Separate Opinion of Judge Ndiaye

(*Translation by the Registry*)

I have voted in favour of the Judgment as I am in agreement with the grounds set out by the Tribunal in respect of the main question, according to which the Decree of Seizure, the Request for its execution and the arrest and detention of the *M/V "Norstar"* constitute a breach of article 87, paragraph 1, of the Convention, but on a number of grounds going beyond those set out in the Judgment of the Tribunal. In my view, the Judgment could have examined precisely the relevance of the article in question and the rules governing its applicability in the circumstances in resolving the dispute before the Tribunal. Thus, after addressing the question of subject-matter jurisdiction (I), consideration will be given briefly to the applicable standard of proof (II) in the case at issue, before moving on to reparation (III).

I. JURISDICTION

For an international court or tribunal, jurisdiction designates the competence, [authority] or legal capacity to examine a request and to adjudicate on its merits (*Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, I.C.J. Reports 1956*, p. 77, at p. 87).

It is thus a power to hear, examine and decide on a dispute based on international law which requires the parties to the dispute to accept that jurisdiction.

The parties disagree in particular on subject-matter jurisdiction in this case with regard to the object of the Decree of Seizure and the other related legal instruments.

Italy has asserted that the Decree did not concern activities conducted on the high seas, such as bunkering, but to alleged tax evasion and smuggling offences committed in the territory of Italy.

Panama

– "[T]he Tribunal observed that since article 87 provides that the high seas are open to all States and that the freedom of the high seas comprises the freedom of navigation, the Decree of Seizure with regard to activities conducted by the M/V 'Norstar' on the high seas may be viewed as an infringement of the rights of Panama under that provision." (Reply, para. 61 (referring to the Judgment on Preliminary Objections, para. 122); see para. 82; see also ITLOS/PV.18/C25/9, p. 5, l. 36–42)

"[T]he Italian reasoning as to why article 87 should not be considered has not changed since the Tribunal made its 4 November 2016 Judgment confirming that article's relevance to this case." (Reply, para. 63; see also para. 184)

Italy

– "Panama has misconceived the meaning of paragraph 122 of the Decision of the Tribunal of 4 November 2016, in which the ITLOS decided that Article 87 and Article 300 of the Convention are relevant to the present dispute. Clearly, the fact that a provision is relevant for the purposes of establishing the jurisdiction of the Tribunal does not equate to a finding that such a provision has been breached. That is a matter reserved for the merits, namely for the present phase of the proceedings." (Rejoinder, para. 3; ITLOS/PV.18/C25/5, p. 6, l. 35–p. 7, l. 19 and p. 27, l. 1–27)

"[N]othing would prevent this Tribunal from adjudging and declaring, even at this merits stage, that article 87 is simply irrelevant to this case." (ITLOS/PV.18/C25/5, p. 7, l. 18–19)

Do the Decree of Seizure and its execution relate to activities undertaken by the *M/V "Norstar"* on the high seas or to crimes committed in Italian territory and, in the latter case, is article 87 of the Convention applicable?

Panama

– "[T]he order of arrest clearly stated that the M/V 'Norstar' was carrying out bunkering activities outside the territory of Italy, specifically on the high seas." (Reply, para. 15; see para. 132; *with regard to documents concerning the Italian judicial system*, see Reply, paras 133–183; ITLOS/PV.18/C25/9, p. 18,

l. 29–40, and p. 25, l. 45–p. 26, l. 22) "The activities for which the M/V Norstar was arrested were carried out on the high seas." (Memorial, para. 85; see also Reply, paras 5, 37 and 51)

"[T]he bunkering operations had been considered as part of the criminal acts that led to the arrest." (ITLOS/PV.18/C25/9, p. 4, l. 21–22)

"[T]he bunkering of gas oil by the M/V Norstar to other vessels, including those of other states, falls within the freedom of navigation and other internationally lawful uses of the sea related to that freedom". (Memorial, para. 76; see also para. 72 and Reply, para. 40)

"Italy has now chosen to redefine the bunkering activities of the M/V 'Norstar' as smuggling and tax evasion, even though its territorial line was not crossed by this vessel." (Reply, para. 54; see para. 36)

"[T]he Decree of Seizure explicitly refers to the constructive presence doctrine as the basis for its jurisdiction." (ITLOS/PV.18/C25/9, p. 26, l. 31–32)

"The use of this doctrine in the Decree of Seizure in itself proves that the '*Norstar*' was not seized for activities in the territorial waters of Italy. There would have been no need to make explicit reference to the doctrine of constructive presence if the vessel was seized for activities in territorial waters, because there would be no element of transhipping, otherwise referred to as mother vessel and contact vessel." (ITLOS/PV.18/C25/9, p. 27, l. 12–16)

With regard to the constructive presence doctrine, see ITLOS/PV.18/C25/9, p. 26, l. 31–p. 27, l. 21.

– "The regulation by Italy of conduct from other States that occurs on the high seas outside its jurisdiction is incompatible with the Convention …". (Memorial, para. 67)

"[T]he Decree of Seizure was based on the internal laws and regulations of Italy." (Reply, para. 99; see also para. 98)

"[E]ven if Italy considered the reintroduction of fuel purchased in international waters to its own territory to be a criminal offense, it would not have jurisdiction to arrest the M/V 'Norstar' for such activities on the high seas." (Reply, para. 120; see also para. 191)

– "None of the M/V 'Norstar"s conduct mentioned by Italy in its Counter-memorial or described in the investigations by the Savona Public Prosecutor has ever been a crime." (Reply, para. 105)

"[T]he Italian judicial authorities in both Savona and Genoa concluded that this was not a crime, thus acquitting the M/V 'Norstar' and the persons therein connected of the charges brought against it." (Reply, para. 118; see also paras 42, 43, 45, 182 and 183; ITLOS/PV.18/C25/2, p. 22, l. 31–43)

With regard to article 3 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, see Reply, para. 97, also referring to the PCIJ Case of the *S.S. "Wimbledon"*.

Italy

– "[T]he Decree of Seizure was not adopted in the context of criminal proceedings concerning bunkering activities carried out by the *M/V Norstar* on the high sea. Rather, it was adopted in the context of proceedings concerning alleged offences that occurred within the Italian territory." (Counter-Memorial, para. 44; see also para. 8 and paras 15, 44, 103, 117, 133 and 137)

"[T]he Decree of Seizure targeted alleged fiscal and customs offences carried out in areas that were subject to Italy's full jurisdiction." (Counter-Memorial, para. 126)

"[N]either the original investigation of the Italian Fiscal Police nor the Decree of Seizure of the Prosecutor challenged the bunkering activity of the *M/V Norstar*. The *M/V Norstar* was arrested and detained not because of its bunkering activity, but because it was *corpus delicti* of an alleged series of crimes consisting essentially in smuggling and tax evasion." (Counter-Memorial, para. 117; see para. 3)

With regard to constructive presence, see ITLOS/PV.18/C25/10, p. 13, l. 1–5.

– "Italy did not apply extraterritorially its laws and regulations in respect of the *M/V Norstar* and did not sanction activity carried out on the high seas." (Counter-Memorial, Introduction to chapter 3, section II C; see paras 120–137)

"The scope of the Italian legislation on which the Decree of Seizure was based is strictly territorial." (Counter-Memorial, para. 105; *with regard to the "principle of territoriality" in the Italian Penal Code*, see Counter-Memorial, paras 106–110)

"[T]he crimes considered by the Prosecutor were crimes committed on the territory of Italy." (Counter-Memorial, para. 128; see also para. 127 and paras 37 and 47; *with regard to documents concerning the Italian judicial system*, see Counter-Memorial, paras 129–131)

"[T]he Italian courts acquitted those involved with the 'Norstar' on the basis of the fact that a crime was not found to have been committed. That is, an acquittal on the merits." (Counter-Memorial, paras 58 and 132, and Rejoinder, paras 21 and 29)

"Had the Italian courts found that the Italian jurisdiction was exercised extraterritorially by the Public Prosecutor, they would have declined jurisdiction because the crime would have been one out of the reach of the Italian judiciary." (ITLOS/PV.18/C25/5, p. 18, l. 34–36)

– "[T]hose accused of the crimes in question were not acquitted because such crimes were not committed on the Italian territory; but rather because the judicial authorities found that the material elements of the crimes under consideration were not integrated by the conduct of the accused." (Counter-Memorial, para. 132; see also para. 58 and Rejoinder, paras 21–29)

§ **Article 87, paragraph 1, of the Convention**

Panama

– "[T]he freedom of navigation governed by article 87 does apply to this case, because the activities for which the M/V 'Norstar' was detained took place in international, not Spanish, waters. Thus, there is a clear distinction here; Italy has based the applicability of article 87 on the locus where the arrest was made, while Panama insists that its relevance must be based on the locus of the alleged crime." (Reply, para. 83; see para. 103)

"This wording [of article 87] refers not only to immediate but also indirect interference with the freedom of the high seas. This strongly suggests that even if these interferences do not occur directly on the high seas but take effect from

a different location, they still impact navigational freedom." (ITLOS/PV.18/C25/9, p. 2, l. 45–48; see also ITLOS/PV.18/C25/9, p. 3, l. 1–5, and p. 2, l. 37–40)

"[T]he fact that a vessel is in port does not affect its right to enjoy freedom of navigation, including the freedom to sail towards the high seas." (Reply, para. 72; see also Memorial, para. 74; ITLOS/PV.18/C25/2, p. 32, l. 4–24, ITLOS/PV.18/C25/9, p. 19, l. 3–6 and p. 22, l. 34–38 and, with regard to the *M/V "Louisa" Case*, ITLOS/PV.18/C25/9, p. 28, l. 33–41)

