability of some laws and regulations (see above, para. 2.58).

⁴⁰¹ The 12 crew members for six months in total, the master and the three other officers for 22 months in total.

⁴⁰² See above, paras. 2.45-2.46.

⁴⁰³ *M/V “SAIGA” (No. 2)* (above note 283), para. 155; see also “*Enrica Lexie*” (*Italy v. India*), *Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015*, p. 182, at p. 204, para. 133.

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would be to interpret the relevant Convention provisions by reference to relevant context.⁴⁰⁴

To assess the lawfulness of measures taken by a coastal State in response to protest actions within its EEZ, the Tribunal considers it necessary to determine whether: (i) the measures had a basis in international law; and (ii) the measures were carried out in accordance with international law, including with the principle of reasonableness. Where such measures involve enforcement measures they are subject to the general principles of necessity and proportionality.⁴⁰⁵

6.60. Referring to the *M/V "SAIGA" (No. 2)* case and the *Arctic Sunrise arbitration*, the Arbitral Tribunal in the *Duzgit Integrity arbitration* held that:

The exercise of enforcement powers by a (coastal) State in situations where the State derives these powers from provisions of the Convention is also governed by certain rules and principles of general international law, in particular the principle of reasonableness. This principle encompasses the principles of necessity and proportionality. These principles do not only apply in cases where States resort to force, but to all measures of law enforcement. Article 293(1) requires the application of these principles. They are not incompatible with the Convention.⁴⁰⁶

6.61. The case law thus refers to two principles: the principle of humanity and that of reasonableness (the latter encompassing *inter alia* the principle of proportionality), both of which were infringed by Nigeria.

6.62. Nigeria's failure to comply with the principle of humanity is apparent from, *inter alia*, its breaches of the MLC and the ICCPR.⁴⁰⁷

6.63. Nigeria's breaches of the principle of reasonableness and the closely related principle of proportionality are plainly established by looking at the facts of the case.

6.64. First, the crew was arrested on the basis of an alleged violation of the Cabotage Act which was later dismissed by NIMASA, and charges were never brought under that Act.⁴⁰⁸ When charges were finally brought, this was in relation to more serious offences under the Miscellaneous Offences Act and the Petroleum Act. These charges were eventually dismissed by Nigerian courts.⁴⁰⁹ On the basis of these charges, however, the vessel, the Master and the three other officers spent more than 22 months in detention in Nigeria. The Master and the

⁴⁰⁴ *Arctic Sunrise Arbitration, Merits* (above note 285), at p. 46, para. 197.

⁴⁰⁵ *Arctic Sunrise Arbitration, Merits* (above note 285), at p. 52, para. 222.

⁴⁰⁶ *The Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe), Award of 5 September 2016, PCA Case No 2014-07 ("Duzgit Integrity arbitration, Merits")*, at p. 54, para. 209; see also *ibid.*, at p. 69, para. 254.

⁴⁰⁷ T. Treves, "Human Rights and the Law of the Sea", *Berkeley Journal of International Law*, Vol. 28, 2010, 1-14, at p. 5.

⁴⁰⁸ See above, para. 2.27.

⁴⁰⁹ See above, paras. 2.44-2.53.

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three other officers endured extremely difficult conditions of detention.⁴¹⁰ Despite charges against them being dropped after one week, the other 12 crew members were detained on the vessel under armed guard and prevented from leaving Nigeria for four additional months. Nigeria had provided no explanation for this.

6.65. Moreover, even if criminal charges had been justified (which they were not), the penalties that the EFCC sought to impose were unreasonable. The Master and the three other officers faced the possibility of life imprisonment.⁴¹¹ This is manifestly unreasonable and disproportionate.⁴¹²

6.66. It is difficult to see how the beating of crew members by Nigerian authorities can be compatible with the principles of humanity and reasonableness.

6.67. Plainly, Nigeria could have acted in a manner less damaging to the vessel, her crew and the flag State, and in a manner consistent with its obligations under the Convention and international law, including the ICCPR and MLC. Nigeria should have, *inter alia*:

- i. contacted the flag State and asked it to investigate;
- ii. allowed the 12 crew members to leave Nigeria shortly after all criminal charges against them were dropped;
- iii. allowed crew members to freely leave the vessel;
- iv. accepted the judgments of the High Court in respect of the Master and the three other officers, and the vessel (including the High Court’s dismissal of the EFCC’s motion of a stay of execution), both in relation to the freedom of movement of the crew and the release of the vessel.

