

# Separate Opinion of Judge Lucky

## Introduction

1. I did not vote in favour of all the operative paragraphs of the Judgment of the Tribunal for reasons that may differ substantially from those in the said Judgment. I find it difficult to concur with some of the findings, specifically with respect to abuse of rights. This Separate Opinion sets out the reasons for my disagreement. My findings will deal with the evidence – documentary and oral – and the admissibility of such evidence.
2. The chronology of the procedure of the case is set out in the introduction to the Judgment and I shall not repeat it.
3. This is a case in which the versions of each Party differ. Therefore, opposing views and conflicting evidence have to be assessed and evaluated. In this regard, the oral and documentary evidence is important and consideration must be given to the admissibility of the documentary evidence presented, including photographs. It is an important case that will establish the extent to which article 87 of the United Nations Convention on the Law of the Sea (hereinafter “the Convention”) can be applied. The interpretation, construction and application of article 87, paragraph 1, of the Convention to the facts found are crucial elements. Therefore, the evidence and the submissions of Counsel must be carefully considered.
4. That this case would result in one or more dissenting or separate opinions should come as no surprise or be the cause of any discomfort. In my view, the ventilation of interpretation of the relevant law, specifically articles 87 and 300, and the findings of fact will be the subject of the highest international scrutiny, and will auger well for the development of the jurisprudence of this specialized court.

5. My concern is primarily with the evidence in determining the important issues, for example, the condition of the *M/V "Norstar"* at the time of its arrest and detention in 1998, in 2003, and when the vessel was sold as scrap in 2015. It will be noticeable that I have spent some time elucidating the evidence. The reason is that the evidence is crucial, because, after 20 years, evidence that would have been very helpful and beneficial to both sides is unavailable. Consequently, in this Separate Opinion I have had to rely on the evidence presented, including the oral evidence, which is very important. I will deal with the oral evidence of the witnesses in some detail in order to support my conclusions and findings.

6. Among the paragraphs set out above, I have to include the last sentence of paragraph 221, which reads as follows: "The Tribunal, therefore, cannot accept Panama's claim that freedom of navigation under article 87 of the Convention includes the right to 'sail towards the high seas' and that a vessel enjoys such freedom even in port of the coastal State." It must be noted that the evidence discloses that the *M/V "Norstar"* was prevented from having access to the high seas because of its unlawful arrest and detention. Paragraph 258 reads:

The Tribunal is of the view that Panama has failed to prove any bad faith on the part of Italy in this regard. The arrest of the *M/V "Norstar"* in a Spanish port cannot be a breach of good faith under article 300 of the Convention. The Tribunal cannot accept the claim.

While it may not be bad faith per se, it will be demonstrated later in this Opinion that there was certainly a lack of good faith. Paragraph 275 reads:

The Tribunal is of the view that the conduct of the Parties prior to or during the proceedings before it regarding disclosure of information or documents, or lack thereof, does not relate to article 87 of the Convention. Therefore, the Tribunal accordingly finds that Panama's claim in this regard falls outside the scope of the Tribunal's jurisdiction.

My view is that the claim is within the jurisdiction of the Tribunal and relates to article 87 of the Convention. It will be clarified in this Opinion. Suffice to

mention at this juncture that the proceedings are based on article 87 and the infringement of same. The Tribunal found that article 300 is not applicable. I find that it is not only relevant but also that it was infringed by Italy.

### Historical and factual background

7. The background is adequately set out in paragraphs 69 to 86 of the Judgment.

### Significant dates

8. It will be helpful if the following events and dates are set out so that this Opinion can be followed in a logical sequence.

- (i) August 1998: Decree of Seizure against the *M/V "Norstar"* issued. (This was in accordance with the prior investigation and section 3 of the European Convention on Mutual Assistance in Criminal Matters (Strasburg) 1969, and letters Rogatory to the relevant authorities in Spain);
- (ii) 24th September 1998: *M/V "Norstar"* arrested in the Bay of Palma de Mallorca, Spain. The *M/V "Norstar"* was detained as a *corpus delicti* regarding criminal cases in Italy against the owner and some of its crewmembers;
- (iii) 25th September 1998: Decree of Seizure executed while the *M/V "Norstar"* was in the internal waters of Spain, moored off the port of Palma de Mallorca;
- (iv) 13th March 2003: the Tribunal at Savona, Italy, delivered its judgment in the criminal proceedings, acquitted all the defendants, and ordered the unconditional release of the *M/V "Norstar"* to Intermarine. The prosecutor appealed the decision to acquit the defendants but not the order to release the said vessel;
- (v) 21 July 2003: the Spanish Authorities instructed the provincial marine service, an institution coming under the Spanish Ministry of the Interior to lift the detention of the *M/V "Norstar"* pursuant to the decision of the Italian judicial authorities. On the said day the detention order was lifted;

(vi) 2nd July 2003: all the relevant documents were delivered to Mr Morch, who was informed that the vessel could be collected within 30 days from the receipt of the notification, after which the judge might order the sale of the vessel by public auction; Mr Morch did not recover the vessel then or, in fact, ever. His reason was that vessel had deteriorated and was never maintained by the Spanish authorities or the duly appointed custodian.

9. It is not disputed that the *M/V "Norstar"* had been carrying out bunkering activities on the high seas and that bunkering on the high seas is lawful. However, the following facts and law are disputed:

- (i) The condition of the *M/V "Norstar"* prior to and at the time of arrest;
- (ii) The seaworthiness of the *M/V "Norstar"*;
- (iii) Whether, according to Italy, the *M/V "Norstar"* was moored and abandoned in the Bay from March 1998 until it was demolished and sold for scrap in September 2015. [Panama denied this and provided evidence that the vessel was seaworthy and had sailed to Algeria and back to the Bay after bunkering vessels on the high seas, and had also been bunkering vessels before that];
- (iv) Whether article 87, paragraph 1, of the Convention is applicable in the circumstances of this case;
- (v) If article 87, paragraph 1, is applicable;
- (vi) Whether article 300 of the Convention applies; and,
- (vii) Whether Panama is entitled to damages and costs.

Italy submitted the following matters, on which the Parties disagree:

- (a) The whereabouts of the *M/V "Norstar"* between 11 August and 25 September 1998;
- (b) The physical condition of the *M/V "Norstar"* at the time of its arrest;
- (c) The correct characterization of the relevant Italian law and proceedings;
- (d) The basis for the adoption of the Decree and the place where the alleged crimes were committed;
- (e) The reasons why the *M/V "Norstar"* was released and the individuals acquitted; and
- (f) The communication concerning the release of the vessel and the owner's failure to retrieve the *M/V "Norstar"*.

### The evidence

10. The evidence comprises the oral testimony of witnesses and documents tendered in evidence. The evidence of witnesses, who testified in support of the case for each Party, is important because it is helpful in arriving at the findings of fact. It is not disputed that the arrest and seizure occurred 20 years ago and that some crucial evidence is not available. In the circumstances, the Parties presented the evidence in their possession to substantiate their case.

11. Documentary evidence is set out in the list of annexes of the Parties. It comprises, inter alia, certified/official copies of the Decree of Seizure, the international letters rogatory from the Tribunal of Savona to the Spanish authorities, the report of the Seizure by the Spanish authorities, the judgments of the Italian courts, financial statements and photographs. I have considered all of these documents in order to arrive at my findings.

12. As I alluded to earlier, one of my concerns is the condition of the *M/V "Norstar"*, whether it was in the port of Palma de Mallorca, Spain, from March 1998 until it was dismantled in September 2015, or whether it had sailed to Algeria for gas oil and bunkered vessels on the high seas before sailing into the port of Palma de Mallorca, where it was seized and arrested. In this regard, the oral and documentary evidence is paramount, and due consideration must be given to the credibility of the witnesses and the admissibility of the documentary evidence, including the photographs tendered in evidence.

13. It will be useful to set out the salient parts of the oral evidence of the witnesses for both sides with comments, where I find it is necessary.

### On behalf of Panama

14. Mr Silvio Rossi testified that he used to advise the fiscal police of the arrival and departure of the *M/V "Norstar"*. He did not provide specific times and dates.

15. He said that, before the arrest in Spain, the *M/V "Norstar"* was "in a very good condition, and of course after staying five years or how many years, the situation was not the same because a boat without maintenance becomes a

wreck." The foregoing, in my view, is based on conjecture, because he did not inspect the vessel after the arrest.

16. He said: "The boat was operating before it was arrested. "I have never been in prison in my life." Without being asked he spoke of his knowledge of fiscal laws. He said the foregoing without being asked. He continued: "In 1998 the *Norstar* supplied two or three vessels, not many". In my opinion, he seemed preoccupied with his business ventures and was of little or no assistance with respect to the condition and commercial business of the *M/V "Norstar"*. His evidence on this issue was not specific. He did not answer the questions posed by Counsel for Panama and his answers to Counsel for Italy did not address the questions put to him.

17. Mr Morch testified that the *M/V "Norstar"* was always clean and well maintained. In 1998 the *M/V "Norstar"* loaded gas oil in Algeria.

18. Prior to the arrest, the ship had all the required certificates and had passed the annual survey in 1997 (former captain Tore Husefest corroborated the foregoing in his testimony). Mr Morch was shown photographs allegedly taken prior to the arrest of the *M/V "Norstar"*. The photos show the vessel in a good condition. The evidential weight of the photographs will be considered later in this Opinion.

19. Mr Morch testified that the legal process – that is the proceedings before the Courts – "dragged on for a long time and all the defendants could not be sure that they would be acquitted. This meant mental stress for everyone. Affected was Silvio Rossi, Renzo Biggio, Emil Petter Vadis Tore Husefest and myself".

20. Silvio Rossi did not testify that he was mentally stressed. Apart from Mr Morch, the other defendants in the criminal cases did not testify. Mental stress must be proven by medical evidence. No such evidence was produced. In these circumstances a claim for mental stress must fail for lack of evidence.

21. Mr Morch testified that the captains, Odd Falck and Tore Husefest, lost their jobs after the arrest of the *M/V "Norstar"* "I think they both stayed at home without employment until 1999, one year after". Neither testified. There is no

evidence of loss of earnings and Mr Morch said that he thought they stayed at home. Therefore his testimony is insufficient in a claim for loss of earnings.

The physical condition of the M/V "Norstar" at the time of arrest

22. The condition of the vessel is important because, if the evidence of Italy is accepted, it would not have been necessary to proceed with the case. If, on the other hand, the evidence is that the M/V "Norstar" was seaworthy at the time of its arrest, then it would be necessary to consider the effect of the Decree of Seizure and whether article 87 of the Convention is applicable.