"Freedom of navigation means not only the right to traverse the high seas but also the right to gain access to it. This freedom would mean little to the international community if the vessels in port could not enjoy the same protections as those already on the high seas. Similarly, this freedom would be meaningless if States could indiscriminately arrest vessels in port without justification." (Reply, para. 74)

"The opposite extreme is if the coastal State orders the arrest of a vessel in a port for its activities carried out on the high seas, which in this case were completely lawful, and if this would not trigger a breach of article 87, because a violation of article 87 would encompass only arrests that have taken place on the high seas. It would mean, in fact, that a coastal State could circumvent article 87 on the freedom of navigation and be free to abuse its right to seize vessels for this purpose by waiting to arrest them in port. The coastal State could rely on the concept that article 87 can only be breached if the interference takes place on the high seas. That is the other extreme." (ITLOS/PV.18/C25/9, p. 29, l. 9–18)

"In a similar vein, Rayfuse recalls that '[w]hile historically the port state has enjoyed enforcement powers in respect of violations occurring within its waters, *no right of sanction has applied in respect of activities that took place on the high seas* or within the maritime zones of other states before a vessel entered a port state's waters.'" (Reply, para. 71)

– "The M/V Norstar conducted bunkering activities supplying gas oil to megayachts on the high seas, outside the jurisdiction of any coastal State. As a lawful activity and as a legitimate use of the high seas, the only State that had jurisdiction over the bunkering activities of the M/V Norstar was the flag State, Panama." (Memorial, para. 16)

With regard to the usual location of the M/V "Norstar" *during bunkering operations*, see the testimony of Mr Rossi, ITLOS/PV.18/C25/1, p. 14, l. 21–22 and p. 24, l. 43–47; see also the testimony of Mr Morch, ITLOS/PV.18/C25/1, p. 28, l. 16–18.

With regard to the location of the M/V "Norstar" *when the Decree of Seizure was issued*, see ITLOS/PV.18/C25/9, p. 22, l. 44–p. 23, l. 13; see also the testimony of Mr Morch, ITLOS/PV.18/C25/2, p. 3, l. 15–p. 6, l. 46; *with regard to the "Diario de Palma" newspaper article from August 2015*, see the testimony of Mr Morch, ITLOS/PV.18/C25/2, p. 6, l. 21–p. 11, l. 30.

With regard to the arrest of the M/V "Norstar" *and the locus of the arrest*: "Italy violated article 87 because it arrested the M/V 'Norstar' for lawful activities that were conducted on the high seas." (Reply, para. 89; see also paras 78, 84 and 85; ITLOS/PV.18/C25/1, p. 8, l. 37–p. 9, l. 4 and ITLOS/PV.18/C25/2, p. 26, l. 33–p. 28, l. 10).

"[T]he arrest of the M/V Norstar and its crew members was unlawful because the ship did not violate any laws or regulations of Italy that were applicable to it." (Memorial, para. 63)

"Panama concedes that the M/V 'Norstar' was in Spain when it was arrested. However, Panama maintains that the arrest of the M/V 'Norstar' was illegitimately based on conduct on the high seas so as that the location where that arrest took place is ultimately irrelevant. What is relevant are the motives that led to such a forceful action by Italy." (Reply, para. 57; see also Reply, paras 75, 104)

– "[T]he application of its internal laws by Italy to the activities and conduct performed by the M/V 'Norstar' and all the persons involved in its operation constitutes a clear breach of article 87 of the Convention." (Reply, para. 106; see also paras 12 and 13 and Memorial, para. 20)

"Italy has hindered Panama's right of navigating the oceans, by subjecting the M/V Norstar to Italian laws that apply to its own vessels within its own territorial waters." (Memorial, para. 75)

"Italy made a complete confiscation of the 'Norstar' and its effects, thus completely removing its freedom to navigate and conduct legitimate business on

the high seas." (ITLOS/PV.18/C25/1, p. 5, l. 40–42; *concerning the "confiscation"*, see also ITLOS/PV.18/C25/2, p. 20, l. 47–p. 21, l. 14)

"However, in spite of being aware that, by lacking a contiguous zone, it did not have any right to exercise its enforcement power to challenge any infringement of its customs or fiscal laws and regulations outside its territorial sea, Italy still proceeded to apply its internal legal regime to the M/V 'Norstar' and all the persons involved in its operation." (Reply, para. 11; see para. 129, Memorial, paras 79, 83 and 87, and ITLOS/PV.18/C25/2, p. 23, l. 46–48)

With regard to extraterritoriality: "The fact that the arrest was executed while the vessel was in a port in Spain does not absolve Italy from having unlawfully extended the application of its criminal and customs law to proscribe conduct that occurred outside its jurisdiction." (Memorial, para. 66)

"By arresting the Norstar, Italy applied its laws extraterritorially, thereby violating principles of jurisdiction under international law." (Memorial, para. 65; see also ITLOS/PV.18/C25/1, p. 6, l. 39–43, ITLOS/PV.18/C25/9, p. 3, l. 29–33, and ITLOS/PV.18/C25/2, p. 33, l. 29–33)

– "Despite its own authorities concluding that the arrest of the M/V 'Norstar' was unlawful, Italy still does not accept this fact." (Reply, para. 63; see para. 103)

"[It]s unlawfulness is a natural consequence of the reversal of the arrest order by the Italian authorities themselves." (ITLOS/PV.18/C25/1, p. 7, l. 45–46)

"[T]he Tribunal of Savona ruled that the arrest of the *'Norstar'* was wrongful precisely due to the location of the vessel when it was bunkering. For this reason, the Public Prosecutor's order of arrest was revoked and the vessel was ordered to be returned to its owner." (ITLOS/PV.18/C25/9, p. 15, l. 44–47)

"A coastal State may decide to arrest a foreign vessel; but, if the arrest proves to be wrongful, the arresting party must bear the consequences of its decision. The legal procedures applied by Italy to arrest the M/V 'Norstar' had to conform with international law, despite their origin in its laws and practice of its own courts." (Reply, para. 101)

– "Panama's position is that before arresting a vessel, the arresting State must establish the existence of a probable cause to believe that an offence has truly been committed and that the defendant is likely to have committed it." (ITLOS/PV.18/C25/3, p. 8, l. 43–45; see also p. 7, l. 46–p. 8, l. 8, p. 8, l. 36–41, p. 8, l. 47–p. 9, l. 21 and ITLOS/PV.18/C25/2, p. 30, l. 14–19)

"Italy may have suspected the commission of a crime…. After the investigation, it should have been clear that there was no reason to arrest, much less to keep the order of arrest in force. How long was it necessary to keep the 'Norstar' under arrest as *corpus delicti?*" (ITLOS/PV.18/C25/2, p. 32, l. 36–40; *concerning the presence of evidence on board the* M/V "Norstar": see the testimony of Mr Rossi, ITLOS/PV.18/C25/1, p. 18, l. 44–46 and p. 19, l. 7–8)

"[I]n international law, reasonableness encompasses the principles of necessity and proportionality." (ITLOS/PV.18/C25/9, p. 30, l. 20–21), *on the reasonableness of the Decree of Seizure*: ITLOS/PV.18/C25/9, p. 30, l. 32–26, ITLOS/PV.18/C25/6, p. 21, l. 27–42)

Italy

– "[T]he Decree of Seizure and the Request for its execution do not constitute a breach of Article 87 because conduct ordinarily able to breach Article 87 is conduct that results in a physical and material interference with the navigation of a ship (namely, the execution of the Decree)." (Rejoinder, para. 44)

With regard to the freedom of navigation: "Freedom of navigation is first and foremost to be interpreted as freedom from enforcement actions." (Counter-Memorial, para. 87; see Rejoinder, para. 53; see also ITLOS/PV.18/C25/5, p. 31, l. 18–20)

"The essential content of freedom of navigation consists in a prohibition for States other than the flag State to interfere with the navigation of a vessel on the high seas." (ITLOS/PV.18/C25/5, p. 29, l. 23–25; see also Counter-Memorial, para. 78); "while the degree of interference may vary, at least some degree of interference with freedom of navigation is necessary in order for a breach of article 87 to be conceivable." (ITLOS/PV.18/C25/5, p. 29, l. 39–42; see also p. 30, l. 1–p. 32, l. 10)

"Italy does not deny that in certain exceptional circumstances an act that falls short of enforcement action may still become relevant from the perspective of article 87, for instance when it produces some 'chilling effect'." (ITLOS/PV.18/C25/5, p. 32, l. 26–29) "Did the Decree of Seizure and the request for execution as such determine any chilling effect with regard to the vessel's ability to navigate? Again, no, they did not, because they were unknown." (ITLOS/PV.18/C25/6, p. 9, l. 38–40)

"[U]ntil the decree was executed against the *M/V Norstar*, in Spanish waters, the Decree was a mere internal act of the Italian investigative and judicial authorities, which did not produce any effect on the *Norstar*'s freedom of navigation." (Rejoinder, para. 50(e); see also ITLOS/PV.18/C25/5, p. 32, l. 15–17; *with regard to the "chilling effect"*, see ITLOS/PV.18/C25/5, p. 32, l. 26–p. 33, l. 18 and ITLOS/PV.18/C25/6, p. 8, l. 39–p. 9, l. 43)

– "Two things can be evinced from this passage [*M/V "Louisa"* (*Saint Vincent and the Grenadines* v. *Kingdom of Spain*), *Judgment, ITLOS Reports 2013*, p. 4, para. 109]: a) that, contrary to Panama's contention, Article 87 does not apply everywhere, but only *applies to the high seas and, under article 58 of the Convention, to the exclusive economic zone*; b) that, again, contrary to Panama's contention, *Article 87 cannot be interpreted in such a way as to grant a vessel a right to leave the port and gain access to the high seas notwithstanding its detention in the context of legal proceedings against it*. The *M/V Norstar*'s case falls squarely within this statement." (Rejoinder, para. 55; see also ITLOS/PV.18/C25/6, p. 1, l. 15–45)

