

Joint Dissenting Opinion of Judges Cot, Pawlak, Yanai, Hoffmann, Kolodkin and Lijnzaad and Judge *ad hoc* Treves

1. For the reasons explained below we have regretfully been unable to vote in favour of the two key operative provisions of paragraph 469 of the Judgment which are set out in its subparagraphs (1) and (4): namely, the finding that Italy violated article 87, paragraph 1, of the United Nations Convention on the Law of the Sea (hereinafter “the Convention”) and, consequently, the decision to award Panama compensation for the loss of the *M/V “Norstar”*.

2. The core issue is whether article 87 of the Convention – “Freedom of the high seas” – is applicable and has been violated in the present case.

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3. The majority recognizes that the Decree of Seizure of *M/V “Norstar”* issued by the Public Prosecutor at the Court of Savona, Italy, concerns alleged crimes committed in the territory of Italy.¹ At the same time, it is of the opinion that the Decree, in particular when viewed in the light of the Request from the Public Prosecutor at the Court of Savona to the Spanish Authorities for its execution, also “concerns” and “targets” the vessel’s bunkering activities on the high seas.² Moreover, the majority finds that “the evidence shows that the bunkering activities of the *M/V “Norstar”* on the high seas in fact constitute not only an integral part, but also a central element, of the activities targeted by the Decree of Seizure and its execution”.³ It then concludes that “article 87 of the Convention may be applicable in the present case”.⁴

1 Judgment, para. 169.

2 *Ibid.*, paras. 172–177, 186.

3 *Ibid.*, para. 186.

4 *Ibid.*, para. 187.

4. While the majority states that it "does not question Italy's right to investigate and prosecute persons involved in alleged crimes committed in its territory", it points out that "[i]t is Italy's action with respect to activities of the *M/V "Norstar"* on the high seas that is the concern of the Tribunal".⁵

5. The majority notes that a "corollary of the open and free status of the high seas is that, save in exceptional cases, no State may exercise jurisdiction over a foreign ship on the high seas" and that "[t]his principle is clearly reflected in article 92 of the Convention".⁶

6. The majority is of the view that "bunkering on the high seas is part of the freedom of navigation to be exercised under the conditions laid down by the Convention and other rules of international law" and "therefore, finds that the bunkering of leisure boats carried out by the *M/V "Norstar"* on the high seas falls within the freedom of navigation under article 87 of the Convention".⁷

7. The majority is of the view that "[a]s no State may exercise jurisdiction over foreign ships on the high seas, ... any act of interference with navigation of foreign ships or any exercise of jurisdiction over such ships on the high seas constitutes a breach of the freedom of navigation, unless justified by the Convention or other international treaties".⁸ It also considers that "even acts which do not involve physical interference or enforcement on the high seas may constitute a breach of the freedom of navigation".⁹

8. In the view of the majority, "any act which subjects activities of a foreign ship on the high seas to the jurisdiction of States other than the flag State constitutes a breach of the freedom of navigation, save in exceptional cases expressly provided for in the Convention or in other international treaties".¹⁰ The majority finds that "Italy's application of its criminal and customs laws to bunkering activities of the *M/V "Norstar"* on the high seas could in itself ... constitute a breach of the freedom of navigation under article 87 of the Convention".¹¹

5 Ibid., para. 212.

6 Ibid., paras. 216, 217.

7 Ibid., para. 219.

8 Ibid., para. 222.

9 Ibid., para. 223.

10 Ibid., para. 224.

11 Ibid.

9. In the opinion of the majority, the principle of exclusive flag State jurisdiction, which is an inherent component of the freedom of navigation under article 87 of the Convention, “prohibits not only the exercise of enforcement jurisdiction on the high seas by States other than the flag State but also the extension of their prescriptive jurisdiction to lawful activities conducted by foreign ships on the high seas”.¹²