Instead, Nigeria needlessly inflicted grave hardship on the vessel, her crew (past and present), her cargo and all the companies involved.

6.68. In light of the above, even assuming that Nigeria enjoyed enforcement jurisdiction over the activities of the *M/T “San Padre Pio”* (*quod non*), that jurisdiction was exercised in a manner contrary to the principle of humanity, and was neither reasonable nor proportionate.

⁴¹⁰ Nigeria bears responsibility for not preventing the acts of piracy of 15 April 2019. According to the UN Human Rights Committee, “State parties [to the ICCPR] also have a heightened duty of care to take any necessary measures to protect the lives of individuals deprived of their liberty by the State, since, by arresting, detaining, imprisoning or otherwise depriving individuals of their liberty, State parties assume the responsibility to care for their lives and bodily integrity, and they may not rely on lack of financial resources or other logistical problems to reduce this responsibility.” UN Human Rights Committee, *General Comment No. 36: Right to Life*, UN Doc. CCPR/C/GC/36 (3 September 2019), para. 25 (footnotes omitted).

⁴¹¹ See above, para. 2.44.

⁴¹² See also *Duzgit Integrity arbitration, Merits* (above note 406), at pp. 69-70, paras. 256-261.

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IV. Nigeria breached Article 300 of the Convention

6.69. Article 300 of the Convention, entitled “Good faith and abuse of rights”, reads:

States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.

6.70. As is clear from the text, and well established by the case-law,⁴¹³ the obligations embodied in Article 300 are not independent; they apply only in connection with some other obligation, right, jurisdiction or freedom provided for in the Convention.

6.71. As shown above in Part II of this Memorial, Nigeria has, in numerous respects, failed to meet in good faith its obligations under the Convention. It has also exercised the rights and jurisdiction it claims in a manner amounting to an abuse of rights. Nigeria’s violation of Article 300 is demonstrated by the examples below.

6.72. The archetype of an abuse of right is to invoke a right for an ulterior purpose. That is precisely what Nigeria did when, without any basis in fact or in law, it arrested and detained the *M/T “San Padre Pio”* and arrested, detained and imprisoned her officers and crew. Thereafter, the justifications invoked by Nigeria changed on numerous occasions, seemingly to suit its shifting legal strategy. For instance, the baseless accusations of “oil theft” demonstrate Nigeria’s absence of good faith and abuse of rights, as do the unsubstantiated attacks against a neighbouring State, Togo.⁴¹⁴

6.73. Regardless of whether or not Nigeria enjoyed enforcement jurisdiction, the manner of the arrest and detention of the vessel and her crew also demonstrates an abuse of rights.

- i. First, Nigeria ordered the vessel to anchor, and stay for a prolonged period of time, in a zone rife with piracy and armed attacks, well-known for congested anchorage positions, leaving her at continued risks of attacks and repeated collisions. By knowingly breaching the enforcement safeguards set forth in Article 225, Nigeria also violated Article 300.
- ii. Second, the EFCC filmed and took photos of the crew during their arrest and published these on the internet, treating them in a humiliating and degrading manner by suggesting they were guilty even before any charges were brought against them. Crew members were then beaten. Nigeria inflicted unnecessary and disproportionate punishment on the vessel and her crew. By acting in a manner which Nigeria knew or should have known breached its human rights obligations under the ICCPR and, accordingly, its obligations Article 56(2), Nigeria also violated Article 300.
- iii. Third, the crew members were refused a lawyer and, on several occasions, were misled as to when they would be released. Twelve crew members were

⁴¹³ See e.g., *M/V “Norstar”* (above note 280), at pp. 65-80, paras. 232-308; *Duzgit Integrity arbitration, Merits* (above note 406), at p. 54, para. 209.

⁴¹⁴ *Statement in Response* (above note 9), at p. 5, para. 2.3 and at p. 8, para. 2.11.

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prevented from leaving Nigeria for four months after all charges were dropped against them. Nigeria blatantly violated the rights of the accused. By breaching Article 230 repeatedly and in this manner, Nigeria also violated Article 300.