23. Panama contends that the ship was seaworthy at the time of arrest. Italy argues that the vessel was not seaworthy and had been in the port of Palma de Mallorca from March 1998 and did not leave until it was dismantled in September 2015. In order to support its claim, Panama provided evidence from Mr Silvio Rossi, Mr Arve Morch, the owner, and Mr Husefest, the captain of the vessel in 1997, and tendered an excerpt of sworn testimony of the former captain, now deceased, at a hearing in 1999.

24. The following excerpts from Mr Rossi's testimony are relevant.

I used to advise the fiscal police of the arrival and departure of the Norstar.

Before the arrest the Norstar was in a very good condition, and of course staying in port for 5 years or how many years, the situation was not the same because a boat without maintenance becomes a wreck.

25. Apart from the abovementioned excerpts, Mr Rossi was not helpful. He demonstrated a wide knowledge of the customs laws and policing requirements with which he complied but did not answer the questions posed.

26. Italy led evidence of Mr Esposito, former prosecutor of the Supreme Court, former Attorney General, a judge at San Marino, and *ad hoc* judge of the European Court of Human Rights, in my view highly qualified in his field; and, Mr Matteini, a sea captain since 1982, and named on the national register

for experts in naval evaluation. Neither Mr Esposito nor Mr Matteini physically examined the *M/V "Norstar"*.

On behalf of Panama, Mr Morch testified that the vessel was always clean and well maintained. It is not correct to say that it was abandoned in the port and was in a state of "dismay". The vessel was engaged in bunkering and on one occasion had left the port and sailed to Algeria, where it was loaded with gas oil (this statement is supported by the testimony of the deceased captain that was tendered in evidence).

27. Mr Morch said that, at the time of the arrest, the vessel had all the valid certificates, the Panama national certificate and trading certificate, and had passed the annual survey in 1997 when Captain Tore Husefest was in command of the vessel. Mr Morch identified photographs of the vessel which were tendered. However, in my view, these photographs have to be considered in the context of the accepted test relating to admissibility: relevance (is the photo relevant?); authenticity (Is the photograph authentic? Where is it from? Who was the photographer? What is the relevance of the photograph in the context in which it is presented); and reliability (What is the evidential weight to be given to the photograph?). I do not think the photographs pass the reliability test. In the circumstances, I cannot accept them as cogent and convincing evidence of the state of the vessel at the time of arrest.

28. Mr Morch stated, inter alia, that "after several attempts to have the vessel released, we received from the Court a letter dated 18th January 1999 in which Italy offered to release the *M/V Norstar* against a bond of 250,000.00 lira. The owners had no option. They could not pay the bond." This statement is supported by the document from the bank which was tendered in evidence. Mr Morch was refused a guarantee in a fax from the bank, dated 16 September 1998 (this document was tendered in evidence without any objection), because the bank felt that the risk was too high. He went on to say:

Therefore the owner had neither the opportunity to pay the bond or to provide a bank guarantee, nor the In this situation all involved had to



wait until the Public prosecutor had lost his case that he had to start in the Tribunal di Savona. This is exactly what happened.

The judicial process dragged on for a long time. All the defendants could not be sure that they would be acquitted. This has meant mental stress for everyone. Those affected were Silvio Rossi, Renzo Biggio, Emil Petter Vadis Tore Husefest and myself.

The captains, Odd Falck and Tor Tollefsen, who were employed at the time of the arrest of the *Norstar*, lost their jobs after the arrest of the *Norstar*. I think they both stayed home without employment.

29. Apart from the former captain, no other members of the crew testified. Evidence of mental stress was not presented at the hearing. In these circumstances a judge cannot assume that a person suffered mental stress. Mental stress must be proven through medical evidence.

30. Counsel for Panama submitted that Mr Morch was cross-examined. His testimony should certainly be given more weight than a newspaper report of 2015 in which the *M/V "Norstar"* was described as abandoned, hosting vagrants and having rats on board. The author of the article was not named and he/she was not examined or cross-examined before this Tribunal. This evidence is obviously hearsay and is unacceptable.

Among other answers, I find the following relevant and important. Mr Morch said the captain of the *M/V "Norstar"* died three years before the hearing. He insisted that the vessel was not in the port from March 1998 until the arrest in September 1998. He added that it had sailed to Algeria for gas oil in July 1998.

While it was under arrest he did not have access to the ship. During the period of arrest and detention no one took care of it. It is not correct to say that the ship was abandoned. The crew was still on board when it was arrested. The logbooks were still on board in 2015 while the vessel was under Italian detention. Access to the vessel was denied. It was impossible to get on board. Everything was closed. The keys were taken.

31. The witnesses were cross-examined. Having observed their demeanour and conduct and the manner in which they testified, the fact that their testimony was corroborated by other witnesses for Panama, as well as documentary evidence, convinces me that the core of their testimony is credible.
32. Mr Morch confirmed that there was no information about a custodian being appointed to oversee the ship. The transcript reads:

*JUDGE LUCKY: Thank you, Mr President. Good afternoon, Mr Morch. For the purpose of my question, I would like to read what you said from the transcript this morning. In answer to learned counsel, you said: "The owners were working hard to retrieve the vessel after the detention in September 1998. I believe that it was for Italy to deliver the vessel and to allow us to confirm its condition as well as the existence of the effects and ship's papers that were there at the moment of arrest." Mr Morch, are you aware that the "Norstar" was a corpus delicti in criminal proceedings?*

*MORCH: Yes, I was.*

*JUDGE LUCKY: Did you or the other owners make any effort to visit the vessel and inspect it during that period while it was a corpus delicti?*

*MR MORCH: No. The area was completely closed after the detention in Palma de Mallorca. We had no access to anything; it was denied. We could not pass the gate because it was closed, so when the ship was brought alongside by the port authority to the mega-yacht yard it was impossible to go on board the ship. Everything was closed. The keys were taken and everything was closed. I know that it was closed.*

*JUDGE LUCKY: Finally, do you know that a custodian was appointed to oversee the ship during that period? Do you know that there was a custodian and who appointed the custodian?*

**MR MORCH:** *No, it was never told. We had no communication later. Nobody informed us about **anything***

He provided valuable information with respect to the ship's documents which are crucial in assessing the evidence and arriving at the truth.

**JUDGE LIJNZAAD:** *Do you know what happens with the ship's documents such as the papers relating to its IMO certificate or class certificate or logbook when the ship was arrested in Italy? Do they stay on board or go elsewhere?*

**MR ESPOSITO** (Interpretation from Italian): *The main problem lies in the custodian nomination, which means that we need actually to impose a binding link. That means the asset is not available any more after it is arrested. Together with this, we need to choose a custodian. All of these proceedings are then in the hands of the custodian, and if there is a problem, the custodian can talk to the Public Prosecutor in order to ask what is the line of action that the custodian should follow, and the same thing goes for the upkeep. If, for example, the custodian cannot go ahead with the upkeep of the boat, then the Public Prosecutor is still the decision-maker of the situation. The problem that we had here was that we had two different jurisdictions in charge. We had Italy requesting the arrest and Spain executing the order, so that is why we had these problems.*

**JUDGE PAWLAK:** *The question is simple. If Italy arrests a ship, who is responsible for taking care of the ship – the owner, the Italian authorities, other authorities?*

**MR ESPOSITO** (Interpretation from Italian): *The general rule is whoever has issued the seizure order. It can be a Public Prosecutor but it can also be a judge. In this case the Public Prosecutor is the chief of the situation. He is the master of the situation, so the Public Prosecutor is in charge. He is in charge of the whole situation, naturally, and I can also give you more precise information. According to the Code, there is a rule for each phase of the procedure, so it is important to nominate a guardian to write all the reports, to seal the reports, and then naturally the custodian becomes the person in charge. The responsibility actually moves from the Public Prosecutor to the custodian, and if the custodian has problems that he cannot solve by himself, in this case the custodian can ask the Public Prosecutor what he*

*needs to do, because the Public Prosecutor is still the person in charge until the trial is in the investigation phase. However, after that, the judge actually becomes the person in charge, and then if the custodian has problems, instead of referring to the Public Prosecutor, he needs to refer to the judge.*

33. (Italy submitted that Judge Pawlak's question is premised on the arrest of a ship in Italy. However, Mr Esposito's answer is based on a general rule that does not apply specifically to Italy and in my view is also applicable in circumstances such as in the instant case.) (See *Submissions of Italy infra*) I set out the above to support my view that the M/V "Norstar" was seaworthy and in a good condition when it was arrested and seized. Italy argued that the M/V "Norstar" was in a bad state at the time of arrest.

34. Italy provided no evidence to support such an argument or claim. The evidence of the witnesses Mr Morch, Silvio Rossi and Captain Husefest testified that the M/V "Norstar" was fully operational, seaworthy and well maintained. Prior to the arrest and seizure, it had been bunkering on the high seas and had sailed to Algeria to refuel in July 1998. They continued that a custodian had been appointed and that the ship had not been maintained while it was detained in the port of Palma de Mallorca.

35. Despite the considerable difficulties involved in the burden of proof after a lapse of 20 years, Panama has provided numerous documents in this process that are capable of proving the important facts. Counsel contends that it is possible to prove facts through written documents. The Rules of the Tribunal expressly provide, inter alia, in articles 44 and 72, that Parties may provide evidence through witnesses or experts. Such evidence will have equal value.

36. The testimony of the witnesses called by Panama in this case – Mr Morch, Mr Rossi and Mr Husefest – was particularly strong because the witnesses were directly involved in the events surrounding the M/V "Norstar" and had extensive knowledge of the facts concerning the vessel and its activities. **I find that the M/V "Norstar" was in a good condition and seaworthy at the time of arrest.**

37. Italy disagrees with Panama's contention that article 87 of the Convention was infringed, because the vessel was prevented from carrying out its commercial activities on the high seas, thereby being prevented from exercising its freedom of navigation on the high seas. Panama argued that the Decree was unlawful and so too the arrest and detention of the *M/V "Norstar"*. This argument, Counsel for Italy submits, amounts to "a fully-fledged attempt at re-writing article 87 of the Convention, as if it applied anywhere and everywhere that a ship may be so long as the ship traverses the high seas".

38. Counsel submitted that Mr Morch asserted without any substantiation that the *M/V "Norstar"* had made a voyage to Algeria in July 1998, but neither Mr Morch nor anyone else on the Panama side has substantiated that the *M/V "Norstar"* was anywhere but in Palma de Mallorca from the time of the Decree of Seizure, namely 11 August 1998, to the time of the *M/V "Norstar"*'s arrest, 25 September 1998. That is the only time period that can be relevant in light of the jurisdictional boundaries of this dispute.

39. Apparently, Counsel is alleging that Mr Morch is not speaking the truth. However, Panama, albeit after the proceedings closed, and without objections from Italy, submitted an excerpt of testimony from the investigating tribunal in Savona, given by the former captain of the *M/V "Norstar"*, who testified that the *M/V "Norstar"* had sailed to Algeria in July 1998. The captain has since died. It must be noted that, although the declaration is an excerpt from sworn testimony before a tribunal, the findings of that tribunal have not been produced before this Tribunal. I will be considering this testimony in the light of all the evidence.