10. The majority considers that “if a State applies its criminal and customs laws to the high seas and criminalizes activities carried out by foreign ships thereon, it would constitute a breach of article 87 of the Convention, unless justified by the Convention or other international treaties” and that “[t]his would be so, even if the State refrained from enforcing those laws on the high seas”.¹³ In their view, “even when enforcement is carried out in internal waters, article 87 may still be applicable and be breached if a State extends its criminal and customs laws extraterritorially to activities of foreign ships on the high seas and criminalizes them” and “[t]his is precisely what Italy did in the present case”.¹⁴

11. The majority, therefore, finds that “article 87, paragraph 1, of the Convention is applicable in the present case and that Italy, by extending its criminal and customs laws to the high seas, by issuing the Decree of Seizure, and by requesting the Spanish authorities to execute it – which they subsequently did – breached the freedom of navigation which Panama, as the flag State of the *M/V “Norstar”*, enjoyed under that provision”.¹⁵

12. The Judgment concludes that “Italy, through the Decree of Seizure by the Public Prosecutor at the Court of Savona against the *M/V “Norstar”*, the Request for its execution, and the arrest and detention of the vessel, breached article 87, paragraph 1, of the Convention”.¹⁶

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13. We are convinced that in the circumstances of the present case, article 87, paragraph 1, of the Convention is not applicable and thus is not susceptible

12 Ibid., para. 225.

13 Ibid.

14 Ibid., para. 226.

15 Ibid.

16 Ibid., para. 230.

to violation. Moreover, we are of the view that even if article 87, paragraph 1, were applicable, *quod non*, it would not have been violated by Italy.

14. For article 87 of the Convention to be violated, it must, in the first place, be applicable to the conduct in question. The conduct in question in the present case is first of all the issuing by Italy of the Decree of Seizure and the Request to Spain for its execution. Already, in its Judgment on Preliminary Objections, the Tribunal stated that the Decree of Seizure against the *M/V “Norstar”* with regard to activities conducted by that vessel on the high seas and the Request for its execution by the Prosecutor at the Court of Savona “may be viewed as an infringement of the rights of Panama under article 87”.¹⁷ The Tribunal then concluded that article 87 of the Convention was “relevant to the present case”.¹⁸ However, in our view, the relevance of this article does not necessarily imply its applicability. While relevance may be sufficient to establish the Tribunal’s jurisdiction, it is not enough to establish that this article applies to the conduct in question when considered on the merits.

15. Article 87 of the Convention protects the free movement of vessels primarily from the exercise of enforcement jurisdiction by non-flag States on the high seas. As stated by Judges Wolfrum and Attard in their *Joint Separate Opinion* in the present case, “[c]onsidering the object and purpose of article 87 of the Convention, this provision first and foremost protects the free movement of vessels on the high seas against enforcement measures by States other than the flag State or States so authorized by the latter”.¹⁹

16. In the present case, it is not disputed that the Decree was enforced in the internal waters of Spain, which the *M/V “Norstar”* entered voluntarily. Moreover, Italy, being a party to the 1959 European Convention on Mutual

17 *M/V “Norstar” (Panama v. Italy), Preliminary Objections, Judgment, ITLOS Reports 2016*, p. 44, at p. 73, para. 122.

18 *Ibid.*

19 *M/V “Norstar” Case (Panama v. Italy), Preliminary Objections, Joint Separate Opinion of Judges Wolfrum and Attard*, para. 34. “[A]rticle 87 protects against enforcement actions undertaken by a State different from the flag State which hinder the freedom of movement of the vessel concerned. In this case such an enforcement action on the high seas did not take place.” *Ibid.*, para. 38.

Assistance in Criminal Matters²⁰ to which Spain is also a party, did not need to arrest the *M/V “Norstar”* on the high seas, as that Convention’s mechanism of letters rogatory provided it with an accepted legal tool to ensure the arrest of the vessel in the port of Palma de Mallorca in Spain.