- iv. Fourth, in the Provisional Measures case, Nigeria expressly claimed that it had taken enforcement measures pursuant to Article 214 of the Convention.⁴¹⁵ However, it repeatedly failed to meet its obligation under Article 231 to notify Switzerland of the arrest of the *M/T "San Padre Pio"* and her crew; the measures subsequently taken against them; and to submit reports regarding these measures. Nigeria's silence continued even after Switzerland repeatedly requested information. By breaching Article 231 continuously and in this manner, Nigeria also violated Article 300.

6.74. In light of the above, Nigeria has failed to fulfil in good faith its obligations under *inter alia* Articles 56(2), 225, 230 and 231 of the Convention and has exercised the rights and jurisdiction it purported to enjoy under the Convention in an abusive manner that constituted a violation of Article 300 of the Convention.

6.75. In conclusion, Nigeria breached the Convention's enforcement safeguards and failed to have due regard to Switzerland's rights and duties as required by Article 56(2). Nigeria also lacked humanity and did not act in a reasonable or proportionate manner in its enforcement actions. Finally, Nigeria violated Article 300 in relation to specific Articles of the Convention.

⁴¹⁵ *Statement in Response* (above note 9), at p. 20, para. 3.16.

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CHAPTER 7
REMEDIES

7.1. Every international wrongful act of a State entails the international responsibility of that State.⁴¹⁶ As regards reparation, the Tribunal stated in its early case law:

It is a well-established rule of international law that a State which suffers damage as a result of an internationally wrongful act by another State is entitled to obtain reparation for the damage suffered from the State which committed the wrongful act and that ‘reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed’ (*Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 47*).⁴¹⁷

7.2. Switzerland respectfully requests that the Tribunal order Nigeria to make reparation for the damage suffered by Switzerland as a result of Nigeria’s breaches of the Convention as set out above. This Chapter lays out the remedies sought (**Section I**), details the heads of damages claimed (**Section II**), and claims legal costs (**Section III**) as well as interest (**Section IV**).

I. Remedies requested

7.3. On the basis of the breaches of the Convention described above, Switzerland requests that the following remedies be granted:

- i. that Nigeria be ordered to allow the *M/T “San Padre Pio”* to leave Nigeria immediately with her cargo;
- ii. that Nigeria be ordered to terminate all potentially ongoing domestic proceedings relating to the *M/T “San Padre Pio”*;
- iii. in light of the breaches of the Convention highlighted in this Memorial, as well as of Nigeria’s complete disregard for Switzerland’s attempts at negotiation, that Nigeria be ordered to issue a formal apology and guarantees that the internationally wrongful conduct referred to above will not be repeated;
- iv. that the Tribunal decide that reparation for breaches of the Convention is due, as detailed below and in an amount to be determined at the appropriate time; and
- v. that the Tribunal award costs in the present proceedings in an amount to be determined at the appropriate time.

⁴¹⁶ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, UN Doc. A/56/10 (2001), Art. 1.

⁴¹⁷ *M/V “SAIGA” (No. 2)* (above note 283), para. 170.

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II. Damages

7.4. Among the remedies that can be granted, the Tribunal can order monetary compensation to be paid for damage suffered as a result of Nigeria’s breaches of the Convention, and it has done so on many occasions.⁴¹⁸

A. Damage suffered by the crew

7.5. First and foremost, it is now well-established that the individuals who suffered directly from breaches of the Convention by another State should be compensated. This compensation should extend to both material and non-material damage, such as moral damage.⁴¹⁹ The International Court of Justice has held that such compensation for non-material damage may be payable even without specific evidence:

In the view of the Court, non-material injury can be established even without specific evidence. In the case of Mr. Diallo, the fact that he suffered non-material injury is an inevitable consequence of the wrongful acts of the DRC already ascertained by the Court.⁴²⁰

7.6. In the present case, all 16 crew members suffered loss and damage because of Nigeria’s breaches of the Convention. They were beaten, unlawfully detained and imprisoned; 12 of them were forced to remain in Nigeria for a total of about six months, and the Master and the three other officers were held in Nigeria for a total of 22 months and one week. During these periods they were refused urgent medical attention and were separated from their families. Some developed long-term physical and psychological health problems.⁴²¹

7.7. In light of the above, Switzerland requests that the Tribunal order Nigeria to pay damages for material and non-material damage to the crew.

B. Damage suffered by the vessel owner, manager, charterer and cargo owner

7.8. Because of the illegal arrest and subsequent detention of the *M/T “San Padre Pio”*, the companies involved suffered significant financial losses.