40. Learned Counsel criticised Panama for the allegation in its application that, after imprisoning members of the crew of the *M/V "Norstar"*, the Italian Republic has (up until this date) failed to give account of this event. Panama conceded that no-one involved with the *M/V "Norstar"* was imprisoned in connection with the arrest or thereafter.

41. In its final submission Italy requests the Tribunal to dismiss all of Panama's claims, either because they fall outside the jurisdiction of the Tribunal, or because they are not admissible, or because they fail on their merits, according

to the arguments articulated during this proceeding. Panama is also liable to pay the legal costs derived from this case.

42. The submissions of learned Counsel are very helpful in the determination of the issues in this case. I must mention my appreciation, because the submissions reflect study and research.

I have read, studied and considered the submissions of advocates for both Parties. Their views and guidance are appreciated and are of considerable assistance in resolving the issues, interpreting the relevant law and arriving at findings in law and fact.

43. It seems to me that, based on the above, Italy is apparently distancing itself from the acts of arrest and seizure. I cannot agree. The Decree was issued by the Public Prosecutor in Italy and letters rogatory were sent to Spain in accordance with the Strasbourg Convention (set out above) to carry out the arrest and seizure. Italy in these circumstances could be regarded as the Principal and Spain its Agent, therefore Italy is responsible for the actions of Spain.

44. In this case the vessel was arrested and seized and detained in 1998 as a *corpus delicti* with regard to criminal proceedings in Italy against the following: Rossi Silvio (not in custody, present), Biggio Renzo (not in custody, present), Melegari Bruno (not in custody, present), Morch Arve Einair (failed to appear), Vadis Emil Petter (failed to appear), Tor Tollefsen, captain of the vessel (failed to appear), Bocchiola Massimo (not in custody, present and Falzon Joseph (failed to appear). The accused were charged for smuggling and evasion of custom duties and taxes. The Courts, both at first instance and appeal, found that the offences were not proven, acquitted the accused and, in 2003, ordered the release of the vessel.

45. It is convenient at this juncture to mention that this case must be distinguished from the *M/V "Louisa"* Case that was cited by Italy. While this contention will be dealt with later, it is necessary to consider the following: The *M/V "Louisa"* was in Spanish internal waters when it was arrested along with the captain for criminal offences involving the stealing of artefacts which were kept on board the vessel. It was argued that, by being detained, the *M/V "Louisa"* did not have access to the high seas. However, the evidence

disclosed that criminal proceedings were ongoing and the *M/V "Louisa"* was intrinsically involved in the criminal activity that led to the charges being laid against those charged.

46. In the period September 1998 to 2003 the vessel was under preventative detention and as a result did not have access to the high seas to continue with its commercial activities of bunkering.

47. It is my view that in these circumstances article 87 should be given a wide and generous interpretation. Freedom of navigation is a right and the *M/V "Norstar"* was denied this right.

### Case for Italy

48. An investigation into the *M/V "Norstar"* began in 1997 when the Italian Fiscal Police, while inquiring into the operations of Rossmare International, an Italian company registered in Savona, was involved in purchasing and loading gasoil, and intended for the ship's fuel store. The said purchased fuel was exempt from excise duties. The fuel was then sold to mega yachts and vessels on the high seas. These vessels would then sail into Italian ports with the fuel sold to them on board, thus evading customs and excise duties. Evidence collected during the investigation confirmed the suspicion that the aforementioned plan was masterminded by Silvo Rossi, the managing partner of Rossmare International and executed through the *M/V "Norstar"*. The *M/V "Norstar"* sailed into the Spanish port of Palma de Mallorca in March 1998 and did not leave the port until it was demolished in September 2015. Therefore, contrary to the Panama's contention, it could not have sailed to Algeria in August and have bunkered vessels prior to its arrest and seizure in September 1998. Italy, without admitting that the vessel was seaworthy and had left the port, argued that article 87, paragraph 1, was not infringed because the vessel was not on the high seas at the time of arrest and seizure but was in the internal waters of Spain.

49. It is not disputed that the Public Prosecutor filed criminal charges against Silvio Rossi, the owner of the vessel, Arve Morch and others.

50. Italy called the following witnesses: Mr Esposito, former prosecutor for the Supreme Court, Attorney General, and currently a judge in San Marino *ad hoc* judge at the European Court of Human Rights; and Mr Matteini, sea captain since 1982 and named on the national register for experts for naval evaluation.

51. Mr Esposito provided evidence on the procedural aspect of the seizure and arrest of vessels for the investigation, the issuance of the Decree of Seizure and the execution of same. I will deal with his evidence later in this Opinion (see para. 96). Mr Matteini provided evidence of the value of the *M/V "Norstar"*. He never inspected the vessel but arrived at his conclusions from photographs he downloaded from the Internet, and from his experience as a ships' valuator.

### Submissions of Counsel

#### Panama

52. Panama submits that the arrest of the *M/V "Norstar"* and the subsequent events amount to a breach of articles 87 and 300 of the Convention. Article 87 protects ships against any form of interference with the freedom of ships to navigate on the high seas; this includes freedom to carry out legal activities, such as the bunkering of vessels. Panama refutes Italy's claim that mega yachts and other vessels that had been bunkered on the high seas sailed into Italian ports without declaring that the fuel on board had been supplied by the *M/V "Norstar"* and was subject to custom duties and taxes. Panama contends that Italy provided no evidence to support their argument; further, the Court at Savona and the Court of Appeal in Genoa had decided that there was insufficient evidence to prove the charges.

53. Italy by its own actions violated articles 87 and 300 of the Convention, incurring international responsibility for which it must provide reparations to Panama in the form of compensation. The Decree of Seizure related to activities performed on the high seas, that is bunkering activities of the *M/V "Norstar"* in international waters. Bunkering on the high seas is a lawful activity. The record reflects that the *M/V "Norstar"* was a fully operational and well-functioning ship. Panama's witnesses, Mr Morch, Captain Husefest and



Mr Rossi, testified that the *M/V "Norstar"* was seaworthy and well-maintained at the time of its arrest.

54. Italy was responsible for the appointment of a custodian even though the arrest was carried out by Spain. (*In my view the evidence discloses that Italy was the Principal and Spain the Agent, consequently, Italy is responsible for the actions of Spain.*) In her address, Counsel for Panama posed the rhetorical question: if the vessel was in a derelict condition, why was a bond of 250,000,000 lira (approximately €125,000) fixed? The vessel deteriorated after its arrest, due to Italy's and, *de jure*, Spain's fault for having failed to "take care" of the ship when it had a legal obligation to do so after it had (albeit unlawfully) arrested the vessel and kept it under its control for an unreasonably long period of time.

55. Italy referred to a newspaper article, which Panama submitted in the proceedings, to say that, "from March 1998 to the date of the article, August 2015 the *M/V Norstar* was abandoned and in a state of disrepair and 'dismay'". Apart from this letter, Italy presented no evidence to support its contention, and further, as I shall point out later, the letter was not signed and the author was not identified. In my view, Panama included this letter to demonstrate that the article was not accurate. Mr Morch was cross-examined about the article. In response he stated that the vessel had left during this period to "call at the port of Algeria to load cargo and supply vessels." He said the article was definitely wrong. Panama submits that Mr Morch is a credible witness whose testimony should be given more weight than a newspaper article, the author of which was not examined or cross-examined to ascertain the accuracy of the information and the dates mentioned in the article.

56. The Decree of Seizure specifies that the *M/V "Norstar"* was bunkering vessels offshore and that those vessels would then return to Italian territory without issuing a statement for customs purposes and thereby evading taxes. This could only mean that the *M/V "Norstar"* was arrested and the persons connected to it charged, because it was carrying out offshore bunkering. The Decree also refers to the doctrine of constructive presence, meaning that the *M/V "Norstar"* was the "mother ship" operating on the high seas for the bunkered fuel and returned to the territorial waters of Italy without making the required declarations for customs duties and taxes.

57. Constructive presence, in the light of the evidence, is not applicable in this case.

58. In this case the *M/V "Norstar"* was allowed to enter the internal waters of Spain. However, the detention was not arbitrary. The vessel was detained as a *corpus delicti* for criminal proceedings against the crew, and one Silvio Rossi for offences against the Italian Criminal Code and for trial in Italy by the Italian Courts. Who, therefore, is responsible for the maintenance of the vessel: Italy, Spain or both?

Panama cites Cohen, who explains that a coastal State cannot impede the freedom of foreign vessels by arbitrarily preventing them from leaving its marine areas. In this case the *M/V "Norstar"* was allowed to enter the internal waters of Spain. The detention was not arbitrary; it was detained as a *corpus delicti* in criminal proceedings against the crew and Silvio Rossi for offences against the Italian Criminal Code and for trial by the Italian Courts. In the light of the accepted procedure where a ship is arrested and detained in accordance with a decree, the State responsible for issuing the decree and order for arrest is responsible for the appointment of a custodian and the maintenance of the vessel. In this case it must be Italy.

Cohen continues: the arbitrary detention of a foreign vessel by a coastal State, after having allowed it to enter its internal waters and/or call at port, cannot but be a blatant breach of the freedom of navigation.

59. Counsel asked the Tribunal to adhere to the decision of the Court in Savona whereby:

the purchase by recreational vessels of fuel intended to be used as even in full ship's stores outside the limit of territorial sea and its subsequent introduction inside it does not entail any application of duties so long as the fuel is not consumed within the customs line or landed; that no offence is committed by anyone who provides bunkering on the high seas.

60. In its final submission, Panama requested the Tribunal to find, declare and adjudge:

First: that by *inter alia* ordering and requesting the arrest of the M/V "Norstar", in the exercise of its criminal jurisdiction and application of its customs laws to bunkering activities carried out on the high seas, Italy has thereby prevented its ability to navigate and conduct legitimate commercial activities therein, and that by filing charges against the persons having an interest on the operations of this Panamanian vessel, Italy has breached the right of Panama and the vessels flying its flag to enjoy freedom of navigation and other internationally lawful uses of the sea related to the freedom of navigation, as set forth in article 87(1) and (2) and related provisions of the Convention;

Second: that by knowingly and intentionally maintaining the arrest of the M/V "Norstar" and indefinitely exercising its criminal jurisdiction and the application of its customs laws to the bunkering activities it carried out on the high seas, Italy acted contrary to international law, and breached its obligations to act in good faith and in a manner which does not constitute an abuse of right as set forth in article 300 of the Convention;

Third: that as a consequence of the above violations, Italy is responsible to repair the damages suffered by Panama and by all the persons involved in the operation of the M/V "Norstar" by way of compensation amounting to TWENTY SEVEN MILLION NINE THOUSAND TWO HUNDRED AND SIXTY SIX US DOLLARS AND TWENTY TWO CENTS (USD 27,009,266.22); plus TWENTY FOUR MILLION EIGHT HUNDRED AND SEVENTY THREE THOUSAND NINETY ONE US DOLLARS AND EIGHTY TWO CENTS (USD 24,873,091.82) as interest, plus ONE HUNDRED AND SEVENTY THOUSAND THREE HUNDRED AND SIXTY EIGHT EUROS AND TEN CENTS (EUROS 170,368.10) plus TWENTY SIX THOUSAND THREE HUNDRED AND TWENTY EUROS AND THIRTY ONE CENTS (EUR 26,320.31) as interest.