"The *M/V Norstar* was not prevented from gaining access to the high seas arbitrarily, but in the context of proceedings governed by law that required its arrest and detention. Therefore, no breach of Article 87 has occurred due to the *M/V Norstar*'s inability to take to the high seas." (Rejoinder, para. 63)

– *With regard to the seizure of the* M/V "Norstar" *and its place of enforcement*: "the question is therefore whether, at the time when the Decree of Seizure was enforced by the Spanish authorities, the *M/V Norstar* was in an area of the sea where it enjoyed freedom of navigation under Article 87(1), also read in conjunction with Article 58(1)." (Counter-Memorial, para. 88)

"Freedom of navigation is not a right enjoyed by States in all maritime zones, but rather on the high seas". (Counter-Memorial, para. 89, referring to article 86 of the Convention) "… [A]s is confirmed by article 8, paragraph 1, of the Convention, the internal waters' regime is characterized by the unlimited sovereignty of the coastal State, thus excluding any right of navigation for foreign ships, except the cases of distress or special agreement." (ITLOS/PV.18/C25/5, p. 35, l. 13–16)

"[A]t the time when the Decree of Seizure was enforced, the vessel was in Spanish internal waters and, therefore, it did not enjoy the right to freedom of navigation under Article 87(1). As a consequence, no breach of Article 87(1) can have occurred vis-à-vis Panama." (Counter-Memorial, para. 75; see para. 91; see also para. 102 and Rejoinder, para. 44; see also ITLOS/PV.18/C25/9, p. 27, l. 33–38)

With regard to the interpretation of article 87 advocated by Panama: "[T]his 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 – even in internal waters – so long as the ship sometimes traverses the high seas. That is clearly wrong, and Panama has failed to set down any way in which this extraordinary enlargement of article 87 may be reasonably confined, nor has Panama paid any attention to the dramatic consequences its new interpretation of the law would have for a State's sovereignty, including its enforcement powers to investigate and adjudicate crime in its internal or territorial waters." (ITLOS/PV.18/C25/10, p. 4, l. 9–16)

– "[A]n extraterritorial exercise of jurisdiction that does not determine any physical interference with the movement of a ship on the high seas does not constitute a conduct ordinarily able to breach Article 87. Since the *M/V Norstar* was within Spanish internal waters at the time when the Decree of Seizure was issued and executed, Article 87 of the Convention would not even be engaged, let alone breached, by Italy's conduct." (Counter-Memorial, para. 7; see also paras 75, 92 and 93; Rejoinder, para. 29; ITLOS/PV.18/C25/6, p. 3, l. 1–4; see also ITLOS/PV.18/C25/10, p. 5, l. 5–10)

"[A]rticle 87 is not concerned with territoriality or extraterritoriality, and these are not the elements to consider when assessing a possible breach. It is

concerned with interference with navigation, as simple as that". (ITLOS/PV.18/C25/6, p. 3, l. 29–31)

"[T]here are provisions of the Convention that protect ships and their activities on the high seas from extraterritorial intrusions by the jurisdiction of a coastal State even when these intrusions do not result in interference with freedom of navigation." (ITLOS/PV.18/C25/6, p. 10, l. 16–19)

"What conduct would article 87 prohibit, for example, that articles 92 or 89 would not already prohibit, if article 87 were a provision simply protecting from extraterritorial exercise of jurisdiction?" (ITLOS/PV.18/C25/6, p. 10, l. 34–36)

– "[T]he Decree in question was never found unlawful by the Italian courts." (ITLOS/PV.18/C25/5, p. 18, l. 11–12; see also Rejoinder, para. 8)

"[T]he Tribunal of Savona's decision … was entirely separate from any assessment of lawfulness or otherwise of the Decree of Seizure in question. Indeed, the Tribunal of Savona did not say anything about the lawfulness of the Decree of Seizure…. The fact that an accused is ultimately acquitted does not mean that the investigation of that individual that led to its acquittal was unlawful." (ITLOS/PV.18/C25/10, p. 5, l. 47–p. 6, l. 4)

"The legality of the arrest of a vessel under Article 87 must be assessed on the basis of the requirements of Article 87, that is to say, if the arrest interfered with the ship's freedom of navigation. It must not be assessed under the prism of whether the alleged crimes were later found to have been actually committed, or else." (Rejoinder, para. 29; see also ITLOS/PV.18/C25/6, p. 6, l. 20–35)

"[I]f the Italian courts had declared the Decree unlawful as a matter of Italian law, which they did not, this would not mean that there is a breach of international law." (ITLOS/PV.18/C25/5, p. 8, l. 11–12, with reference to the *ELSI Case* and the *Case concerning certain German interests in Polish Upper Silesia*)

"[A] State cannot possibly be held internationally responsible for conducting investigations that ultimately led to the acquittal of the defendants. That would represent an intolerable interference with each State's sovereign right to investigate and prosecute crime." (ITLOS/PV.18/C25/5, p. 8, l. 16–19)

"[A] State cannot possibly be held internationally responsible every time it does not award compensation to an individual who has been acquitted of a crime, particularly if it has not been asked for." (ITLOS/PV.18/C25/5, p. 8, l. 23–25)

– "[T]he Decree of Seizure … was adopted on the ground of a regular investigatory framework and it was based on sufficient *fumus* for the purposes of further investigation into alleged criminal activity carried out primarily by an Italian national in relation to alleged crimes committed exclusively on Italian territory." (ITLOS/PV.18/C25/5, p. 14, l. 4–7; ITLOS/PV.18/C25/5, p. 13, l. 26–p. 14, l. 7 and p. 24, l. 50–p. 25, l. 2; *with regard to the nature and purpose of the Decree in Italian law*, see the testimony of Mr Esposito, ITLOS/PV.18/C25/7, p. 23, l. 26–31; *with regard to "fumus"*, see the testimony of Mr Esposito, ITLOS/PV.18/C25/7, p. 26, l. 32–49; ITLOS/PV.18/C25/10, p. 14, l. 11–25)

"The fact that this investigation did not lead to the ultimate prosecution of the individuals concerned – and condemnation – of course, does not necessarily mean that the seizure of that *corpus delicti* must therefore have been wrongful. As I will revert to shortly, the Italian courts acquitted the defendants, but did not find the Decree to be unlawful." (ITLOS/PV.18/C25/5, p. 17, l. 21–25; *with regard to the "corpus delicti" under article 253, paragraph 1, of the Code of Criminal Procedure*, see ITLOS/PV.18/C25/5, p. 17, l. 12–19)

"I should also emphasize at this point that Mr Carreyó's assertions on Monday that the seizure was a *sine die* confiscation is simply wrong. This seizure, by its very nature, as a means of investigation, as we have just seen from article 253 of the Italian Procedural Criminal Code, was only a temporary measure. That is also why, of course, the vessel was conditionally released in February 1999 and unconditionally released in March 2003. Clearly, there was nothing confiscatory about this seizure, nor anything *sine die* about it, and it was only the owner's failure to retrieve the vessel that extended the period of the seizure." (ITLOS/PV.18/C25/5, p. 17, l. 27–35)

With regard to the proportionality of the Decree: ITLOS/PV.18/C25/7, p. 4, l. 28–34

With regard to the non-arbitrariness of the Decree: ITLOS/PV.18/C25/7, p. 4, l. 36–44

§ Article 87, paragraph 2, of the Convention

Panama

– "In article 87, paragraph 2, the requirement of 'due regard' is a qualification of the rights of States in exercising the freedom of the high seas. The standard of 'due regard' requires all States, in exercising their high seas freedoms, to consider the interests of other States and refrain from activities that interfere with the exercise by other States of their parallel freedom to do likewise." (Memorial, para. 96; see also ITLOS/PV.18/C25/2, p. 37, l. 13–44; ITLOS/PV.18/C25/9, p. 8, l. 42–46)

"This provision does not distinguish between flag and coastal States; the freedoms are to be implemented and upheld by all States with respect to the interests of other States." (Reply, para. 336; see also Reply, para. 110)

– "By its wrongful conduct, Italy has interfered unreasonably with the interests of Panama as the flag State with exclusive jurisdiction over M/V Norstar on the high seas." (Memorial, para. 98)

Italy

– "[T]he obligation to have due regard to the rights of other States under Article 87(2) binds States that exercise their freedom of navigation under Article 87(1). It is … Panama that invokes Article 87(1), in the present dispute, and therefore any obligation of due regard under Article 87(2) binds Panama, and not Italy." (Counter-Memorial, para. 202; see also ITLOS/PV.18/C25/6, p. 6, l. 43–p. 7, l. 23)

"In the context of the present dispute, it is Panama, in its capacity as Claimant, that invokes Article 87 and the freedom of navigation that it protects; as such, it is to Panama that the obligation contained in Article 87(2), is addressed, and not to Italy." (Counter-Memorial, para. 140)

– "Therefore, Italy has not violated paragraph 2 of Article 87 of the Convention, either." (Counter-Memorial, para. 141)

Did Italy breach article 300 of the Convention by maintaining the arrest of the *M/V "Norstar"* and by exercising its jurisdiction over the activities carried out by the vessel?[1]

§ The link between article 300 and article 87 of the Convention

Panama

– "All claims that Panama has made concerning Italy's bad faith and abuse of rights have emerged from the hindrance of the free navigation protected by article 87." (Reply, para. 203; see paras 239 and 240)

"Panama is most aware of the interrelationship between these two provisions, recalling that the Tribunal cited the *M/V 'Louisa'* case in its judgement of 4 November 2016." (Reply, para. 202; see also ITLOS/PV.18/C25/3, p. 2, l. 36–41 and p. 3, l. 33–50)