⁴¹⁸ *M/V “SAIGA” (No. 2)* (above note 283), paras. 167-172; *M/V “Virginia G”* (above note 297), at pp. 109-112, paras. 427 and following, esp. 434, 439; *M/V “Norstar”* (above note 280), at pp. 82-83, paras. 316-317, 323; See also *Arctic Sunrise Arbitration, Merits* (above note 285), at p. 95, para. 385; *The Arctic Sunrise Arbitration (Netherlands v. Russia), Award on Compensation of 10 July 2017, PCA Case No 2014-02 (“Arctic Sunrise Arbitration, Compensation”)*; *Duzgit Integrity arbitration, Merits* (above note 406), at p. 92 para. 333; *The Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe), Award on Reparation of 18 December 2019, PCA Case No 2014-07 (“Duzgit Integrity arbitration, Reparation”)*.

⁴¹⁹ *M/V “SAIGA” (No. 2)* (above note 283), paras. 171, 175; *M/V “Virginia G”* (above note 297), at p. 111, para. 434; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment, ICJ Reports 2012*, p. 324 (“*Diallo*”), at p. 334, paras. 21-24; *Arctic Sunrise Arbitration, Merits* (above note 285), at p. 97, para. 394; *Duzgit Integrity arbitration, Reparation* (above note 418), at pp. 50-51, paras. 180-185.

⁴²⁰ *Diallo* (above note 419), at p. 334, para. 21.

⁴²¹ See above, para. 2.70.

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7.9. Switzerland seeks compensation for the losses suffered by the vessel owner and/or the manager (as appropriate), for:

- i. the losses in relation to the *M/T "San Padre Pio"*, resulting from the market devaluation of the vessel and the costs of repairs caused by Nigeria's illegal actions;
- ii. the loss of hire income due to the impossibility to conclude a new time charter following the expiry of the one concluded with the charterer. These financial losses are particularly significant due to continued payment of salaries to the crew (comprising both the original crew and the replacement crews which are necessary ensure the continued manning of the vessel, and, thereby, her safety);
- iii. the legal costs incurred;
- iv. the costs for providing basic goods and necessities for the crew;
- v. the costs of the security vessel that was required to escort each delivery or travel to/from land for the crew; and
- vi. bail monies paid to enable the crew to leave jail.

7.10. Switzerland seeks compensation for the losses suffered by the charterer and/or cargo owner (as appropriate), due to:

- i. the amount of equivalent to the hire of the *M/T "San Padre Pio"* paid to the vessel owner, because the charterer paid from the start of the charterparty until 8 June 2019. However, it could not use the vessel for its intended purpose nor benefit from the hire from 23 January 2018 onwards. No benefit could be obtained for the sums paid;
- ii. the loss of value of the cargo owing to deterioration of its quality and/or market price over the period of unlawful detention;
- iii. the loss or deterioration of the specialist equipment onboard over the period of unlawful detention;
- iv. the cargo that the *M/T "San Padre Pio"* was forced to use as fuel during the period of unlawful detention; and
- v. the legal costs incurred.

7.11. In light of the above, Switzerland requests that the Tribunal order Nigeria to pay damages for material and non-material damage to the companies concerned.⁴²²

⁴²² See, *inter alia*, *M/V "SAIGA" (No. 2)* (above note 283), para. 172; *M/V "Virginia G"* (above note 297), at p. 111, paras. 434, and at p. 112, para. 441; *M/V "Norstar"* (above note 280), at pp. 100-102, paras. 406-417; *Arctic Sunrise Arbitration, Merits* (above note 285), at p. 96-97, paras. 391-395; *Duzgii Integrity arbitration, Reparation* (above note 418), at pp. 26-28, paras. 102-107 and at pp. 45-48, paras. 167-173.

MEMORIAL OF SWITZERLAND**C. Direct damage suffered by Switzerland**

7.12. Switzerland, too, suffered direct damage due to Nigeria’s illegal actions in relation to the *M/T “San Padre Pio”*.

7.13. Switzerland incurred substantial costs in defending its interests. These are heads of damages distinct from the legal costs sought below, because such costs would not have been incurred but for Nigeria’s refusal to cooperate with or inform Switzerland. Nigeria breached its obligations to notify Switzerland under the Convention and failed to provide any information about relevant events. As a result, it was necessary for Switzerland to retain experts to establish the relevant facts.