Fourth: that as a consequence of the specific acts on the part of Italy those have constituted an abuse of rights and a breach of the duty of good faith, as well as based on its procedural conduct, Italy is also liable to pay the legal costs derived from this case.

61. It must be noted that the arrest and detention took place 20 years ago. If the shipowner had obtained access to the logbooks of the *M/V "Norstar"*, all the information persistently requested by Counsel for Panama would have been readily available. Italy contends that article 87 of the Convention is not applicable because the arrest of the *M/V "Norstar"* was due to its activities in territorial waters, not for activities carried out on the high seas. Italy also contends that article 87 of the Convention only applies if there is physical interference on the high seas and not if the vessel is arrested in a port. Italy argues that while in port, vessels do not enjoy freedom as if on the high seas.

### Italy

62. Italy submits that there are five flaws that characterize Panama's case. Italy is the Principal and Spain is the Agent, within the scope of the dispute, as defined by this Tribunal in its Judgment of 4 November 2016; Panama characterizes article 87 as a provision without geographical limits; Panama attempts to plead a breach of article 87 without demonstrating any interference which could impinge on the freedom of navigation; Panama misunderstands the relevance of the acquittals of the accused; and Panama baselessly accuses the Italian Public Prosecutor of arbitrariness.

63. Panama made false allegations of imprisonment; Panama's delay in commencing this case militates against its claim for damages and compensation; and it has repeatedly grossly inflated its damages claim. Italy rebuts Panama's allegations concerning the Prosecutor's conduct, in particular: (a) the reasonableness of the Prosecutor's actions; and (b) the limitations on the Prosecutor's responsibility for the execution of the Decree of Seizure of the *M/V "Norstar"*.

64. I refer to some intrinsic parts of the submission of Counsel for Italy: Panama's continued attempts to make this case about the arrest of the *M/V "Norstar"* must fail; it is the Decree of seizure, together with the Request for its execution, which is relevant to the present dispute. The execution was carried out far from the high seas, in Spain's internal waters and such acts cannot be

attributed to Italy. In other words, the key event upon which Panama brought this claim in the first place is no longer relevant to this dispute.

65. Attempts to plead breaches of human rights obligations must fail. The Tribunal has no jurisdiction to determine breaches of such obligations, which are contained in separate treaties that have their own enforcement regimes.

66. Panama contends that article 87 has an obligation with no geographical limits. In doing so, Panama is attempting to enlarge the obligation under this article to an extent that is not tenable.

Italy cited the following cases in support:

- (i) *M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain), Judgment, ITLOS Reports 2013*, p. 4, pp. 36–37, para. 109;
- (ii) *M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain), Declaration of Judge Paik, ITLOS Reports 2013*, p. 49, p. 56, paras. 28–29; and
- (iii) *Rejoinder of Italy*, 13 June 2018, paragraph 56.

67. In the *M/V “Louisa” Case*, Judge Paik declared that:

[w]hile the content of the freedom of the high seas is subject to change, and indeed has evolved over time, it has been long established that this freedom is one which all States enjoy “in the high seas”.... To extend the freedom of the high seas to include a right of the State to have access to the high seas to enjoy that freedom is warranted neither by the text of the relevant provisions or the context of the Convention, nor by established State practice on this matter.

Counsel for Italy cited the above to support Italy’s argument that article 87 of the Convention does not provide that denial of access to the high seas infringes the right of freedom of navigation on the high seas. For reasons set out in this Separate Opinion, I do not agree.

68. In the same vein, Counsel referred to the Dissenting Opinions of Judge Cot and Judge Wolfrum in the *M/V “Louisa” Case*. Judge Cot observed that: “It is hard to imagine how the arrest of a vessel in port in the course of national

criminal proceedings can be construed as violating the freedom of navigation on the high seas." Judge Wolfrum commented that

Article 87 covers freedom of the high seas and, in particular, freedom of navigation. But the existence of a basic freedom does not prohibit the coastal State from exercising the powers of its police and judiciary in its own territory. It is hard to imagine how the arrest of a vessel in port in the course of national criminal proceedings can be construed as violating the freedom of navigation on the high seas. To take this argument to the extreme would, in fact, mean that the principle of the freedom of navigation would render vessels immune from criminal prosecution since any arrest of a vessel, under which ground whatsoever, would violate the flag State's right to enjoy the freedom of navigation.

69. Italy disagrees with Panama's contention that article 87 of the Convention was infringed, because the vessel was prevented from carrying out its commercial activities on the high seas, it was thereby prevented from exercising its freedom of navigation on the high seas. Panama argued that the Decree was unlawful and so too the arrest and detention of the *M/V "Norstar"*. This argument, Counsel submits, amounts to "a fully-fledged attempt at rewriting article 87 of the Convention, as if it applied anywhere and everywhere that a ship may be so long as the ship traverses the high seas."

70. During the period September 1998 to 2003 the vessel was under preventative detention and as a result did not have access to the high seas to continue with its commercial activities of bunkering. Panama complains that the *M/V "Norstar"* was denied its right to freedom of navigation. It sailed into the port with consent, was detained therein and was not allowed to exercise its right of navigation in the high seas. Counsel for Panama advanced a novel argument. He contends that, by preventing the *M/V "Norstar"* from leaving port to sail onto the high seas, Italy has infringed the right to freedom of navigation. This may be so in a case where a vessel is detained without just cause. However, in the instant case, the vessel, as a *corpus delicti* in an investigation relating to criminal offences and until released by the Italian court, could not leave the port. In fact, Italy contends that this article is not applicable, because the vessel was an exhibit in criminal proceedings as a result of an investigation, an investigation that resulted in charges being preferred against the owner, Silvio

Rossi, the captain and the crew. Further, Italy argues that article 87 applies to the high seas. Therefore, even if it is given the widest and most generous interpretation, article 87 cannot be deemed to include the territorial sea or internal waters. If that were the case, the article would provide for such circumstances. The sovereignty of a State must be respected and so too the laws of the State.

71. In its final submission, Italy requests the Tribunal to dismiss all of Panama's claims, either because they fall outside the jurisdiction of the Tribunal, or because they are not admissible, or because they fail on their merits, according to the arguments that are articulated during this proceeding. Panama is also liable to pay the legal costs derived from this case.

I have read, studied and considered the submissions of advocates for both Parties. Their views and guidance are appreciated and are of considerable assistance in resolving the issues, interpreting the relevant law and arriving at findings in law and fact.

72. It is my view that in these circumstances article 87 should be given a wide and generous interpretation. Freedom of navigation is a right and the *M/V "Norstar"* was denied this right.

73. Once more I must emphasise that this case must be distinguished from the *M/V "Louisa"* case. The *M/V "Louisa"* was in Spanish internal waters when it was arrested along with the captain for criminal offences involving the stealing of artefacts which were kept on board the vessel. It was argued that by being detained, the *M/V "Louisa"* did not have access to the high seas. However, the evidence disclosed that criminal proceedings were ongoing and the *M/V "Louisa"* was intrinsically involved in the criminal activity that led to the charges being laid against those charged.

### Assessment of evidence

74. In a trial in open court, issues are determined by reviewing documentary and oral evidence. The trial incorporates both written and oral evidence of witnesses and submissions of learned counsel. Consequently, the principle of "equal arms" (*égalité des armes*) is open to both sides. For

the avoidance of doubt with regard to the foregoing, I have to add that if a tribunal strictly adheres to written proceedings and does not take cognisance of all the evidence, including testimony of witnesses, their answers on cross-examination and their demeanour and conduct in court, then cases will be determined on documentary evidence. I do not think this can be acceptable, especially in cases such as the instant case where the oral evidence is also crucial to arriving at the truth.

75. The issue to be determined is how a judge, sitting in an international court, assesses evidence and determines the facts. There is no general rule in international law. In fact, the Rules of the Tribunal are silent. Rules cannot set out how a judge should consider and find facts from the evidence. It is solely the function of the judge who is the fact-finder. This is a case abounding with evidence, both oral and documentary. It includes the testimony of a witness who has since died. Therefore, how can it be assessed? Italy did not object to the admission in evidence. It must be assessed in the light of all the oral and documentary evidence on the issue.

76. In common law, there are two main standards: one that is applicable in civil law cases and the other in criminal cases. The standard adopted in common law jurisdictions in criminal cases is proof beyond a reasonable doubt; in civil cases, the standard is based on the "preponderance of evidence" or "the balance of probabilities". In the civil law system, the concept of the standard is different. It is not "on the balance of probabilities" but is a matter for the personal appreciation of the judge, or "*l'intime conviction du juge*". In other words, if the judge considers himself to be persuaded by the evidence and submissions based on the evidence, then the standard of proof has been met. I have applied the foregoing when examining the documentary and oral evidence. The rules of procedure of tribunals do not deal with the authenticity of documents. A tribunal has the power to exclude documents.

77. In the *M/V "SAIGA" (No. 2) Case*, the entries were not contested. The Tribunal referred to this fact and did not enquire into the authenticity of the entries in the documents. In the instant case, the authenticity of the statement was not challenged. Counsel did not object to or challenge the authenticity of the statement, neither was there any objection to its admissibility. However,



by implication, Counsel suggested that the contents were not true and led evidence to contradict what is set out therein.

78. I mentioned above that in this case the oral evidence is crucial to arriving at a finding. Consequently, it is necessary to consider the evidence of each witness, individually and collectively.

79. Mr Silvio Rossi testified that he used to advise the fiscal police of the arrival and departure of the *M/V "Norstar"*. However, this was a generic statement. He was unable to provide dates and times and had no documentary evidence to substantiate his statement. He said "the vessel was in a very good condition however he did not see or inspect the vessel before it was arrested. He added that "the boat was operating before it was arrested". He added later on in his testimony that "the *Norstar* supplied two or three vessels, not many". Mr Rossi was described as the "mastermind in the operation of the *Norstar*", yet his answers in examination in chief and on cross-examination were not on the issue. He seemed preoccupied with telling the Court about his vast knowledge of the Italian Customs laws and his "good" relationship with the police and customs officials. He was not very helpful.