– "[T]he freedom of navigation established under Article 87 guarantees a right to freedom of navigation on the high seas to all States as well as an obligation to respect other States' freedom to navigate without undue interference. It is in this context that Article 300 finds application to this case." (Memorial, para. 102; see also ITLOS/PV.18/C25/3, p. 2, l. 46–p. 3, l. 3)

With regard to good faith: "all of the Italian conduct leading up to and during the time that the arrest was in force was in violation of article 87, while its conduct since the arrest, including examples cited by Italy in its Counter-memorial, have demonstrated a lack of good faith, thereby contravening article 300 of the Convention." (Reply, para. 217)

With regard to the definition of good faith: "A state does not act in good faith when it is found to have violated or acts in violation of a provision of the Convention." (Memorial, para. 108) "In international exchanges and negotiations, good faith

1 *Panama*: "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" (Final submissions of Panama; see also Reply, Submissions, para. 593; see Memorial, Submissions, para. 260).

is presumed. However, Panama maintains that this presumption has been distorted by the unlawful conduct of Italy in several instances". (Reply, para. 220)

With regard to abuse of rights: "Article 300 of the Convention specifically protects States from any abuse of rights and is being invoked by Panama with respect to the manner of the exercise of the right of jurisdiction recognized by the Convention. This provision also empowers the Tribunal to find justice and provide remedies when there are abuses of rights, including the seizure of property as an incidental procedure to the criminal prosecution of the persons having an interest on the operations of the M/V Norstar." (Memorial, para. 125)

With regard to the interpretation of article 87 and "effet utile", see Reply, paras 213–215: "[I]t is crucial to use the concept of good faith to interpret article 87 and link it with article 300 of the Convention" (Reply, para. 215; see also ITLOS/PV.18/C25/3, p. 1, l. 23–p. 2, l. 41)

Italy

– "Panama invokes Article 300 as a stand-alone provision, contrary to the constant case law of this Tribunal on the interpretation of Article 300." (Counter-Memorial, para. 168; see also para. 165, referring to the decision on Preliminary Objections, para. 131)
"Panama has failed to identify any provision of the Convention with respect to which Article 300 would have been breached". (Rejoinder, para. 65(c); see also Counter-Memorial, para. 168)

– "Panama's argument is that Italy has breached Article 300 with regard to Article 87, because it has breached Article 87.... If Panama were correct that violating a provision of UNCLOS equals to not fulfilling in good faith the obligations assumed under that provision, the illogical consequence would be that a violation of Article 300 would occur any time a State acts in contravention to the Convention. This conclusion is not tenable ..." (Counter-Memorial, para. 146; see also Rejoinder, paras 69–70)

"[A] breach of Article 300 cannot be argued autonomously ... Establishing a link between Article 87 and Article 300 requires ascertaining first that Article 87 has been violated and then, if this violation has occurred in breach of Article 300." (Rejoinder, para. 75)

With regard to good faith: "All of the conduct that Panama claims are indicative of lack of good faith on Italy's part are not, on their merits, contrary to good faith." (Rejoinder, para. 65(d); see also Counter-Memorial, para. 169, and ITLOS/PV.18/C25/6, p. 20, l. 7–26)

With regard to the definition of "good faith": "Panama's allegations that Italy did not act in good faith are unsubstantiated and apodictic, and based on mere presumptions." (Counter-Memorial, para. 153) "[T]he ease with which Panama presumes bad faith on Italy's part is against fundamental principles of international law." (Rejoinder, para. 103, see also Counter-Memorial, para. 154) "Not only can bad faith not be presumed, … but such a serious allegation against Italy and against a State must also be proved to a rigorous standard of proof. Panama falls far short of that in this case." (Memorial, para. 108; Reply, para. 220)

With regard to abuse of rights: "Also with regard to the abuse of rights component of Article 300, the principle applies that it is necessary to establish a link with specific provisions of the Convention." (Counter-Memorial, para. 197, referring to the *Chagos Marine Protected Area Arbitration*, para. 303) "Panama has … failed to provide a link with any provision of the Convention that it alleges Italy has violated in exercising rights or jurisdictions under the Convention." (Counter-Memorial, para. 196)

With regard to "effet utile", see Rejoinder, paras 73 to 80, and ITLOS/PV.18/C25/6, p. 19, l. 7–p. 20, l. 5 and p. 20, l. 28–42.

Did Italy breach the obligation of good faith under article 300 of the Convention in light of the circumstances of the arrest of the *M/V "Norstar"* and Italy's subsequent conduct?

The circumstances of the arrest of the *M/V "Norstar"*

Panama[2]

– "Italy has not acted in good faith. Italy breached its obligation first by violating its obligation to allow free navigation under Article 87 by arresting

2 For the list of Italy's actions which, according to Panama, "failed to meet good faith standards", see ITLOS/PV.18/C25/3/11, p. 3, l. 11–31.

and detaining M/V Norstar and its crew when it had no jurisdiction to do so." (Memorial, para. 114; see also Reply, para. 216)

"More importantly, as Captain Husefest of the M/V 'Norstar' has stated, Italian gunships threatened the M/V 'Norstar' in international waters. Such an action clearly exhibited bad faith." (ITLOS/PV.18/C25/3, p. 6, l. 21–23)

"Since Italy has admitted that arresting the M/V 'Norstar' on the high seas would have constituted a violation of its freedom of navigation, Panama would then like to ask: is it good faith on the part of a coastal State to avoid arresting a vessel when traversing its own territorial waters or international waters, for acts carried out there, but rather wait until it sailed into the port of another State to do so? Clearly, the answer is no, since such behaviour is deceptive in nature." (ITLOS/PV.18/C25/3, p. 6, l. 25–30; see also Reply, para. 225)

– "Italy knew that the M/V Norstar carried out such bunkering 'from 1994 to 1998', and did not take any steps to criminally prosecute this activity during those four years. Therefore, its decision to suddenly treat the Norstar's actions as a crime could hardly be considered as good faith." (Memorial, para. 118; see also Reply, paras 250 to 253 and 354 and ITLOS/PV.18/C25/3, p. 5, l. 3–47)

"Italy has stated that the reason for which it ordered and requested the arrest of the M/V Norstar was its 'bunkering activity off the coasts of France, Italy and Spain'. This attitude of Italy does not reflect good faith either but rather is an intentional act of evading the actual and relevant facts of this case …". (Memorial, para. 117; see also para. 120, and Reply, para. 224, 293–300)

– "[W]hen Italy decided to arrest the M/V 'Norstar' without having finished a full investigation as to whether such a seizure was justified, the premature response on its part represented an absence of the good faith needed to protect the rights of ships from other flag States to freely navigate in international waters." (Reply, para. 247)

"[T]he arrest of the M/V 'Norstar' was seemingly rushed and enforced without the final and definitive approval of the Italian jurisdictional authorities." (Reply, para. 255; see also paras 226, 254, 260–273 and 362, and Memorial, para. 120)

Italy

– "The circumstances invoked by Panama are hardly indicative of any bad faith on Italy's part. On the contrary, they advance Italy's argument that its conduct was in compliance with the Convention". (Counter-Memorial, para. 150)

"In order to make up for its inability to prove any interference, the Panamanian narrative went on so far as to submit, for the first time in this proceeding …, that the 'Norstar' was harassed. On this point, the witness statement of Mr Husefest is vague and unreliable about time and circumstances. For the record, the question is not whether the 'Norstar' experienced any interference on the high seas at any point in its life, but whether the Decree of Seizure and the request for its execution determined any interference." (ITLOS/PV.18/C25/10, p. 5, l. 14–19)

– "[T]he *M/V Norstar* … was arrested and detained because it was allegedly part of a unitary criminal plan concerning the commission of the crimes of tax evasion and smuggling in the Italian territory. Therefore, the fact that the *M/V Norstar* was only arrested in 1998 finds a simple explanation in the fact that it was only by then that investigative activities by the Italian tax police came to suggest its involvement in the crimes specified above." (Counter-Memorial, para. 151; see also Reply, para. 82, and ITLOS/PV.18/C25/6, p. 22, l. 11–p. 23, l. 10)

– "Panama's second contention is equally not indicative of any bad faith…. The *Norstar* was arrested in the internal waters of Spain precisely to avoid breaching the provision of the Convention on freedom of navigation on the high seas." (Counter-Memorial, para. 152; see Reply, paras 83 to 85; see also ITLOS/PV.18/C25/6, p. 23, l. 32–p. 24, l. 20)

– "[T]he adoption of the Decree was neither premature nor unjustified." (Rejoinder, para. 88) "[T]he purpose of the Decree was to secure evidence assessing the commission of a crime by certain individuals also through the *M/V Norstar*." (Rejoinder, para. 89; see also ITLOS/PV.18/C25/6, p. 22, l. 28–p. 23, l. 10)

"It is true that the Decree was adopted without the approval of the jurisdictional authorities, but only because such approval is not even contemplated, let alone required, by the Code of Criminal Procedure." (Rejoinder, para. 95; see paras 92 and 96)

Italy's conduct subsequent to the arrest of the *M/V "Norstar"*

(*i*) *Conduct in relation to communications sent by Panama*

Panama

– "One of the most salient illustrations of the lack of good faith on the part of Italy is that it did not answer any of the communications sent by Panama as a means to exchange views." (Reply, para. 276; see paras 277 to 292; see also Memorial, para. 114, ITLOS/PV.18/C25/3, p. 9, l. 30–p. 10, l. 17, and ITLOS/PV.18/C25/9, p. 12, l. 40–p. 13, l. 32)

"The failure to respond to a request for negotiation constitutes by itself a breach of an international obligation and reflects a lack of good faith." (Memorial, para. 121; see para. 123)