7.14. Nigeria was the sole cause of the damage suffered, bearing in mind that Switzerland attempted to mitigate damage and repeatedly sought to find a solution to the dispute, through bilateral negotiations and exchanges of view.

7.15. In light of the above, Switzerland requests the Tribunal to order Nigeria to pay damages for material damage suffered by Switzerland.

III. Legal costs

7.16. Switzerland incurred substantial legal costs in the defence of its interests. The preparation of the legal argumentation and written submissions led to significant expenses, including, but not limited to, fees and expenses for external advisers. In light of Nigeria’s unwillingness to cooperate, highlighted throughout this Memorial, Switzerland requests that the Tribunal depart from the usual repartition of costs envisioned in Article 34 of its Statute and order Nigeria to reimburse Switzerland’s legal expenses.

IV. Interest

7.17. Switzerland claims interest on all the damages and legal costs to be paid by Nigeria. As stated in the Tribunal’s early case-law:

The Tribunal considers it generally fair and reasonable that interest is paid in respect of monetary losses, property damage and other economic losses.⁴²³

7.18. In assessing the interest due, the Tribunal should be “guided by the principle that the injured State is entitled to such interest as will ensure full reparation for the injury it has suffered as a result of the internationally wrongful measures of the injuring State”.⁴²⁴ Switzerland submits that the Tribunal should apply an appropriate interest rate or rates to the various heads of damage to be determined at the appropriate time, compounded annually or at intervals related to the rate or rates selected, and payable from the date of the arrest or the date the various heads of damage were incurred to the date of the effective payment.

⁴²³ *M/V “SAIGA” (No. 2)* (above note 283), para. 173.

⁴²⁴ *Arctic Sunrise Arbitration, Compensation* (above note 418), at p. 31, para. 119.

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7.19. Switzerland will set out the precise amounts claimed at the appropriate time. Switzerland also reserves the right to modify or expand its claims to damages, costs and interest at further stages of the proceedings.

MEMORIAL OF SWITZERLAND**SUBMISSIONS**

The Swiss Confederation respectfully requests the International Tribunal for the Law of the Sea to adjudge and declare that:

1. By maintaining the legislation it applied against the *M/T “San Padre Pio”* (“the vessel”), as detailed in Chapters 4 and 5, the Federal Republic of Nigeria has acted and is acting in a manner incompatible with Articles 56, 58, 87 and 92 of the Convention.
2. By intercepting the vessel and requiring her to proceed to Bonny Anchorage; arresting the vessel and her crew; detaining the vessel, her crew and cargo; and initiating and maintaining judicial proceedings against the vessel and her crew:
 - (a) the Federal Republic of Nigeria has breached its obligations with regard to the freedom of navigation and the exercise of exclusive flag State jurisdiction as provided for in Article 58(1) of the Convention, read together with Articles 87(1) and 92(1);
 - (b) the Federal Republic of Nigeria has breached its obligations under Articles 225, 226, 230 and 231 of the Convention;
 - (c) the Federal Republic of Nigeria has failed to have due regard to the rights and duties of the Swiss Confederation, in breach of Article 56(2) of the Convention;
 - (d) the Federal Republic of Nigeria has breached its obligation to act in a manner consistent with the principles of humanity, reasonableness and proportionality.
3. The Federal Republic of Nigeria has failed to fulfil in good faith its obligations under the Convention and it exercised the rights and jurisdiction it purported to enjoy in a manner that constituted an abuse of rights, in violation of Article 300 of the Convention.
4. These breaches of the Convention entail the responsibility of the Federal Republic of Nigeria and require the latter to:
 - (a) cease forthwith the internationally wrongful conduct referred to above, which is of a continuing nature, namely the ongoing arrest and detention of the vessel and her cargo, as well as the refusal to let the vessel leave Nigeria’s waters and its EEZ and any ongoing judicial proceedings relating to the vessel and her crew;
 - (b) provide the Swiss Confederation with an apology and with appropriate assurances and guarantees that the internationally wrongful conduct referred to above will not be repeated;
 - (c) provide to the Swiss Confederation full reparation for the injuries and damage caused by the internationally wrongful acts referred to above (including interest);
 - (d) reimburse the legal costs of the Swiss Confederation (including interest).