80. Mr Morch's evidence was based on personal knowledge of the *M/V "Norstar"*. He said it was clean and well maintained. In July 1998 it sailed to Algeria where it was loaded with gasoil. Prior to arrest, the vessel had all the valid certificates, the Panama national certificate, the trading certificate and had passed the annual survey in 1997. The former captain in 1997, Tore Husefest, corroborated this evidence. However, he was not able to produce any documents to support his statement because, he said, upon arrest all the documents in the captain's cabin were seized by the Spanish authorities. Access to the vessel was denied. It was impossible to get on board. Everything was closed. Documents may have been used in the investigation required under the Decree of Seizure. However, none was produced in court. Mr Morch claims he did not have access to the ship. No-one took care of it although, in accordance with the relevant law, a custodian was appointed. The vessel was not in a state of "dismay" when it was arrested, neither had it been abandoned as Italy contends.

81. During cross-examination he was shown a newspaper article written in August 2015 in which it is reported that the *M/V "Norstar"* entered the port of Palma de Mallorca in March 1998 and did not leave until 17 years later, when the ship was in a bad state. Apparently, Counsel used this article to demonstrate that the vessel never left the port as Panama claims and that it was in a bad condition. The article was written in August 2015. It is an article that was written by an unnamed reporter. It has no evidential value. It may, therefore, correctly describe the true of the state of the vessel at that time.

82. Mr Morch was shown photographs of the vessel. He testified that they had been taken prior to the arrest of the vessel. These photos show the vessel in good condition. He says that the photos were taken between 2010 and 2012. Before accepting the photos in evidence, I applied the accepted test for the acceptance of photographs in evidence. Firstly, is the photograph relevant? Secondly, is the photograph authentic? Where is it from? Who is the photographer? And what is the date of the photograph in the context in which it is presented? There were no definite answers to the foregoing questions. In my opinion, the photographs do not have the evidential weight required.

83. Mr Tore Husefest was the captain of the *M/V "Norstar"* in 1997. He testified that, at that time, the vessel was in a very good physical condition. He was at that time in possession of all the required certificates. If the vessel had not had all the necessary certificates, it would not have been able to enter the port. As captain, he kept the logbook, charts and record of customers, as well as records of salary payments. On occasions he noticed that the *M/V "Norstar"* was under surveillance by Italian gunships. Mr Husefest's evidence of threats by Italian gunboats was not challenged. He said that he did not report the threats because he did not want to interfere with the Italian authorities. The Italian authorities were aware of the *M/V "Norstar"*'s commercial activities of bunkering on the high seas. Towards the end of 1997 the seaworthiness of the *M/V "Norstar"* was as good as or better than that of other ships of similar age and type. All the documents with regard to maintenance records were stored in the vessel's files. The vessel was *de jure* under the control of Italy through Spain. It is accepted that when a vessel is under arrest, as a *corpus delicti*, it is under the custody and control of the court, which appoints a custodian. The custodian is responsible for the safety, care and maintenance of the vessel. No evidence has been provided to demonstrate that the custodian carried out his duties. In fact a custodian did not testify.

84. The documentary evidence of Mr Petter Vadis shows that it has also been proven that, in 2001, Mr Emil Petter Vadis, then managing director of the shipowner company, provided a list of clients from 1998, from which it can be seen that the *M/V "Norstar"* was not in a bad condition, but rather in very good working order and performing its usual operations until its arrest. The document does not stand alone: it corroborates the evidence of Mr Morch and Tore Husefest. Further, the document provides evidence of the amount and value of the cargo, including the gasoil, on the date of arrest of the *M/V "Norstar"*. The value was US\$ 108,670.79; with interest it amounts to US\$ 176,771.06. The question must be: Is this sufficient evidence to establish that at the time of arrest the said amount of fuel was on board the vessel? Mr Morch did not inspect or see the vessel when it entered the port, Mr Rossi said it may have bunkered two or three vessels while there, which could mean that the vessel left the port on more than one occasion. A judge cannot presume anything on the basis of conjecture. One person alleges something and another must prove it. In these circumstances the proof that the said amount of fuel was on board is insufficient. I do not agree with the reasoning of the Tribunal and consequently voted that Panama is entitled to damages for the loss of the gasoil onboard the vessel at the time of arrest. The only evidence on this issue is that of Panama and the fact that the evidence discloses that *M/V "Norstar"* had arrived from Algeria where it was fuelled with gasoil.

85. The following must be noted from the evidence of Mr Morch. He was unable to provide security in 1999 because the bank would not provide a guarantee owing to the risk – the *M/V "Norstar"* was a *corpus delicti* (see bank documents of 6 March 2000; and 6 and 8 May 2003). There is also no evidence that the owner, Mr Morch, refused to take possession of the *M/V "Norstar"*. He was informed of the Decision of the Court at Savona; there is no evidence of arrangements to collect the vessel.

86. It must be noted that if, as Italy says, the *M/V "Norstar"* was in such a bad condition, why a bond was fixed at 250 million lira.

87. In order to fully appreciate the process employed when an order for a vessel to be arrested and seized is made, I refer to the evidence of Mr Esposito, whom I regard as a fair, knowledgeable and truthful witness.

88. Mr Esposito said that there are three forms of seizure: probative seizure is a method implemented to search for proof. The problem, he says, is that probative seizure is characterized by the fact that the investigation is to be kept secret. It is a means to search for proof. The purpose of probative seizure is to ensure that the *corpus delicti* can be acquired and that all the elements relating to the offence can be gathered. The *fumus* is not requested for this measure; however it is required for the two other forms of seizure: preventative seizure and conservative seizure. It is necessary to have proof of the wrongdoing when the acts were committed. So, probative seizure is different from conservative and preventative seizure. Preventative seizure is the one adopted by the judge for the preliminary ruling on 24 February 1999. It is a means to search for proof. It is a temporary measure. When asked by Counsel for Italy whether it is possible to ask the judge for permission to carry out maintenance work, Mr Esposito said that "it is clear that with the decree of seizure there is no possibility to have access to the goods. (This evidence corroborates Mr Morch's evidence.) The goods are immobilized. (Mr Morch was unable to obtain the relevant books, e.g. the logbook.) At the same time, pursuant to Italian law, a custodian has to be appointed, a custodian for the seized ship, so the seized goods have to be entrusted to an individual who may be captain of the ship, so for maintenance purposes, a request might have been filed with the Spanish Authorities or with the Public Prosecutor in Savona." A custodian may have been appointed. There is no evidence specifying who the person was or what their responsibilities were. "After seizure a report must be prepared by the judicial police officers." Apparently a report was not prepared or if it was it has not been produced for the Tribunal. Mr. Esposito said that "*we had two different jurisdictions in charge, Italy requesting arrest and Spain executing the Order, so that is why we have these problems*" (my emphasis). The evidence discloses that he is correct.

89. It will be convenient to consider the non-production of the report, inventory and captain's logbooks at this stage. If the logbook had been produced, it would have shown whether the vessel was seaworthy, whether it was bunkering vessels on the high seas and whether it had sailed to Algeria in August 1998, and was bunkering prior to arrest. Panama asked Italy for these documents. Italy has not produced them and Panama has been unable to obtain them, so the Tribunal has to rely upon the verbal evidence of the witnesses. In my opinion,

the evidence of the witnesses of this fact produced by Panama outweighs that of Italy. Mr Matteini said it was not possible to inspect the vessel, so he used available data. He referred to several photographs found in the marine traffic and ship finder. This photo showed that the ship was "active". The photographer's name is not on the photograph and there are no specific dates. I am not satisfied that the photos qualified for acceptance in evidence, having asked whether they are relevant, authentic and reliable to be given evidential weight.

### **The Decree of Seizure**

90. The method adopted by Italy in executing the Decree of Seizure is set out above. After an investigation, the Public Prosecutor applied for and obtained a Decree of Seizure. The Decree reads in part:

As a result of complex investigations carried out it emerged that Rossmare International s.a.s. managed by Silvio Rossi sells in a continuous and widespread fashion, mineral oils (gas oil and lubricant oil) for consideration which it bought exempt from taxes (as ship's stores) from custom warehouses both in Italy (Livorno) and in other EU States (Barcelona) and intended to trade in Italy, thus evading payment of custom duties and taxes by factiously using oil tankers, which are in fact chartered, and by resorting to consequent tax fraud in respect of the product sold to EU vessels;

It was found that the mv Norstar positions itself beyond the Italian, French and Spanish territorial seas, mostly inside the contiguous vigilance zone and promptly supplies with fuel (so-called "offshore bunkering") mega yachts that are exclusively moored at EU ports. Thus they willingly and consciously give the sold product a destination that differs from the one for which tax exemption was granted (with reference to products bought in Italy and Spain, which are then surreptitiously re introduced into Italian, French and Spanish customs territory) while being fully aware

that the product will be subsequently introduced into Italian territory and that no statement for customs purposes is issued by the purchasers.

Savona 11 August 1998

THE PROSECUTOR OF THE REPUBLIC AT THE COURT OF SAVONA

(Dott. Alberto Landolfi – Deputy)

91. It seems clear to me that the basis for the Decree of Seizure is the legal bunkering activities of the *M/V "Norstar"* on the high seas. It is on the basis of this Decree that the *M/V "Norstar"* was arrested and seized. Consequently, the *M/V "Norstar"*, from the date of seizure, was denied access to the high seas and its right of freedom of navigation on the high seas was infringed.

92. Letters rogatory were then sent to the Spanish authorities to execute the Order of Seizure. **The International letter Rogatory of the Tribunal of Savona to the Spanish Authorities** (Annex K of the Counter-Memorial of Italy)

93. In summary, the letter sets out facts in which it is alleged that the *M/V "Norstar"* and another tanker, the *M/V "Spiro F"*, loaded marine gas oil in named European ports and sailed to the high seas, where they bunkered mega yachts and other vessels. These vessels then sailed into the ports with gas oil for which taxes and custom duties had not been paid. With respect to the *M/V "Norstar"*, the request specified that the vessel loaded gas oil on four different occasions in the ports of Gibraltar, Livorno, and Barcelona and again Livorno in 1997. The following paragraph of the Request specifies that:

- (b) Normaritime Bunker Co. Ltd of Valletta (Malta), by means of the motor vessel *Norstar*, which was positioned close to the territorial waters off the Western coast of Liguria, has thus traded in gas oil purchased exempt from domestic taxes and mainly destined to supply mega yachts flying European Union flags through the intermediation of ROSSMARE INTERNATIONAL SAS (Which acted as a collector of all supply requests;

In the following paragraph

- (c) it is alleged that ROSSMARE INTERNATIONAL SAS did not issue invoices to the various yacht owners that had left the ports for the sole purpose of fuelling up (through bunkering on the high seas) and returning to the ports without declaring that they possessed the bunkered fuel.