Italy

– "What Italy is saying is that it did not respond to Panama's communications because it *believed* – and, Italy accepts that this belief was legally wrong since 31 August 2004 – that the requests from Panama were coming from individuals not authorized to represent Panama." (Rejoinder, para. 99; see paras 100, 101,105 and 108; see also Counter-Memorial, para. 177; ITLOS/PV.18/C25/6, p. 15, l. 42–p. 18, l. 22)

"Panama presumes, without indicating any element to substantiate its position, that the reason for Italy's silence was bad faith. In essence, Panama presumes Italy's bad faith. Not only is this not true in light of Italy's explanation of its own silence; Panama's assertion is also contrary to the principle that good faith must be presumed." (Counter-Memorial, para. 181)

(*ii*) *Conduct in relation to the Italian domestic proceedings*

Panama

– "Italy has not acted in good faith … neglecting to release the vessel when its own courts had decided that no crime had been committed." (Memorial, para. 114; see also para. 119 and Reply, paras 302 and 311)

– "[T]he M/V 'Norstar' was detained for an inordinate period of time. Panama's position is that the detention was prolonged, and that the vessel was kept, in effect, incommunicado under Italy's control and authority over the years. This can only be considered as a betrayal of good faith." (Reply, para. 228; see also para. 229)

"Italy has completely abandoned its duty to provide for the maintenance of the vessel in order to prevent its decay … Thus, Panama feels entirely justified in describing Italy's actions … as being conducted in bad faith." (Reply, para. 331; see paras 303 to 312; see also ITLOS/PV.18/C25/3, p. 12, l. 17–43)

– "Italy has acted in bad faith not only by bringing the persons involved in the operation of the M/V Norstar to trial, but also by letting criminal proceedings endure for 5 years, from 1998 until 2003. Although the Italian courts dismissed the claims of the Prosecutor, none of the accused has received any offer of compensation." (Memorial, para. 115)

Italy

– "The return of the vessel was promptly offered upon payment of a security; at the end of the proceedings, it was released unconditionally, yet it was never collected by the owner. Even if Panama's statements were factually correct, Panama does not explain, let alone prove, how they are indicative of any lack of good faith." (Counter-Memorial, para. 183; see also para. 182)

– "Italy … has not detained the *M/V Norstar* for an unreasonable period of time; … at the latest on 11 March 1999, that is, less than 6 months after the execution of the Decree of Seizure on 25 September 1998, the *M/V Norstar* was

released and could have been collected by its owner, who however failed to do so." (Rejoinder, para. 115; see paras 13–40 and 116; see also Counter-Memorial, paras 53–55, and ITLOS/PV.18/C25/6, p. 23, l. 33–p. 23, l. 25)

– "The Italian judicial system provides for mechanisms of compensation for those who feel they have suffered a damage due to legal proceedings; however, none was activated by those who were put to trial. Also, Panama does not explain how bringing to trial people who are accused of a crime, or the duration of criminal proceedings, [is] suggestive of a lack of good faith." (Counter-Memorial, para. 184; see also the testimony of Mr Esposito, ITLOS/PV.18/C25/7, p. 26, l. 4–27)

(*iii*) *Conduct in relation to the proceedings before the Tribunal*

Panama

– "Italy has not acted in good faith by delaying these proceedings". (Memorial, para. 114)

"There were seven attempts made by Panama to communicate with Italy concerning this case, yet all of them were unsuccessful." (Reply, para. 282)

"The refusal of Italy to admit that it was forestalling exchanges regarding the M/V 'Norstar' has placed Panama in a very disadvantageous position. If Panama had known this, it could have taken other measures to avoid wasting time and money in the belief that negotiations were still possible." (Reply, para. 284)

– "[T]he Counter-memorial adds a … dimension to Italy's bad faith conduct. Italy has now tried to alter the facts of the case, saying that it was investigating actions by the M/V 'Norstar' performed in Italian territory." (Reply, para. 230; see paras 231–233 and paras 338–348)

Italy

– "That Italy has delayed these proceedings is a patently false statement…. It is regretful that Panama should make such gratuitous accusations, without pointing to one single event in support of its argument." (Counter-Memorial, para. 170)

"[A]ny delay in *commencing* these proceedings is imputable to Panama, and to Panama only. It is useful to recall that Panama invoked the commencement of international proceedings for the first time in 2001; it reiterated its position in 2002, and then went completely silent for 5 years and 7 months before actually commencing them." (Counter-Memorial, para. 171)

"Italy has explained in the incidental phase of the proceedings before the Tribunal that it did not consider Mr Careyò as a legitimate representative of Panama." (Counter-Memorial, para. 177)

"Italy's partial lack of response to Panama's communications cannot be invoked to blame Italy for Panama's delays in commencing this case. A Claimant can decide at any time that it wants to commence proceedings against a respondent, when there is no prospect of success in negotiations." (Counter-Memorial, para. 172)

– "It is impossible for Italy to understand how Panama can consider in breach of Article 300 and good faith statements that Italy has made in its Counter-Memorial, that constitute the mere narration of facts and legal principles in the context of a pleading. Italy hopes to be able to address this matter during the oral phase of the proceedings, in the event that Panama would like to clarify its position." (Rejoinder, para. 111)

Did Italy exercise its jurisdiction in a manner constituting an abuse of rights in breach of article 300 of the Convention?

Panama

– "Panama contends that Italy breached this provision because it did not comply with its international obligation of due regard for the interest of other States in their exercise of the freedom of the high seas as Panama, by wrongfully ordering and requesting the arrest of the M/V Norstar and by the improper application of its customs laws to it." (Memorial, para. 126)

"Italy breached Article 300 of the Convention by exercising its authority and jurisdiction in contravention of the Convention, and in such a manner that acted to the detriment of Panama and persons involved in the operation of the

M/V Norstar, thereby constituting an abuse of its authority and jurisdictional rights." (Memorial, para. 128)

"Italy violated the principle of legality because it knew that there was no international law of the sea provision in force allowing the application of its customs laws for arresting a vessel for acts performed in the high seas." (Memorial, para. 125)

– "Italy, as a coastal State, abused its right enshrined in article 21 of the Convention to legally prevent the infringement of its customs or fiscal regulations by foreign ships which enter its territorial sea." (Reply, para. 356; see also paras 358–359, 362 and 363)

Italy

– "If, contrary to Italy's arguments, the Tribunal were to find that the abuse of rights component of Article 300 falls within its jurisdiction in the present case, its breach with respect to Article 87 still would not have occurred." (Counter-Memorial, para. 199; see also ITLOS/PV.18/C25/6, p. 12, l. 41–p. 13, l. 44)

"The necessary prerequisite to establish that a State has abused a right under international law is that such State had a right to exercise in the first place." (Counter-Memorial, para. 200)

"Article 87 … does not confer any right or jurisdiction to Italy in the present dispute, but only places obligations on Italy vis-à-vis Panama." (Counter-Memorial, para. 201)

"The only way in which Article 300 could be linked with freedom of navigation under Article 87 would be if a State, in exercising the freedom of navigation under 87, abused the rights of other States." (Rejoinder, para. 124; see para. 125)

– "Panama tries to enlarge the scope of the dispute … Italy does not intend to engage the merits of this argument, but wishes to note that Article 21 of the Convention is not part of the present dispute as determined by the Tribunal, and therefore does not fall within its jurisdiction in the present case." (Rejoinder, para. 121)

If the Tribunal has jurisdiction to consider these provisions, does the Decree of Seizure for the *M/V "Norstar"* breach articles 92 and 97, paragraphs 1 and 3, of the Convention?

Panama

– "By ordering the arrest of the M/V Norstar in the exercise of its criminal and tax jurisdiction for bunkering activities performed by Panama on the high seas, Italy also breached Articles 92, 97(1) and 97(3) of the Convention." (Memorial, para. 92; see also ITLOS/PV.18/C25/2, p. 36, l. 12–15)

"Italy's exercise of its criminal and tax jurisdiction over the M/V Norstar through its order and request of arrest for lawful activities carried out on the high seas is in direct conflict with the exclusive jurisdiction of Panama as the flag state over that vessel in extraterritorial waters." (Memorial, para. 90; see also para. 93)

"[B]y instituting proceedings against the master and the other persons in the service of the M/V 'Norstar', Italy also contravened article 97(1)." (Reply, para. 373)

"Panama contends that the character of the dispute is not transformed in any way by the consideration of these provisions, and does not expect that Italy will be judged on the basis of these additional provisions, but rather that they will complement the application and interpretation of articles 87 and 300 of the Convention, hence contributing to the sound administration of justice." (ITLOS/PV.18/C25/2, p. 37, l. 7–11)

Italy

– "While Panama invokes Articles 92, 97(1) and 97(3), it is apparent from the Submissions in Chapter 5 of its Memorial that Panama does not seek a declaration from the Tribunal that Italy has breached those provisions of the Convention." (Counter-Memorial, para. 207)

"Considering that Articles 92(1), 97(1) or 97(3) and their content were not even mentioned in Panama's Application and therefore do not arise directly from it, the issue that Italy would like to address is whether these claims can be considered as implicit in Panama's Application. The answer should be most definitely in the negative." (Rejoinder, para. 139)

§ **Rules of evidence**

What is the standard of proof applicable in this case?