17. Article 87 may also protect vessels on the high seas from the prescriptive jurisdiction of non-flag States. The majority holds that freedom of navigation prohibits not only the exercise of enforcement jurisdiction on the high seas by States other than the flag State but also the extension of their prescriptive jurisdiction to lawful activities conducted by foreign ships on the high seas.²¹

18. However, for a State to apply its prescriptive criminal jurisdiction to any activity and in particular an activity beyond its territory, that State must target the activity as a criminal one extending rules of criminal law to this activity and not just mentioning or describing it. The activity must be criminally prosecutable under the law of that State.

19. Moreover, nothing in the text of the Convention, in its *travaux préparatoires*, in other international treaties, in customary international law, or in the practice of States suggests that article 87 and its corollary article 92 altogether excludes the right of non-flag States to exercise their prescriptive criminal jurisdiction with respect to activities on the high seas. Guilfoyle, referring to Gidel’s *Le droit international public de la mer: le temps de paix* and to the *Judgment in the Case of the S.S. Lotus*, states that “[e]xclusivity of jurisdiction ... creates only a prohibition on exercising **enforcement jurisdiction** over foreign vessels on the high seas; multiple States may still attach legal consequences to acts committed on a vessel on the high seas as a matter of **prescriptive jurisdiction**”.²²

20. The majority in the present case limits the prohibitive effect of article 87 with regard to prescriptive jurisdiction of a State to the “lawful activities”

20 Strasbourg, 20/04/1959; ETS 30.

21 See para. 9, *supra*.

22 *United Nations Convention on the Law of the Sea. A Commentary*, ed. by A. Proelss, 2017, pp. 700–701. The author is referring to: G. Gidel, *Le droit international public de la mer: le temps de paix*, vol. I (1932), p. 261; “*Lotus*”, *Judgment No 91927, P.C.I.J. Series A, No 10*, p. 4.

of foreign vessels on the high seas. This would seem to suggest that a non-flag State is not excluded from extending, in conformity with international law, its prescriptive jurisdiction to the unlawful activities of foreign vessels or of persons on the high seas.

21. Italy has stated that its criminal law is based on the strict observance of territorial jurisdiction.²³ It did not exercise its criminal jurisdiction – neither enforcement nor prescriptive – with respect to the bunkering activities of the *M/V “Norstar”* on the high seas. Italian law does not criminalize bunkering activities of foreign vessels on the high seas, and Italy never claimed that bunkering of mega yachts by the *M/V “Norstar”* on the high seas was unlawful under its own or international law.²⁴ In the present case, the Italian authorities were exercising criminal jurisdiction in respect of the alleged crimes of tax evasion and smuggling²⁵ which were considered under Italian law to have been committed on Italian territory.²⁶

22. The majority is of the view that the Decree of Seizure “concerns” and “targets” bunkering activities of the *M/V “Norstar”* on the high seas. While the first (“concerns”) may be deemed to be true, the second (“targets”) is not, as will be elaborated below.

23 Counter-Memorial, paras. 106–112.

24 “It is not contested that the *Norstar* may carry out bunkering activities; what is contested is that the activity carried out was widely different from bunkering (on the matter in point, it is noteworthy that the “bunkers receipts” addressed to the yachtsmen were fraudulently addressed on the basis of an agreement between [Silvio] ROSSI and ARVE [Morch]).” Office of the Prosecutor of the Republic attached to the Court of Savona, Decree refusing the release of confiscated goods by the Public Prosecutor of the Tribunal of Savona, 18 January 1999, Rejoinder, Vol. 2, Annex C, p. 2 of the English translation. “[W]e are not contesting whether the vessels seized could carry out bunkering operations, but we are contesting that the activity carried out was quite different from actually being bunkering [...]” Appeal submitted by the Public Prosecutor, 20 August 2003, Rejoinder, Annex D, p. 2 of the English translation.