In the light of the above the Italian authorities were of the view that offences of smuggling, evasion of taxes and customs duties had been committed and hence the request for the arrest of the offenders and seizure of the Norstar was made to the Spanish authorities.

94. The testimony of Mr Esposito was not challenged. He was fair and forthright. To the question "Does the foreign authority (in this case Spain) have to make an inventory of the conditions of the object of seizure?" he replied "Yes of course ... the country to which the Rogatory has been sent must of course write a report and give all the information concerning the vessel. The vessel's captain must give all the information and must help the country to execute the Order in the case". He went on to say that according to Italian law "all the information is kept by the authorities".

95. In this case the report of seizure by the Spanish Authorities is set out in Annex K of the Counter-Memorial of Italy.

96. Minutes No. 640/1998 specify that the owner is Arve Morch; the name of the vessel is *M/V "Norstar"*; the documents of the *M/V "Norstar"* are in the central Port Authority of Palma de Mallorca (boat office unit); the place of deposit, port of Bahia de Palma; Remarks: It is moored. The report continues:

*The captain questioned as to where and how to locate him, replies that he resides in the m/v "Norstar" where she is moored. The captain of the boat in relation to the facts of the case declares as follows: THAT HE WISHES A PROMPT SOLUTION OF THE CASE, AS HE WOULD LIKE RETURN BACK TO HOME SOON.*

97. The report does not mention details of an inventory. It does not itemize the documents or state whether a logbook and ship records are among them. As I mentioned earlier, these documents would be helpful for more conclusive fact-finding in this case. The above-mentioned documents are important. Consequently, the testimony of the witnesses for Panama has to be carefully scrutinized and assessed. These witnesses were cross-examined and were not shaken. In the circumstances, with no evidence to the contrary from Italy, I accept their evidence as the truth.

98. In my view the report submitted to the Tribunal did not include the captain's logbook and the ship's documents, including the records of purchases and sales to bunkered vessels. These would have been helpful in determining conclusively the activities of the *M/V "Norstar"*, its condition before and at the time of arrest and whether it had sailed from the port to Algeria and to bunker vessels on the high seas in August 1998. Prior to the hearing in September 2018, Panama made several requests for these documents. None of the above-mentioned documents were produced by Italy. Panama cannot be blamed for the non-production of documents requested.

99. It seems to me that the *probation diabolica* rule is applicable. Article 3 of the European Convention on Mutual Assistance in Criminal Matters (the Strasbourg Convention) provides:

#### Chapter II Letters Rogatory

The requested party shall execute in the manner provided by its law any letters relating to a criminal matter and addressed to it by the Judicial Authorities of the Requesting Party for the purpose of procuring evidence or transmitting articles to be produced in evidence, records and documents.

100. Italy has not presented any articles, records or documents that were procured by the Spanish authorities and transmitted to the Italian Prosecutor or judicial authorities. As I mentioned above, the *M/V "Norstar"* was arrested, seized and detained and kept under guard. The owner did not have access to the vessel, therefore the obligation was on Italy to procure and produce the relevant documents if called upon by a court or tribunal. Despite requests by Panama, Italy did not produce any articles or records or documents. It appears



as though Italy is blaming the Spanish authorities for not complying with the requirements of Article 3 of the Strasbourg Convention, i.e., obtaining a detailed report with an inventory of all the documents, records, fuel and goods on board at the time of arrest and naming and *appointing* a custodian for the maintenance of the vessel.

101. For the purpose of clarification, I refer once more to the testimony of Mr Esposito. He explained that the purpose of protective seizure is to ensure that the *corpus delicti* can be acquired and all elements relating to the offence can be gathered. The investigation prior to the seizure is secret. It could involve telephone tapping, surveillance and examination of documents (Silvio Rossi testified that his lines were tapped, and Tore Husefest, the former captain, testified that the *M/V "Norstar"* had been under surveillance by the Italian coastguard). Probative seizure is the means used to search for proof.

102. It seems evident that, when the *M/V "Norstar"* was arrested, seized and detained, the Public Prosecutor was still searching for evidence in the cases against Mr Rossi, Mr Morch and certain members of the crew. From the time of arrest and detention, the *M/V "Norstar"* did not have access to the high seas to continue its commercial business of bunkering. Mr Esposito also said that the Public Prosecutor can inspect the vessel if it is in Italian waters, so if he wanted to have access to the vessel, which was in Spanish waters, he would have had to obtain the permission of the Spanish authorities. After seizure and arrest, a report with every detail must be prepared by the judicial police officers. (The report is set out later in this Separate Opinion; in my view it is not sufficiently detailed.) This statement in his testimony seems to resonate with one of the problems in this case "*the problem is that we had two different jurisdictions in charge. We had Italy requesting the arrest and Spain executing the order, so that is why we had these problems*" (my emphasis). The foregoing words speak volumes in this case.

103. In this case a detailed report was not produced, nor were the captain's logbook, the relevant records from the vessel upon arrest or an inventory. These would have been essential in assisting the Tribunal in arriving at its findings. In their absence, the Tribunal had to rely upon such evidence produced: the oral and documentary evidence submitted.

### The judgments of the Italian courts

#### 104. Background

- (a) 25 September 1998: the *M/V “Norstar”* was seized as a *corpus delicti*;
- (b) 15 August 1999: Mr Carreyó, by letter, asked the Italian Government to lift the seizure of the *M/V “Norstar”* “within a reasonable time”;
- (c) On 7 and 6 June 2002, in letters bearing those dates, Mr Carreyó reiterated his requests for the seizure to be lifted;
- (d) 13 March 2003: the learned judge at first instance in the criminal court acquitted all the accused of the charges made against them and ordered the release of the *M/V “Norstar”*;
- (e) 18 March 2003: the Public Prosecutor appealed against the acquittal of the accused only, not against the release of the *M/V “Norstar”*;
- (f) 25 October 2005: the appeal was dismissed;
- (g) 17 April 2010: Mr Carreyó wrote to the Italian Minister of Foreign Affairs, reiterating the facts and seeking compensation for the damages caused by the illegal arrest of the *M/V “Norstar”*.

It must be noted that, from the time of seizure until the acquittal of the accused and later the dismissal of the appeal, the *M/V “Norstar”* was in the port of Mallorca, Spain, apparently under the control of the Spanish authorities

### The judgments

105. In the Court of Savona, Division for Monocratic Proceedings, the charges against all the above-named defendants were dismissed. The reasons are set out in the judgment.

106. Evidence was taken from: Silvio Rossi; Renzo Biggio; Bruno Melegari; Arve Linier Morch; Petter Emil Vadis; Tore Husefest; Massimo Bocchiola; and Joseph Falzon for avoiding customs duties and taxes, fraud and smuggling.

107. The following is an extract from the judgment that is helpful in the assessment of evidence before this Tribunal.

The defendants have been committed to trial to answer for the offences they have been respectfully charged with described above. Evidence was taken during the trial by the transcript of telephone interception, reading of witnesses' statements submitted by the parties to the proceedings, examining the defendant Rossi and reading the interviews of the defendants who failed to appear. Then the parties have submitted their conclusions and the court delivered its judgment by reading out the decision on 13th March 2003.

108. It is clear to me that the learned judge considered evidence that must have included all the relevant documents and oral evidence. Consequently, he acquitted all the defendants and ordered the release of the *M/V "Norstar"*. The learned judge is the sole judge of the facts and the application of the relevant law to the facts. In other words, he was the fact-finder. It must be noted that this Tribunal sits as a court of superior record and as a final arbiter. In doing so the Tribunal must accept the findings of the judge at first instance in Savona who was aware of all the evidence in the case. Further, his decision was confirmed by the Court of Appeal in Genoa on 25 October 2005. Panama argues that the judgments in effect declare that the Decree of Seizure was unlawful because the *M/V "Norstar"* was seized and arrested on a basis that was wrong in law, because bunkering on the high seas is lawful. Italy contends that the Decree was issued in accordance with due process and was per se lawful. It seems to me that the execution of the Decree that was predominantly based on bunkering on the high seas is *de jure* and *de facto* unlawful.

### Assessment of evidence

109. The issue to be determined is how a judge, sitting in an international court, assesses evidence and determines the facts. There is no general rule in international law. In fact, the Rules of the Tribunal are silent. Rules cannot set out how a judge should consider and find facts from evidence. It is solely the function of the judge who is the fact-finder. This is a case abounding with evidence, both oral and documentary. It includes the testimony of a witness who has since died. Therefore, how can it be assessed? Italy did not object to the admission in evidence. It must be assessed in the light of all the oral and documentary evidence on the issue.

### The burden of proof

110. For purposes of clarification I must emphasize that in common law jurisdictions, there are two main standards: one that is applicable in civil cases and the other in criminal cases. The standard adopted in common law jurisdictions in criminal cases is proof beyond a reasonable doubt; in civil cases, the standard is based on the "preponderance of evidence" or "the balance of probabilities". In the civil law system, the concept of the standard is different, it is not based "on the balance of probabilities" but is a matter for the personal appreciation of the judge, or "*l'intime conviction du juge*". In other words, if the judge considers himself to be persuaded by the evidence and submissions based on the evidence, then the standard of proof has been met. I have applied the foregoing when examining the documentary and oral evidence.

111. "The Rules of Procedure of Tribunals do not deal with the authenticity of documents. Clearly, though a tribunal has the power to exclude documents" (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, *Merits, Judgment, I.C.J. Reports 2001*, p. 40, at p. 46, paras. 15ff).

112. In the *M/V "SAIGA" Case*, the Tribunal did not have to take a decision on the issue.

113. An issue relating to the authenticity of documents was raised in the *M/V "SAIGA" (No. 2) Case* cited above, while in *Qatar v. Bahrain*, the documents were challenged by the Respondent State as not being authentic and were excluded. Documentary evidence seems to be the most common type of evidence before the Tribunal (see C.F. *International Litigation*, p. 183, *Amerasinghe Evidence in*).

114. In the *M/V "SAIGA" (No. 2) Case*, the entries were not contested. The Tribunal alluded to this fact and did not enquire into the authenticity of the entries in the documents.

115. In the instant case, the authenticity of the statement was not challenged. Counsel did not object or challenge the authenticity of the statement, neither was there any objection to its admissibility. However, by implication, Counsel suggested that the contents were not true and led evidence to contradict what is set out therein.

## The law

116. The articles that are relevant are: articles 87 and 300 and articles 92, 97, paragraphs 1 and 3, of the Convention. Although I set out article 87 earlier, it seems convenient to repeat it here. It reads:

### *Freedom of the high seas*

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:
  - (a) freedom of navigation;
  - (b) freedom of overflight;
  - (c) freedom to lay submarine cables and pipelines, subject to Part VI;
  - (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
  - (e) freedom of fishing, subject to the conditions laid down in section 2;
  - (f) freedom of scientific research, subject to Parts VI and XIII.
2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

117. Article 300 reads:

### *Good faith and abuse of rights*

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.