Panama

– "Panama has already argued … that while it bears the burden to prove its case, Italy has failed to provide, in spite of the numerous requests from Panama, important documents and information that are under the control of Italy and that only Italy can access." (ITLOS/PV.18/C25/9, p. 24, l. 16–19)

"The *probatio diabolica* rule states that the *ratio* inherent in the rules of burden of proof for negative facts applies to cases where an actor faces problems establishing the evidence, provided such problems are beyond its reach and no fault is imputable to it. This principle is applicable to Panama in the present case because it has requested evidence from both Italy and Spain without success." (ITLOS/PV.18/C25/3, p. 29, l. 10–14; see also ITLOS/PV.18/C25/3, p. 28, l. 39–46, with reference to the *Corfu Channel Case*; ITLOS/PV.18/C25/9, p. 13, l. 34–43; *with regard to evidence on criminal procedure in Italy*, see also ITLOS/PV.18/C25/9, p. 24, l. 29–38; *with regard to the logbook and other documents relating to the vessel*, see ITLOS/PV.18/C25/9, p. 14, l. 36–46; *with regard to the testimony of Mr Esposito*, see ITLOS/PV.18/C25/9, p. 13, l. 45–47; *with regard to the letters sent by the Service of Diplomatic Litigation and Treaties of the Italian Ministry of Foreign Affairs* (Reply, Annex 12, and Memorial, Annex 7), see ITLOS/PV.18/C25/9, p. 14, l. 1–16 and l. 23–32)

– "[I]t is not only possible to prove facts through written documents only. The Rules of the Tribunal expressly provide, inter alia, in article 44 and article 72 and the following, that the parties may also provide evidence by witnesses or experts. This evidence has an equal value." (ITLOS/PV.18/C25/9, p. 31, l. 9–12)

– "The testimonies of the witnesses called by Panama in this case, Mr Morch, Mr Rossi and Mr Husefest, were particularly strong evidence because the witnesses were directly involved in the events surrounding the 'Norstar' and had extensive knowledge of the facts concerning the vessel and its activities." (ITLOS/PV.18/C25/9, p. 31, l. 14–17)

Italy

– "It concerns the generally recognized principle that 'evidence produced by the parties [must be] "sufficient" to satisfy the burden of proof'" (ITLOS/PV.18/C25/5, p. 8, l. 30–32)

"Panama advances a significant number of factual and legal contentions which are unsupported by a sufficient standard of proof." (ITLOS/PV.18/C25/5, p. 9, l. 16–17; see also ITLOS/PV.18/C25/7, p. 8, l. 9–16) "[F]requently where Panama cannot prove its assertions, it instead tries to shift the burden of proof onto the defendant." (ITLOS/PV.18/C25/5, p. 10, l. 10–12; *with regard to the use of the maxim "res ipsa loquitur" by Panama*: ITLOS/PV.18/C25/7, p. 9, l. 8–18).

– "It is not for Italy to provide Panama with all the evidence it needs to build its case." (ITLOS/PV.18/C25/10, p. 8, l. 18–19)

"Panama must now bear the consequences of that refusal. It is not for Italy to provide Panama with all the evidence it needs to build its case." (ITLOS/PV.18/C25/10, p. 8, l. 18–19)

– "Nor can Panama make up indeed for its evidential failures through the oral testimony of self-interested witnesses." (ITLOS/PV.18/C25/10, p. 8, l. 44–46)

"I [Counsel for Italy] also want to challenge the strength of that oral evidence as a general matter based on well-accepted principles in international dispute settlement affirming that the evidence of individuals that have an interest in a case – and especially a financial interest – has less value than the evidence of those who do not have such an interest." (ITLOS/PV.18/C25/10, p. 9, l. 11–15, with reference to the *Nicaragua Case*; see l. 16–22; see also, ITLOS/PV.18/C25/10, p. 9, l. 24–31)

§ Jurisdiction and applicability of article 87

Panama and Italy are both States Parties to the Convention. The Parties disagree on whether the Tribunal has jurisdiction over the *M/V "Norstar" Case*.

The relevant provisions concerning jurisdiction are laid down in article 286, article 287, paragraph 4, and article 288, paragraph 1, of the Convention and in article 21 of the Statute. Article 286 of the Convention provides:

> Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.

Article 287, paragraph 4, of the Convention provides:

> If the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree.

Article 288, paragraph 1, of the Convention provides:

> A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.

Article 21 of the Statute provides:

> The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.

Reference should be made in this regard to article 288, paragraph 4, of the Convention, which provides: "In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal."

The Tribunal's substantive jurisdiction, that is to say, the authority to exercise the powers inherent in the judicial function, stems both from its Statute, as laid down by UNCLOS, which establishes it, and from the declarations made by Panama and Italy recognizing its jurisdiction in the present case.

In judicial settlement, the two legal bases are distinct. Jurisdiction stems from a combination of the Statute and the consent of each Party. The consent of each Party permits the Tribunal to entertain the specific dispute between them. However, the powers that constitute "jurisdiction" in general stem from the Statute.

The Tribunal may deal with the merits of a case only if the conditions laid down by the parties and in its Statute are satisfied in the case at issue. The conditions laid down by the parties relate to the jurisdiction of the Tribunal while the conditions laid down in its Statute relate to the admissibility of the action. It is therefore for the parties and for the Tribunal to raise objections to the exercise of judicial power if any of those conditions is not satisfied.

The present case was brought before the Tribunal unilaterally by Panama, the Applicant, availing itself of a compulsory jurisdiction mechanism. Italy, the Respondent, seeks to evade it by contesting the jurisdiction of the Tribunal and the admissibility of the Application.

The Tribunal has to examine with particular care the question of its jurisdiction, which is fundamental to the present case because the Parties disagree completely on this point.

The Tribunal has taken precautions in its case-law in respect of the examination of its jurisdiction according to the nature of the proceedings brought before it. These precautions should be qualified on account of the differences between provisional measures and preliminary objections.

The distinction between jurisdiction and admissibility is of particular practical importance. Judicial decisions that do not adhere scrupulously to the limits imposed on jurisdiction can have a significant effect on the parties' expectations, especially since international judicial bodies rule at first and last instance. Similarly, the misclassification of a question of admissibility as a question of jurisdiction may unduly extend the scope of the parties' judicial claims in fact and in law. Consequently, the court or tribunal must always avoid deciding a question of admissibility when it examines its jurisdiction, that is to say *the authority to exercise the powers inherent in the judicial function*, which stems both from its Statute and from the declarations made by the Parties recognizing its jurisdiction in the present case. It should be noted that, in judicial

settlement, the two legal bases are distinct. The exercise of judicial power by the Tribunal is subject to these two types of conditions being satisfied.

Sometimes, the Tribunal has relied on arguments relating to the admissibility of the legal action in order to decline jurisdiction. That was what happened in the *M/V "Louisa" Case*, as I pointed out (in paragraph 38 of my Separate Opinion). The Tribunal states that

> to enable it to determine whether it has jurisdiction, Saint Vincent and the Grenadines must establish a link between the facts advanced and the provisions of the Convention referred to by it and show that such provisions can sustain the claim or claims submitted by it (para. 99 of the Judgment, which reproduces the reasoning adopted by the ICJ in *Oil Platforms* (*Islamic Republic of Iran* v. *United States of America*), *Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803).

It should have been added that the dispute must be one which the Tribunal has jurisdiction to determine *ratione materiae* pursuant to the Convention. In other words, the dispute must exist and be justiciable.

As the ICJ stated in the Lockerbie case: "The dispute must in principle exist at the time the Application is submitted to the Court" (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (*Libya* v. *United Kingdom*), *Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 9, at pp. 25–26, paras 42–44).

Furthermore, the Court also held that "in terms of the subject-matter … the dispute must be 'with respect to the interpretation or application of [the] Convention'" (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia* v. *Russian Federation*), *Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70, para. 30).

In the *M/V "Norstar" Case*, the Tribunal conducted an examination of the applicability of article 87, relied on by Panama, and concluded that: "[c]onsequently, the Tribunal concludes that article 87 is relevant to the present case" and, in the operative provisions of the Judgment, it "[r]ejects the objections raised by Italy to the jurisdiction of the Tribunal and finds that it has jurisdiction to adjudicate upon the dispute".

It should be borne in mind that, in the law on evidence, relevancy expresses proof of facts which have a legal interest in the dispute and which are such as to influence the outcome of the dispute.

In addition, the Tribunal's ruling is binding on the Tribunal itself and on the two Parties, having the force of *res judicata*.

In other words, the relevancy of the article and its applicability are essential elements of the applicable regime in the legal order that provides a basis for the settlement of the dispute in that order. Thus, the Tribunal does not need to concern itself with internal considerations – pure facts in the international order – in order to fulfil its function.
As the ICJ states,

> [a]lthough it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law (*Fisheries* (*United Kingdom* v. *Norway*), *Judgment, I.C.J. Reports 1951*, p. 116, at p. 132).

This recalls the system applicable to nationality. "It does not depend on the law or on the decision of [of a State] whether that State is entitled to exercise its protection, in the case under consideration" (*Nottebohm Case* (*second phase*), *Judgment of 6 April 1955, I.C.J. Reports 1955*, p. 23). On the other hand, the internal validity of nationality is the primary condition for its international validity. Just as international law acknowledges that States have exclusive competence in determining nationality, it makes its effectiveness in the international order subject to its own requirements. Accordingly, a challenge by a State to an act of nationality does not invalidate it but does render it not opposable.

As is noted by Brownlie,

> Nationality is a problem, inter alia, of attribution and regarded in this way resembles the law relating to territorial sovereignty. National law prescribes the extent of the territory of a State, but this prescription doesn't preclude a forum which is applying international law from deciding questions of title in its own way, using criteria of international law. (I. Brownlie, "The Relations of Nationality in Public International Law", *BYBIL*, 1963, pp. 290–291)

It should be recalled that the high seas are the maritime area where there is complete freedom of navigation for any vessel. That freedom – the first of the six freedoms provided for in article 87, paragraph 1 – forms the basis for the principle that the flag State has exclusive jurisdiction over its own vessels in accordance with international rules under article 92, paragraph 1. This is a guarantee of the effectiveness of freedom on the high seas so that no State is tempted to set itself up as a maritime police force.