25 See, for ex., Counter-Memorial, paras. 37, 39, 46–47; Rejoinder, Vol. 1, paras. 13, 15, 18–19.

26 Counter-Memorial, paras. 105–112; 117–118, 121, 127–137; “The crime is deemed to have been committed on the territory of the State when the action or omission that constitutes the crime occurred therein, wholly or in part, or the event that is a consequence of said action or omission has therein arisen.” Article 6 (2), Italian Criminal Code, *Published on the Italian Official Gazette*, n. 251, of 26 October 1930, Counter-Memorial, Annex v.

23. It is true that bunkering activities of the *M/V "Norstar"* on the high seas were described in the Decree of Seizure and other related documents issued by the Italian judicial authorities within the framework of the criminal case against the Italian national Mr Silvio Rossi and several other persons. Ordinarily, prosecutorial documents describe the whole sequence of the relevant conduct of an alleged perpetrator, including the possession and use of the object (the *corpus delicti*) as an instrument of the alleged criminal act and the conduct that formed part of the alleged criminal scheme. Such description, however, does not necessarily mean that the possession and use of a possible *corpus delicti*, or such conduct itself, is unlawful or criminal. Neither does it mean that the prosecution and the prosecutorial documents describing them criminalize or target them. Not every element in the chain of events that leads to a crime is necessarily criminal.

25. The criminal scheme investigated by the Italian prosecution consisted of three main elements: (1) the fuel was bought in Italian territory for falsely stated purposes to avoid payment of taxes, (2) the fuel was intended to be sold at a reduced price to mega yachts outside the territorial waters of Italy using the *M/V "Norstar"*, knowing that, after its sale, (3) the fuel would be reintroduced undeclared into Italian territory.

26. Since the vessel was instrumental in the allegedly criminal conduct, the bunkering activities of the *M/V "Norstar"* were relevant for the criminal case investigated by the Italian authorities. In the Decree of Seizure the Public Prosecutor needed to describe how the *M/V "Norstar"* was used as *corpus delicti*, in particular to transport the tax-free fuel to a position outside Italian territorial waters, where it would be used for supplying the fuel to mega yachts. However, nothing suggests that these bunkering activities, relevant for the prosecution of the alleged crimes, were on their own unlawful or criminal under Italian law or that the Decree and the Request, issued in the exercise of Italian criminal jurisdiction, criminalized or targeted them as such. It was only the first and the third elements of the scheme described above that were targeted and prosecuted by Italy.

27. The fact that the bunkering activities of the *M/V "Norstar"* were included in the description of the allegedly criminal conduct in the Decree of Seizure and other related documents may be considered sufficient to determine that

the Decree also concerned these activities, that consequently article 87 of the Convention may be relevant and accordingly to find, as the Tribunal did, that it has jurisdiction in the present case. However, this is not sufficient to find that Italy, by issuing the Decree, has targeted and criminalized the bunkering activities of the *M/V "Norstar"* on the high seas. Accordingly, this fact is not sufficient to conclude in the present case that article 87 is applicable, let alone that it has been violated by Italy.

28. Moreover, even if, for the sake of argument, one accepts that describing the bunkering activities in the Decree of Seizure serves to prove that Italy targeted and criminalized the bunkering activities of the *M/V "Norstar"* on the high seas, thereby extending to such activities its prescriptive criminal jurisdiction and thus making article 87 applicable, we believe that Italy still has not been in violation of article 87 of the Convention.

29. As a matter of principle, bunkering on the high seas may be considered a lawful activity. Thus, it is protected by article 87 (and by article 92) of the Convention from the prescriptive jurisdiction of States other than the flag State of the bunkering vessel.

30. However, in the present case, even if Italy, in the exercise of its prescriptive criminal jurisdiction, was targeting the activities of the *M/V "Norstar"* on the high seas, it was not targeting the bunkering as such. Rather, the focus of its investigation was the use of the vessel *as a means* to transport and supply fuel for the purchase of which allegedly appropriate taxes were not paid in its territory and which was subsequently allegedly smuggled into its territory. Italy was entitled to investigate this otherwise lawful activity as an integral part of the allegedly criminal scheme.