118. The specific article to be interpreted is article 87, paragraph 1(a).

119. Courts do not make law. Courts interpret, construe and apply the law to the facts of a case. Panama contends that the article should be given a wide and generous interpretation. Italy argues that the interpretation must be strict and in conformity with principles of international law. "Freedom of navigation" refers specifically to the high seas and not any other area. Freedom of navigation is a right, therefore any denial or prevention of or interference with the exercise of that right is an infringement of article 87, paragraph 1, of the Convention.

120. In referring to the relevant articles, I also make mention of article 31 of the Vienna Convention on the Law of Treaties, which reads:

Section 3: Interpretation of treaties

*Article 31*

[General rule of interpretation]

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes.

121. With Section 3 of the Vienna Convention on the Law of Treaties in mind, specifically, article 31(1), the ordinary meaning of the words, and more importantly in this case, the object and purpose of the article 87 of the Convention will be interpreted. The "object" is ensuring the right to freedom of navigation and the "purpose" is to guarantee that right. The words "freedom of navigation" are not qualified. It is a generic term; it will apply in circumstances where the right is circumscribed, for example, preventing a vessel from exercising the right. In this case the *M/V "Norstar"* was unlawfully denied access to the high seas in that it was unlawfully and unjustly arrested and detained such that the vessel was prevented from carrying out lawful activities of bunkering vessels on the high seas, thereby earning a livelihood for its owners and crew.

122. I am further guided by the following principles of interpretation: the interpretation of legislation is not a simple task and traditional methods which relied heavily on a conservative approach have been replaced by a more liberal style, as adopted by the courts, which, in general, are charged with the responsibility to interpret legislation.

123. The courts may take one or both of two general approaches. The first approach is a confined one, where the courts try to avoid imposing their own interpretation of the statute and restrict their role to the meaning of the specific provisions or ineffective result and the "mischief rule" which takes account of the deficiency that parliament sought to cure. This method promotes the use of rules such as the "literal rule", which is best captured by Sir Harry Gibbs' words "begin with the assumption that words mean what they say";<sup>1</sup> the "golden rule" that parliament does not intend an absurdity. The second approach involves a more dynamic and creative style of interpreting legislation which has been described by many as the court stepping obscenely out of its crease. This technique includes the modern purposive approach, where the spirit and purpose of an act is considered in the overall meaning of the specific provision(s) under review.

124. Article 87 of the Convention is part of the corpus of the United Nations Convention on the Law of the Sea. The Convention is part of International legislation, the interpretation of which is governed by rules of international law, such as Article 31 of the Vienna Convention on the Law of Treaties, referred to above, and general rules of interpretation of legislation in national law systems.

125. Having considered the evidence, the relevant law, and the submissions of Counsel for both Parties, for the reasons set out above I find that:

1. The *M/V "Norstar"* was in a good and seaworthy condition prior to its arrest and detention;
2. Spain was carrying out the instructions of Italy. Therefore Italy is liable for any abuse of right that may have taken place. In the light of the Decree and the letters rogatory in conjunction with section 3 of the mutual

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<sup>1</sup> Considered by J. Bryson, "Statutory Interpretation: An Australian Judicial Perspective" (1992) 13 *Statute Law Review* 187 at 188.

- assistance treaty between Italy and Spain, Italy was responsible and liable;
3. The Decree itself shows that the main reason for the arrest and seizure was for bunkering activities on the high seas;
  4. In the light of the judgments of the Court at Savona and the Appeal Court in Genoa, the charges against the accused were unfounded;
  5. The hypotheses raised by Italy with respect to evasion of taxes and customs duties by re-entry into Italian waters by mega yachts and vessels after being bunkered by the *M/V "Norstar"* on the high seas have not been proven in any of the Italian Courts (see the judgments);
  6. By being unlawfully arrested, seized and detained, the *M/V "Norstar"* was denied access to the high seas, and the provisions of article 87 of the Convention were thereby infringed.

### Damages and compensation

126. For the above reasons Panama is entitled to damages and compensation.

127. Panama claims monetary compensation as a substitution for the loss of the *M/V "Norstar"*. The evidence discloses that, as a direct consequence of the arrest and seizure, the lack of maintenance while the vessel was under the authority of the custodian duly appointed by Italy and the auctioning off of the said vessel in September 2015, the vessel is a total loss for the owner. Evidence was led that the value of the *M/V "Norstar"* at the time of arrest was US\$ 625,000.00. Panama claims interest at the rate of 6 per cent per annum from 5 September 1998 to the present date

128. Apart from Mr Morch, Panama led evidence from Mr Horacio Estribi, an economic adviser to the Ministry of Finance of Panama [18/C25/4] who testified that: "the loss and damage suffered by the owner includes damage for loss of the vessel, damage resulting from loss of revenue, continuing payment of wages, legal fees, payment due for fees and taxes to panama maritime Authority and payment due for fees and taxes to Palma de Mallorca port Authority." The total amount for the loss of the vessel was US\$ 1,641,670.06.



This amount includes the principal and interest i.e., US\$ 625,000 plus interest, which is US\$ 1, 06,670. He said that CM Olson is a company well acquainted with the *M/V "Norstar"*.

129. In response to Panama's claim, Italy led evidence from Mr Matteini, a sea captain and "part of the national register for experts for naval evaluation" and "an expert for the Tribunal in Florence." He said he assessed the value of the *M/V "Norstar"* at the time of execution of the seizure. He did not inspect the vessel but based his valuation on available data, including photographs, and he assessed the value of the *M/V "Norstar"* at the time of seizure as €250,000. It was not disputed that the *M/V "Norstar"* was approximately 20 years old. On the basis of his research, the *M/V "Norstar"* did not undergo any renewal action. Mr Matteini was shown several photographs that had been published in the Marine Traffic and Ship Finder, specifically Baltic and Marine Traffic. He added that

when you look at my calculations to make comparisons also to prepare for this hearing. *These photographs are no longer available, because we are talking about a ship that has been demolished, a lot of time has gone by, and only the ship owner can do this.* The data has been cancelled and even though in my report I do state the sources, it is possible that some of these photos are no longer available on line.

It seems to me that he was speaking the truth about his findings. In my view, the evidence based on references to photographs and research is not evidentially reliable on such an important issue as the value of the vessel at the time of seizure, because he was unable to say in answer to Counsel for Italy whether the photographs were taken when the *M/V "Norstar"* was arrested. (The question was "According to your opinion when were these photographs taken?")

130. When asked during cross-examination whether he had said: "the photographs were not fitted with any dates", he replied

I recall that in the data sheets that accompanied the pictures there are date indications, hour indications, time indications. No matter when, then, the pictures were uploaded onto the portal – so I correctly remember, some pictures have been displayed on the screed and they had

a clear indication of a date. Maybe we can display the pictures again so we can confirm the date.

Counsel for Panama did not find it necessary to do so. Nevertheless, the photographs are evidence with the data sheets. The data sheets show all the relevant data. When asked at the end of the cross-examination whether he took the photographs into consideration for his evaluation, he said he did but he did not know the author or authority of those photographs, however they were taken from official websites.

131. In my opinion, the photographic evidence led by both sides is not cogent and convincing. The witnesses were not clear and specific with respect to the dates on which the photographs were taken. It appears to me that in this case a judge must primarily rely on the oral evidence. Such evidence is gleaned from that of Mr Morch. Further, there is the evidence of the experts on the net worth of the *M/V "Norstar"* at the time of seizure. I do not think a judge can surmise or speculate. In this case one must rely on the evidence presented. Panama claims US\$ 625,000. Italy's expert testified that the amount, having regard to the age of the vessel and likelihood of repairs and renovating, was €250,000. It is said "fairness transcends the strict requirements of the law", whereas in such circumstances a judge should consider an equitable solution. It is important to carefully access and examine the Olsen report and the oral evidence of the witnesses for Panama and the evidence led by Italy. I do so now.

132. As set out above, the evidence led by Panama compared with that of Italy does not exceed that of Italy, which is totally dependent on the acceptance of the evidence of Mr Matteini, who did not inspect the vessel but used photographs and experience to arrive at a valuation. It appears to me that the witness based his evaluation on references to photographs which are no longer available because he said "we are talking about a ship that has been demolished, a lot of time has gone by, and only the ship owner can do this". The shipowner testified and in his opinion the value of the vessel was higher. Further, Italy had pleaded that at the time of arrest the vessel was not seaworthy, it was in a state of "dismay" and abandoned. However, evidence was

led, as set out in the report, that upon arrest, the captain was living on board. The allegation set out in the pleading was not proven. In fact, the Tribunal found that the vessel was seaworthy at the time of arrest.

133. It is not disputed that the *M/V "Norstar"* was built in 1966. At the time of arrest it was over 20 years old. In order to arrive at a figure for valuation the Tribunal has to rely on such evidence led by the Parties. In a court or tribunal the judge cannot assume or speculate. Panama asked the Tribunal to place a value at US\$ 625,000. Mr Matteini says €250,000. In the absence of clear and specific evidence, the only specific figure is that provided by Mr Matteini.

134. Panama submits that damages started accruing from the very moment the *M/V "Norstar"* was not allowed to leave port and only ended when the *M/V "Norstar"* was dismantled in September 2015.

135. Italy argues that the causal link was broken in 1999, when the Court in Savona advised that the *M/V "Norstar"* could be released upon payment of a bond through a bank guarantee, set at 250 million lira, approximately US\$ 250,000. As I alluded to above, the owner, Mr Morch, could not raise the amount or secure a bank guarantee. The question is: was the link broken in 2003 when the Court in Savona ordered the release of the *M/V "Norstar"* or in 2005 when the Court of Appeal dismissed the appeal of the Prosecutor against the decision of the Court in Savona where the charges against Mr Morch, the crew and Mr Rossi were dismissed?

### **Abuse of rights**

136. Article 300 of the Convention provides:

#### *Good faith and abuse of rights*

States parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognised in this Convention in a manner which would not constitute an abuse of right.

137. Good faith in this article could only mean with absolute fairness in mind parties will deal with each other honestly and fairly so that each party would receive the benefits under articles 2 and 87, paragraph 1, of the Convention and not do anything that would destroy the rights of the other party. The obligations in this case would be those set out in articles 2 and 87, paragraph 1, "freedom of navigation", which means the right to sail freely on the high seas or in this case to conduct the business of bunkering other vessels. The said freedom is recognized in the Convention, i.e., freedom of navigation. The question is: does the evidence disclose an abuse of right? There is no evidence of "bad faith" on the part of Italy. However, in respect of good faith the following is relevant.