The fundamental principle in this maritime area is freedom of navigation. In a world of free communication and in particular undergoing globalization of trade, the principle influences all the legal regimes applying to the different maritime zones. This key principle in the law of the sea prevails over claims to ownership asserted by the maritime powers.

It should be stressed that the flag State generally enjoys exclusive jurisdiction over vessels flying its flag on the high seas. The relevant exceptions are laid down in international treaties and the Convention (article 92, paragraph 1) or may be based on international custom, such as the right of self-defence. Since the high seas are governed by international law, the freedom of navigation is subject to certain limitations recognized within that legal order. Thus, ships on the high seas may be checked by foreign warships if they are engaged in activities subject to the right of visit of States other than the flag State (article 110 of the Convention). This is because the freedom of navigation may lead to conduct or activities of which States collectively disapprove; hence the developments relating to the freedom of navigation.

It must be hoped that in the foreseeable future these developments will include cases of trafficking of migrants, drugs and weapons of mass destruction and even IUU fishing, which are detrimental to peace on the seas and oceans. Through treaties, States will be able to regulate effectively the policing powers of the coastal State, the flag State and other States in those activities alongside piracy, ships without nationality, unauthorized broadcasting from the high seas, the right of visit and cooperation to combat crimes on the high seas in general.

Under article 87 of the Convention, the high seas are open to all States. Accordingly, no part of that zone can come under the sovereignty of any one

State. In short, the principle of freedom of the high seas forms the legal regime for this area and the freedom of navigation is the first of the six freedoms recognized by paragraph 1 of article 87 of the Convention. This means that any vessel may sail on the high seas without intervention from States other than the flag State. Freedom of navigation is based on the individual jurisdiction of the State over vessels flying its flag in that zone. There are exceptions to the exclusive jurisdiction of the flag State in relation to the right of hot pursuit, the right of visit, piracy or any other incident of maritime navigation.

In the present case, the main issue to be resolved is whether or not bunkering on the high seas is covered by the freedom of navigation. As we know, such activity on the high seas falls outside the regulation or control of any State except the vessel's flag State. As such, bunkering in that area is covered by the freedom of navigation. Consequently, control or exercise of jurisdiction over the vessel on the high seas by any State other than the flag State constitutes a blatant breach of the freedom of navigation enshrined in article 87 of the Convention; such control or exercise of jurisdiction may take a wide variety of very different forms.

The Tribunal rightly holds that, by extending the application of its criminal law to the high seas, issuing the Decree of Seizure and requesting the Spanish authorities to execute it, which they did, Italy breached the freedom of navigation enjoyed by Panama as the flag State of the *M/V "Norstar"* under article 87, paragraph 1, of the Convention.

The interpretation of the legal regime of internal waters must be more cautious, on the other hand. The State does exercise its full sovereignty in its maritime waters, with any associated consequences for foreign vessels.

However, the inalienable rights inherent in the status of a vessel exclusively carrying out offshore bunkering activities should not be overlooked. Access to a State's port does require the prior authorization of the State's port authorities but the abovementioned status of the vessel gives it the right of access to the high seas.

Otherwise, it would be destined to wander off the coast, not fully enjoying the freedom of navigation which must provide a right of access to and from the sea or the freedom to access or transit through a port. The conditions and

arrangements under which that freedom is exercised must comply with the port State measures and may not in any way undermine its legitimate interests.

It should be borne in mind that ships sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in the Convention, are subject to its exclusive jurisdiction on the high seas. If those ships did not benefit from the freedom of navigation and the related rights, they would have to resolve to return to the ports of the flag State even if they were thousands of nautical miles away.

In this case, however, the matter at hand is not "[t]o interpret the freedom of navigation as encompassing a right to leave port and gain access to the high seas". Rather, it is a question of the arrest and detention of the *M/V "Norstar"*, wrongful acts the consequences of which are to prevent

- the *M/V "Norstar"* gaining access to the high seas and therefore
- enjoying the freedom of navigation, and
- developing the bunkering activities in which the *M/V "Norstar"* was engaged on the high seas.

The acts subjecting the activities of the *M/V "Norstar"* on the high seas to the jurisdiction of Italy breach the freedom of navigation because the principle of the exclusive jurisdiction of the flag State is a fundamental element of the freedom of navigation enshrined in article 87 of the Convention.

The arrest and detention of the *M/V "Norstar"* are unlawful because the vessel did not violate any Italian laws. Italy's application of its laws, resulting in the confiscation of the vessel, breaches article 87 by depriving it of the freedom of navigation. The lack of a contiguous zone prevents it from exercising its enforcement powers to challenge any possible infringement of its customs or fiscal laws. In addition, the Italian judicial authorities confirmed in respect of Italy's extraterritorial application of its laws – in arresting the *M/V "Norstar"* – that the arrest was unlawful. The Decree of Seizure and its execution related to activities carried out on the high seas by the *M/V "Norstar"*. These constitute obstacles to navigation and only the authorities of the flag State may order the arrest or the detention of the vessel. In other words, it is for those authorities to avoid obstacles to navigation: freedom of movement, the right to leave port, physical interferences on the high seas with indirect measures etc. That is to

say, in light of the facts of the case, the legal regime of the freedom of navigation has been substantially affected.

As far as article 300 of the Convention is concerned, the Tribunal has recognized its relevance in this case. It will have to be determined whether or not it is applicable in the light of the pleas raised by Panama.

Article 300 states:

> 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.

Article 300 encompasses two aspects underlying the concepts of good faith and abuse of rights. Good faith is always presumed and it is for the party alleging bad faith to prove it. Good faith represents a legal standard by which the court or tribunal is able to assess the conduct of the parties. It can be viewed as

> conduct which the parties are legally obliged to observe, in the performance and the interpretation of their rights and obligations, whatever their source, in accordance with a general legal principle whose binding force is reaffirmed in consistent practice and jurisprudence (*Dictionnaire de droit international public*, Jean Salmon (ed.), p. 134).

"One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation" (*Nuclear Tests* (*Australia* v. *France*), *Judgment, I.C.J. Reports 1974*, p. 253, at p. 268, para. 46).

The principle is recalled in the 1969 Vienna Convention on the Law of Treaties with regard to both the performance and the interpretation of treaties (article 31, paragraph 1, of the VCLT). In respect of the exercise of a power, good faith presupposes the possibility that an act can be justified by reference to the pursuit of a legitimate purpose. "The power of making the valuation rests with the Customs authorities, but it is a power which must be exercised reasonably and in good faith" (*Rights of Nationals of the United States of America*

in Morocco (*France* v. *United States of America*), *Judgment, I.C.J. Reports 1952*, p. 176, at p. 212). In any event, good faith is always linked to an existing rule.

> The principle of good faith is … one of the basic principles governing the creation and performance of legal obligations …; it is not in itself a source of obligation where none would otherwise exist (*Border and Transborder Armed Actions* (*Nicaragua* v. *Honduras*), *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 69, at p. 105, para. 94).

As regards abuse of rights, it makes it possible to sanction any exercise of a right that goes beyond the limits of reasonable use of that right. The existence of the right can hardly be contested, but it is the manner in which it is exercised, where this causes prejudice to others, that entails an abuse of rights. Abuse of rights can also stem from the application of an unlawful act which is incompatible with the primary rule establishing the right in question. There is also an abuse of rights where the State acts with the sole intention of harming another, even if it complies with its international obligations. Ultimately, abuse of rights can be viewed as where a

> State exercises a right, power or competence in a manner or for a purpose for which that right, power or competence was not intended, for example to evade an international obligation or to obtain an undue advantage (*Dictionnaire de droit international public*, *op. cit.*, p. 364).

In this case at issue, it would seem that it is this second element of article 300, abuse of rights, that allows the Tribunal to fulfil its task. The somewhat elliptical approach taken by the Tribunal may seem surprising, in particular the emphasis placed on the first element, good faith.
The question arising is whether the rights, powers and freedoms conferred on the Respondent by the Convention are exercised by it in a manner which scarcely constitutes an abuse of rights.

(a) It is apparent from the *ratio legis* for the Decree of Seizure and its execution that it was a matter of offshore bunkering which was considered to relate to *corpus delicti*. These acts were obstacles to free navigation, exacerbated by the continued detention of the *M/V "Norstar"*. By illegally applying its internal legislation outside its territory to lawful offshore bunkering activities and by exacerbating these acts by extending the detention of the *M/V "Norstar"* for a very long period, despite the decisions made by the Italian courts themselves holding that the prosecution was unlawful in criminal law.

(b) The *M/V "Norstar"* was detained for a very long period under the control and authority of Italy, which was not required to take any steps to return the ship to its owner or to the flag State. On the contrary, the *M/V "Norstar"* had decayed so much that it had to be sold in public auction as scrap. Nevertheless, as the court having jurisdiction, the Tribunal of Savona should have taken the appropriate steps to maintain and thus to preserve the ship and other property on board during the time of the detention.

(c) The other important element is that Italy waited until the *M/V "Norstar"* was in the port of Palma to arrest the vessel. The decision to arrest the vessel in the internal waters of a third State, when it was clear that such an arrest on the high seas would constitute a breach of the freedom of navigation, is telling. Furthermore, it is possible under the Decree of Seizure itself for the vessel to be arrested on the high seas. As the case stood so far back in time and involved intertemporal law, the Tribunal should have paid closer attention to the documentary evidence and carried out a more detailed examination of the oral proceedings in order to arrive at a more precise characterization of the facts of the case.

Note should also be taken of other points that bear out the idea of an abuse of rights.

(d) The premature enforcement of the Decree of Seizure. The arrest of the *M/V "Norstar"* was premature and enforced without final and definitive approval from the Italian judicial authorities. It should be noted that the Decree of Seizure and the Request for its execution were issued on 11 August 1998, while the Italian fiscal police transmitted its findings on the investigation regarding the *M/V "Norstar"* to the Public Prosecutor only on 24 September 1998. As we know, provisional measures may be ordered only if it is established that they are justified *prima facie* in fact and in law and that they are urgent, none of which has really been proved by the Respondent. Furthermore, the decisions delivered by the Italian courts indicated that the prosecution was illegal from the point of view of criminal law.