31. It is widely recognized that a State may extend its prescriptive criminal jurisdiction to conduct beyond its territory when a constituent element of an alleged crime has occurred in its territory or where there is a sufficient connection to it. It may do so, in particular, if the alleged crime, of which the conduct is a part, originated in its territory, or if it was completed in its territory and, at least in some cases, when the alleged crime produces harmful effects in the State's territory.²⁷ As it has been observed, most criminal codes in continental Europe ordinarily state that "offences are considered to be committed within

²⁷ See, for ex.: Brownlie's *Principles of public international law*, 8th ed. by J. Crawford, Oxford Univ. Press, 2012, pp. 458–459; C. Ryngaert, *Jurisdiction in international law*, 2nd ed.,

the territory where one of its constituent elements was committed within that territory”.²⁸ The Italian Penal Code Article 6 quoted in the Judgment is no exception.

32. Even if Italy exercised its prescriptive criminal jurisdiction in respect of this conduct on the high seas, this was exercised in respect of an integral part of the alleged crime (tax evasion), which commenced in its territory (purchase of fuel for falsely stated purposes in Italian ports), was completed in its territory (reintroduction of non-declared fuel into Italian internal waters) and had effects in the Italian territory (financial damage from non-payment of taxes). Since the alleged crime was initiated and completed in Italian territory, there is no doubt that its location was Italy and not the high seas.

33. In these circumstances, the conduct on the high seas was merely an element of the alleged crime which took place in Italian territory. Thus, there was more than enough connection to Italy to justify under international law the exercise of its prescriptive criminal jurisdiction.

34. In our view, it does not matter in this case whether the exercise of jurisdiction with respect to activities on the high seas is labelled “territorial” or “extraterritorial”. Even in the latter instance, the exercise by Italy of its prescriptive criminal jurisdiction in respect of the conduct on the high seas would have been in conformity with international law.

35. The separation of Italy’s right to investigate and prosecute persons involved in alleged tax crimes committed in its territory and closely linked to the *M/V “Norstar”* from its right to exercise prescriptive criminal jurisdiction with respect to the conduct of the vessel on the high seas,²⁹ is misconceived. The conduct on the high seas for which the vessel was used, whether or not it was “targeted” by Italy, was instrumental to the alleged crimes committed in Italian territory. The vessel was an instrument used both in and beyond the territory of Italy to perpetrate these crimes. We do not see how under these circumstances article 87, paragraph 1, can prohibit Italy from ordering the seizure of

Oxford Univ. Press, 2015, pp. 78–79; Chr. Staker, “Jurisdiction”, in *International law*, 5th ed. by M.D. Evans, Oxford Univ. Press, pp. 297–298.

28 C. Ryngaert, op. cit., pp. 101–102.

29 See para. 4, supra.

the M/V "Norstar" as *corpus delicti* and from implementing this order when the vessel entered internal waters voluntarily.

36. Finally, we are convinced that a State may exercise its prescriptive criminal jurisdiction with respect to conduct on the high seas where such conduct is integral to an alleged crime committed in the State's territory, not when it is justified or allowed by international law to do so, but when it is not prohibited by international law to do so.³⁰ Article 87 of the Convention does not contain such a prohibition. Therefore, even if, *quod non*, Italy through the Decree of Seizure and the Request for its execution exercised its prescriptive criminal jurisdiction with respect to the supplying of mega yachts on the high seas with fuel for the purchase of which taxes were allegedly not paid in its territory and which was subsequently allegedly smuggled into its territory, it did so in conformity with international law.

(signed) Jean-Pierre Cot

(signed) Stanislaw Michal Pawlak

(signed) Shunji Yanai

(signed) Albert J. Hoffmann

(signed) Roman A. Kolodkin

(signed) Liesbeth Lijnzaad

(signed) Tullio Treves

30 "It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts 'outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable." *"Lotus"*, Judgment No. 9, 1927, P.C.I.J., Series A, No. 10, p. 19.