138. Article 300 applies, in a direct way, the doctrine of abuse of right to the law of the sea, as set out in the Convention, thus creating definite limits on the manner in which States may exercise their rights, jurisdiction and freedoms established in the Convention. The primary question is: Did Spain on behalf of Italy exercise its right in a manner that would amount to an abuse of rights? I agree that article 300 is not applicable unless it relates to another provision of the Convention concerning a right, jurisdiction or freedom set out in the Convention which is exercised in an abusive manner by the coastal State, in this instance Spain, which, as I said, was acting on behalf of Italy. In my view article 2, paragraph 3, of the Convention provides the link to article 300. Article 2, paragraph 3, provides that "The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law". It seems clear to me that, while the Convention recognizes the sovereignty of the coastal State over its territorial sea, it prescribes that there are limitations to its substantive rights. In other words, a coastal State cannot unlawfully arrest and detain persons and/or a vessel and deny its right to access to the high seas as in the instant case. Consequently, it would be illogical if article 300 of the Convention, which introduces directly into the law of the Sea the concept and doctrine of abuse of right that apply to the exercise of rights, jurisdiction and freedoms individually recognized in the Convention; but, not to the said rights and freedoms exercised by the coastal State based on its sovereignty over the territorial sea.

139. The evidence discloses that Panama questioned the legality of the arrest and detention of the *M/V "Norstar"* and the persons connected therewith. It also challenged the way the Spanish and Italian authorities were, throughout

the detention of the vessel, exercising their jurisdiction, which, in my view, amounts to an abuse of process. The evidence discloses that Spain acting on behalf of Italy executed the Decree of Seizure and arrested and detained the *M/V "Norstar"*, thereby preventing the vessel from accessing the high seas and enjoying its freedom of navigation. Italy deprived the *M/V "Norstar"* of its right to freedom of navigation: by unlawfully ordering the seizure and arrest of the *M/V "Norstar"* and by its failure to maintain the vessel after arrest. The seizure of all the documents, including the logbooks, and the failure after several requests to produce them amount to an abuse. The owner was not permitted to board the *M/V "Norstar"*. The relevant documents were on board the vessel but the owner was not allowed access to them. Contrary to accepted procedure, a custodian was not appointed to take care and ensure maintenance of the vessel.

140. The evidence discloses that Spain acting in accordance with the Order of Seizure seized all documents. Although required by law and the letters rogatory, Spain did not make out a full report and did not prepare an inventory of the items on the vessel. Further, as already mentioned, despite several requests, neither Spain nor Italy provided the necessary documents that would have been valuable evidence in the case for both Italy and Panama. The foregoing amounts to a lack of good faith. The owner was not allowed access to the vessel. It must be noted that the actions in these circumstances are attributed to Italy. In other words, Italy failed to ensure that the necessary requirements under the letters rogatory were fulfilled.

### Article 300

141. The applicant contends that article 300 is applicable. The Applicant claims that Italy has violated article 300 that reads:

#### *Good faith and abuse of rights*

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.

142. As I alluded to above, article 300 embodies general principles of international law that emphasize "good faith" and abuse of right. The article must not be construed narrowly but should be given a wide and generous interpretation. It specifies that States shall exercise their rights, jurisdiction and obligations under the Convention in good faith and in a manner which does not constitute an abuse of right under the Convention. Counsel for the Applicant contends that the article is applicable per se and that the abuse of right is relevant because of the treatment meted out to Mr Morch. The *M/V "Norstar"* was arrested and detained for five months initially then for five years; the owner, Mr Morch, was refused access to the vessel, although he requested the relevant documents, e.g. the captain's logbook and ship's documents were not provided. During the period September 1998 to 2003 the vessel was under preventative detention and as a result did not have access to the high seas to carry out its commercial obligations, thereby depriving the owner of an income. The Decree itself shows that the main reason for the arrest was because of its bunkering activities, which in fact are legal in the circumstances. The court found that the charges against the accused were unfounded; consequently the arrest was unlawful. The end result must include abuse of the rights of the vessel and, by extension, the owner. A State should not proffer criminal charges that in reality never existed. No authority can investigate, charge, arrest and detain a person or, as demonstrated in this case, a vessel unlawfully.

143. Two questions arise: What are the obligations that Italy assumed under the Convention in the relationship with the *M/V "Norstar"*? Did Italy exercise its rights, jurisdiction and freedoms in good faith? Further, does the evidence led prove the contention of Panama? The answer must be affirmative. The interpretation of the said article is important.

144. In order to construe article 300, the rules of statutory interpretation apply.

It is necessary to examine the ordinary or plain meaning of the provisions of the article; secondly, to determine what the object and purpose of the said provisions are; and, thirdly, to construe the true purport of the article. In doing this, the judge will not be making new law or leading to judicial legislation, but will be making a positive contribution to the development of international law. The law is not static, it is dynamic.

### Statutory interpretation

145. The law on statutory interpretation will be helpful in construing article 300 of the Convention. Once more, I find the following passages relevant:

In construing an ongoing Act the interpreter is to presume that Parliament intended the act to be applied at any future time in such a way as to give effect to the true original intention. Accordingly, the interpreter is to make allowances for any relevant changes that have occurred since the Act's passing, in law, social conditions, technology, the meaning of the words and other matters. An enactment of former days is thus to be read today in the light of dynamic processing received over the years, with such modification of the current meaning of its language as will now give effect to the original legislative intention. The reality and effect of dynamic processing provides the gradual adjustment. It is constituted by judicial interpretation year in and year out; it also comprises processing by executive officials.

(Bennion on *Statutory Interpretation*, 5th edition, 2008, p. 887)

146. In order to determine whether the Court should apply a rectification construction, guidance is also taken from Bennion on *Statutory Interpretation*, 5th edition, 2008, p. 877, section 287 which states:

A flawed text has been promulgated as expressing the legislative intention, this needs judicial correction, yet those who have relied on it are entitled to protection. This raises a difficult conflict between literal and purposive *construction*. *The Courts tread a weary middle* way between the extremes; the Court must do the best it can to implement the legislative intention without being unfair to those who reasonably expect a predictable construction. The cases where rectifying construction may be required can be divided into five categories, which may overlap. These are: One, the garbled text, which is grammatically incomplete or otherwise corrupt; Two, the text containing an error of meaning; Three, the text containing a casus omissus; Four, the text containing a casus male inclusus; and five, the case where there is a textual conflict.

147. I do not think the text of article is "flawed". However, the text in article 300 provides a link to other relevant articles in the Convention. Therefore, I have linked article 300 to article 2, paragraph 3, of the Convention, which provides that "the sovereignty over the territorial sea be *exercised subject to this Convention and to other rules of international law*" (my emphasis).

148. Therefore, there can be reference not only to article 300 but also to rules of international law.

149. In my opinion, article 300 does not provide for a right per se. It specifies that parties must act in good faith in the manner in which they exercise their rights recognized in the Convention and these rights must be recognized in the Convention to prevent an abuse of right. Article 300 must be paired with a substantive right in the Convention to be invoked. The article has a horizontal effect in the Convention and must be linked to a right in the Convention, for example under article 87, where the vessel was arrested and seized and members of a crew are arrested and detained in the territorial waters of Spain, where rights should not be abused.

150. The article does not provide for the protection of human rights per se. If it did, the article would have so provided; however, by inference, it envisages an abuse of human rights. There is little or no guidance by the courts on the interpretation of article 300 in this context. Therefore, it seems to be incumbent on a judge to interpret the article without "making new law". Consequently, if the five categories mentioned above are applied to the articles, the reader will find that the judge is not making new law but rising to the challenge of contributing to the development of international law and providing an enhancement to the existing law set out in the Convention.

151. Article 31 of the Vienna Convention on the Law of Treaties provides for methods of construction and I have applied it. I think recent approaches will be helpful.

Article 300 is set out under the rubric "Good faith and abuse of rights".

152. The obligations are set out in the relevant articles of the Convention. Spain has exercised its right to enforce its laws in its sovereign waters but in doing so, the rights of a person arrested and detained must be observed.



153. The principle of the respect and protection of a person's right is applicable throughout the Convention and this seems to be the true purport of article 300. The said article is set out under "General Provisions" and not in relation to any specific provision. It is a "golden thread" running throughout the Convention and as a result can stand by itself in relation to an abuse of a right or in conjunction with a specific provision. This article is applicable throughout the Convention and guarantees that good faith will be recognized and that States parties will not abuse any right under the Convention. In other words, the article provides that States, in exercising their obligations under the Convention, must do so in a manner such that there is no abuse of right. It is noticeable that the word "Convention" appears twice in the article and this in the context can only mean that any obligation or right abused must be set in an article in the Convention. It seems to me that in exercising its rights, jurisdiction and freedoms, the State must do so without abusing the right of any person.

154. I recognize that there is a view that such a right must exist under the articles of the Convention and that article 300 cannot prescribe a right per se. Nevertheless, the right must be provided for in an article under the Convention.

155. In the Preamble to the Convention the relevant part for the purposes of this case reads "Affirming that matters not regulated by this Convention continue to be governed by the rules and principles of general international law".

156. It seems to me that where the Convention is silent and does not specify where the rules of general international law are applicable, abuse of right is recognized in international law.

157. Article 300 must be linked to one or more of the articles of the Convention to be applicable. The article can be linked to article 87 of the Convention, as I will demonstrate later.

158. I think that in exercising its rights, a State party to the Convention must ensure that it respects and recognizes the rights of those whom it has arrested. This is in accordance with the rule of law, both nationally and internationally.

159. It seems clear to me that the sovereignty of a State is qualified because it is subject to the Convention. Consequently, it will include the provisions of article 300 of the Convention. This means that when a person is arrested for an alleged offence in the territorial sea, his rights must not be infringed.

160. How therefore does the article apply to the facts presented by the Applicant in the context of the submissions and the law?

161. In construing article 300 I am also guided by the principles set out in article 31 of the Vienna Convention; firstly to consider the ordinary meaning of the words used; secondly the object of the provisions in the article; and, thirdly the true purport of the article.

162. It seems to me that construed as a whole, in the context of the Convention, article 300 focuses on an abuse of right. In this context, article 300 provides that States Parties shall act in good faith in fulfilling *obligations assumed under the Convention and to exercise the rights, jurisdiction and freedoms recognized in the Convention*.

163. I find that the provisions of article 300 were infringed by Italy.

### Costs

164. Article 34 of the Statute of the International Tribunal for the Law of the Sea provides that: "Unless otherwise decided by the Tribunal, each party shall bear its own costs." In this case no reasons or reasons have been submitted for the Tribunal to otherwise decide. Therefore I agree that each Party shall bear its own costs.

(signed) Anthony A. Lucky