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The Swiss Confederation reserves the right to supplement and/or amend its claim and the relief sought as necessary (including in relation to damages, costs and interest), and to make such other requests from the Tribunal as may be necessary to preserve its rights under the Convention

Bern,

23 June 2020



Corinne Cicéron Bühler

Ambassador, Director

Directorate of International Law

Federal Department of Foreign Affairs

Agent of the Swiss Confederation

MEMORIAL OF SWITZERLAND**LIST OF ANNEXES**

- Annex CH/M-1** Affidavit of Captain Andryi Vasko, Master of the *M/T “San Padre Pio”*, dated 19 June 2020
- Annex CH/M-2** Affidavit of Mr Mykhaylo Garchev, Chief Mate of the *M/T “San Padre Pio”*, dated 17 June 2020
- Annex CH/M-3** Affidavit of Mr Vladislav Shulga, 2nd Mate of the *M/T “San Padre Pio”*, dated 19 June 2020
- Annex CH/M-4** Affidavit of Mr Ivan Orlovskiy, 3rd Mate of the *M/T “San Padre Pio”*, dated 19 June 2020
- Annex CH/M-5** Affidavit of Mr Giuseppe Nestola, Managing Director of The Augusta Energy Group, dated 21 June 2020
- Annex CH/M-6** Diplomatic Interventions by Switzerland between 13 March 2018 and 8 May 2019
- Annex CH/M-7** Special Agreement and Notification (including Minutes of Consultation), dated 17 December 2019
- Annex CH/M-8** ABC Maritime AG, Ship Specifications: *M/T “San Padre Pio”*, dated 11 May 2017
- Annex CH/M-9** Extract from the Commercial Register for San Padre Pio Schiffahrt SA, dated 18 June 2020
- Annex CH/M-10** Extract from the Commercial Register for ABC Maritime AG, dated 18 June 2020
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- Annex CH/M-12** Schematic Diagram of the Relationships between Various Relevant Entities
- Annex CH/M-13** Time Charter Party between San Padre Pio Schiffahrt SA and Argo Trading and Shipping Ltd, dated 12 July 2017
- Annex CH/M-14** Switzerland, *Loi fédérale sur la navigation maritime sous pavillon suisse*, RS 747.30, 23 September 1953 (excerpt)
- Annex CH/M-15** Switzerland, *Constitution fédérale de la Confédération suisse*, RS 101, 18 April 1999 (excerpts)
- Annex CH/M-16** Switzerland, *Loi fédérale sur l’approvisionnement économique du pays*, RS 531, 16 June 2016 (excerpt)

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- Annex CH/M-17** Switzerland, *Ordonnance sur le cautionnement de prêts pour financer des navires suisses de haute mer*, RS 531.44, 14 June 2002 (excerpt)
- Annex CH/M-18** Nigeria, *Territorial Waters Act*, 8 April 1967 (excerpt)
- Annex CH/M-19** Nigeria, *Exclusive Economic Zone Act*, 2 October 1978 (excerpts)
- Annex CH/M-20** Nigeria, *Petroleum Act*, 27 November 1969 (excerpts)
- Annex CH/M-21** Nigerian Department of Petroleum Resources, *Guidelines for the Importation of Petroleum Products into Nigeria*, 1 June 2015
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- Annex CH/M-23** Nigeria, *Interpretation Act*, 20 January 1964 (excerpt)
- Annex CH/M-24** Auke Visser, Photographs, Information and Characteristics Particulars of the “*FSO UNITY*”
- Annex CH/M-25** Nigeria, *Coastal and Inland Shipping (Cabotage) Act*, 30 April 2005 (excerpts)
- Annex CH/M-26** Nigeria, *Nigerian Oil and Gas Industry Content Development Act*, 22 April 2010 (excerpt)
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- Annex CH/M-29** Contract between Vitol SA and Augusta Energy SA, dated 27 December 2017
- Annex CH/M-30** Togo, *Arrêté réglementant la circulation, l'accès à la rade et le mouillage dans les espaces maritimes sous juridiction togolaise*, 2018-001/PR/ONAEM/PREMAR, 11 September 2018
- Annex CH/M-31** Chart of the Lomé Anchorage Area
- Annex CH/M-32** Bill of Lading, dated 12 January 2018
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- Annex CH/M-35** International Organization for Standardization, *ISO 8217 2010 Fuel Standard for Marine Distillate Fuels*
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- Annex CH/M-41** Brightness Maritime Agency SARL, Clearance Certificate for the *M/T “San Padre Pio”*, Lomé Port – Offshore, dated 18 January 2018
- Annex CH/M-42** Nigerian Navy Ship Pathfinder Verification Certificate to Receive/Supply/Load/Discharge Approved Products, dated 12 January 2018
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- Annex CH/M-44** Email from the *M/T “San Padre Pio”* to the Charterer enclosing the Master’s Statement of Facts for 20-23 January 2018, timed 15:46, 23 January 2018
- Annex CH/M-45** Deck logbook of the *M/T “San Padre Pio”*, 20-24 January 2018
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- Annex CH/M-49** LATC Marine Ltd, Information Sheet for the *M/V “Lahama”*
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- Annex CH/M-51** Golden Energy Offshore Services AS, Information Sheet for the *M/V “Energy Scout”*

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- Annex CH/M-52** Augusta Energy SA, Bunker Receipt Relating to the Transfer to the *M/V "Energy Scout"*, dated 23 January 2018
- Annex CH/M-53** Note of the Criminal Proceedings in the Federal High Court of Nigeria at Port Harcourt of 26 September 2018, Charge No. FHC/PH/24C/2018
- Annex CH/M-54** Federal High Court of Nigeria, Port Harcourt, *Judgment of 28 November 2019*, Charge No. FHC/PH/24C/2018, issued on 2 December 2019
- Annex CH/M-55** Email from the *M/T "San Padre Pio"* to the Charterer, timed 08:19, 23 January 2018
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- Annex CH/M-61** Email from the *M/T "San Padre Pio"* to the Charterer enclosing the Master's Statement of Facts for 24 January 2018, timed 23:04, 24 January 2018
- Annex CH/M-62** Nigerian Ministry of Petroleum Resources, Petroleum Products Import Permit for Anosyke Group of Companies Ltd, PMB No. 12650 (Lagos), dated 13 December 2017
- Annex CH/M-63** Report of the Chief of Naval Staff to the Acting Chairman of the Economic and Financial Crimes Commission on the Arrest of the *M/T "San Padre Pio"*, dated 23 February 2018
- Annex CH/M-64** Nigeria, *Nigerian Maritime Administration and Safety Agency Act*, 25 May 2007
- Annex CH/M-65** Nigeria, *Marine Environment (Sea Protection Levy) Regulations*, 8 June 2012 (excerpts)

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- Annex CH/M-66** Nigerian Maritime Administration and Safety Agency, Ship Clearance Certificate for the *M/T “San Padre Pio”*, dated 24 January 2018
- Annex CH/M-67** Letter from the Cargo Owner to the Director of Shipping and Development at the Nigerian Maritime Administration and Safety Agency, dated 5 February 2018
- Annex CH/M-68** Letter from the Deputy Director of Legal Services at the Nigerian Maritime Administration and Safety Agency to the Head of Operations of the Economic and Financial Crimes Commission, dated 13 April 2018
- Annex CH/M-69** Affidavit of Mr Aminu Ismaila of the Nigerian Economic and Financial Crimes Commission in Port Harcourt (Affidavit in Support of the EFCC’s Motion on Notice of 15 May 2018), dated 10 May 2018
- Annex CH/M-70** Handover Letter from the Nigerian Navy to the Nigerian Economic and Financial Crimes Commission, dated 9 March 2018
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- Annex CH/M-75** Federal High Court of Nigeria, Port Harcourt, Charges against the 16 Crew Members and *M/T “San Padre Pio”*, dated 12 March 2018
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- Annex CH/M-81** Correspondence with the Nigerian Economic and Financial Crimes Commission Seeking Authorisation for Crew Members to Receive Medical Treatment, dated 28 May 2018 to 1 June 2018
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- Annex CH/M-104** United Kingdom, *The Merchant Shipping (Ship-to-Ship Transfers) Regulations 2020*, 2020 No. 94, 31 January 2020 (excerpts)
- Annex CH/M-105** Norway, *Regulation on Vessels’ Notification Obligations Under the Harbour and Fairways Act*, 21 December 2015 (excerpt)
- Annex CH/M-106** Australia, *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*, No. 41, 1983, 16 June 2017 (excerpt)

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- Annex CH/M-107** Australia, *Marine Order 91 (Marine Pollution Prevention – Oil) 2014*, 13 December 2016 (excerpt)
- Annex CH/M-108** Switzerland, *Ordonnance sur la navigation maritime*, RS 747.301, 20 November 1956 (excerpt)