(e) The other important point is the withholding of information. Since the incidental phase, the Applicant has stated that Italy has always been opposed to disclosing all the documents concerning the criminal proceedings against the *M/V "Norstar"*. Its argues that Italy has withheld vital information relevant to the present case.

In this regard, Panama has referred to letters from the Service of Diplomatic Litigation dated 4 September 1998 and 18 February 2002, informing the Italian Prosecutor of the non-existence of a contiguous zone and expressly referring to the claim for damages by the Agent of Panama. The existence of these documents was disclosed by Italy only in 2016. The obligation to cooperate in the settlement of disputes is thus seriously impaired.

(f) Note can also be taken of the silence kept when confronted with the persistent claims made by Panama, not to mention the international obligation to have due regard for the interests of other States. Panama asserts that it made seven attempts to communicate with Italy concerning the *M/V "Norstar"*, yet all of them were unsuccessful. Panama contends that, by intentionally keeping silent when confronted with the claim that article 87 of the Convention had been breached, Italy acted in a manner contrary to its duty of good faith.

(g) In addition, Panama asserts that the reasons Italy used to justify the Decree of Seizure were contradictory. In its view, while Italy asserts that the arrest of the *M/V "Norstar"* was executed within the internal waters of Spain for the reason that its arrest on the high seas would have amounted to a breach of article 87 of the Convention, Italy based its Decree of Seizure on the constructive presence doctrine, which is applicable only to seizures on the high seas. Furthermore, once the Tribunal of Savona had held that the *M/V "Norstar"* conducted its business outside territorial waters, it is inconsistent to allege that the vessel was arrested for a crime that it was suspected of having committed in Italy. Accordingly, the Applicant requests the application of the principle of ***non concedit venire contra factum proprium*** because, if Italy had originally stated that the *M/V "Norstar"*s conduct had taken place outside its territorial waters, no offences were actually committed. The law prohibits Italy from now arguing in direct opposition to the conduct it itself had stated was responsible for this case being brought before the Tribunal.

All these points which have been emphasized constitute at least an abuse of rights on the part of Italy in the absence of evidence on the basis of which they could be characterized as bad faith.

II. STANDARD OF PROOF

What is the standard of proof applicable in this case?

In characterizing proof as the demonstration of the existence of a fact (in his *Dictionnaire de la terminologie du droit international*, p. 471), Basdevant recalls the *Queen Case* of 26 March 1872:

> One must follow, as a general rule of solution, the principle of jurisprudence, accepted by the law of all countries, that it is for the claimant to make the proof of his claim.

It is said today that "the applicant has the burden of proof" and, according to J.C. Wittenberg, "La théorie des preuves devant les juridictions internationales", *R.C.A.D.I. 1936*, p. 59, "written proof is that which comes from papers or documents such as to establish the alleged fact".

Consideration will now be given the methodology of proof before turning to the matter at hand. Written proof comes from papers or documents such as to establish the alleged fact, including treaties, correspondence, laws, regulations, orders, decrees, judicial and administrative acts, etc.

The ICJ states that:

> In accordance with its practice, the Court will first make its own determination of the facts and then apply the relevant rules of international law to the facts which it has found to have existed …
> (*Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo* v. *Uganda*), *Judgment, I.C.J. Reports 2005*, p. 168, para. 57).

The Court continues:

> These findings of fact necessarily entail an assessment of the evidence. The Court has in this case been presented with a vast amount of materials proffered by the Parties in support of their versions of the facts.
>
> The Court has not only the task of deciding which of those materials must be considered relevant, but also the duty to determine which of them have probative value with regard to the alleged facts.

> The greater part of these evidentiary materials appear in the annexes of the Parties to their written pleadings.
>
> The Parties were also authorized by the Court to produce new documents at a later stage.
>
> In the event, these contained important items.
>
> There has also been reference, in both the written and the oral pleadings, to material not annexed to the written pleadings but which the Court has treated as "part of a publication readily available" under Article 56, paragraph 4, of its Rules of Court.
>
> Those, too, have been examined by the Court for purposes of its determination of the relevant facts.
> (para. 58)

The Court concludes its methodological considerations in paragraph 59:

> As it has done in the past, the Court will examine the facts relevant to each of the component elements of the claims advanced by the Parties.
>
> In so doing, it will identify the documents relied on and make its own clear assessment of their weight, reliability and value.
>
> In accordance with its prior practice, the Court will explain what items it should eliminate from further consideration
>
> (see *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*), *Merits, Judgment, I.C.J. Reports 1986*, p. 50, para. 85; see equally the practice followed in the case concerning *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 3).

The particular characteristics of jurisdiction in international law explain the relative margin of discretion of the organ exercising it and the vital role played by parties in establishing a purely voluntary jurisdictional connection. They can be seen inter alia in the rules on evidence.

The evidentiary mechanisms show that the parties and the judicial body combine in establishing the legal truth.

On the one hand, it is for each party to prove its claims, both in relation to the facts on which they rely (including domestic law, which has the status of simple fact vis-à-vis the International Tribunal) and in relation to the law, whatever might often be said and in particular where the applicable rules are customary and the State invoking them has to establish both their substance and their applicability in its relations with the opposing party. On the other hand, however, the Tribunal has considerable latitude in most cases in assessing the probative value of evidence presented to it and plays an important role in establishing the truth; written or testimonial evidence is submitted to it, but it does not remain passive in relation to that evidence and has the power to examine witnesses, to request additional information from the parties, to have recourse to new measures of inquiry (expert opinions, inquiries) etc.; it may apply an adverse presumption to the failure by one party to produce evidence under its control; lastly, within the considerable latitude it is allowed by the rules on evidence, which do not follow any particular national system but rather the common set of their "general principles", it enjoys a wide margin of autonomy in respect of admissibility and the assessment of the probative value of evidence submitted to it.

The facts of the present case, viewed in light of the applicable rules of law, show extremely clearly the successive failures by Italy to fulfil its obligations to Panama under the Convention.

Italy has sought to evade its fundamental responsibility by placing it on Spain, which carried out the arrest of the *M/V "Norstar"*. However, the clauses establishing prerogatives in the Strasbourg Convention of 20 April 1959 are clear. They present a requesting State and a requested State, the latter acting in the name and on behalf of the former, in conformity with the Convention. Article 1 thereof provides:

> 1 The Contracting Parties undertake to afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party.

In truth, Spain itself had no interest in the seizure of the *M/V "Norstar"*. Its action simply follows the "International Letters Rogatory of the Tribunal of Savona to the Spanish Authorities, 11 August 1998" and Italy's order constituting a request for international judicial assistance sent to Spain.

It is thus Italy that initiated the letters rogatory and, consequently, it is Italy that is responsible for the actions of the Spanish authorities carried out in its name since, with Spain being the requested State, they were hardly responsible for conducting an investigation into the validity or invalidity of the arrest of the vessel in the context of a request for assistance.

Spain was accountable only for the manner in which the arrest was carried out, that is, for the protection of the integrity of the vessel and crew when arrested. This definition of mutual responsibility is inherent in the system of judicial assistance. This distinction between the responsibility of the requesting State and the responsibility of the requested State in the area of judicial assistance also means that, if a criminal charge is unfounded, it is the requesting State that is liable for compensation, not the requested State; any other conclusion would result in States' refusing to accept a request for judicial assistance.

What is more, in annex to its letter of 18 March 2003, Italy sent Spain the judgment of the Tribunal of Savona, requesting it to execute the release order. That is to say, Italy considered its request necessary in order for the vessel to be released. Similarly, Spain considered that the vessel was still Italy's responsibility when it requested its authorization to demolish the vessel in its letter of 6 September 2006.

The necessary conclusions must be drawn from these findings with regard to Italy's international responsibility, and in particular the issue – the crux of the present case – of the production of documents, to which Italy has systematically refused to grant access to Panama.

As we know from the statements made by the Italian expert Mr Esposito, Panama was legally entitled under Italian law to request the entire files from the administrative and criminal proceedings for the purposes of the present case.

In *United States Diplomatic and Consular Staff in Tehran* (*United States of America* v. *Iran*), *Judgment, I.C.J. Reports 1980*, p. 3, at p. 10, para. 11, the ICJ states:

> In the present case, the United States has explained that, owing to the events in Iran of which it complains, it has been unable since then to have access to its diplomatic and consular representatives, premises and archives in Iran; and that in consequence it has been unable to furnish detailed factual evidence on some matters occurring after 4 November 1979. It mentioned in particular the lack of any factual evidence concerning the treatment and conditions of the persons held hostage in Tehran.

In other words, no one is expected to do the impossible. In those circumstances, as in the case of the *M/V "Norstar"*, the burden of proof becomes volatile because what must be proved is significantly limited by what can be proved.

An international court or tribunal must adjudicate on the facts in dispute, which it may do only if the parties have both the right and the opportunity to furnish evidence to it with a view to the resolution of the dispute.

The criterion of relevance, which stems from the logical need to have available papers and documents such as to establish the facts alleged by the Applicant, would seem to apply.

The concept of *probatio diabolica* is a legal requirement for achieving an impossible proof. This can be viewed as a remedy whose purpose is to reverse the burden of proof or to grant additional rights to the Applicant.

There is hardly consensus between the Parties in this case on the rules on evidence, with regard to the burden of proof, the applicable standard of proof or the probative value of witnesses.

In respect of the request for further information made by the Tribunal concerning the cargo on board the *M/V "Norstar"* at the time of seizure and the monitoring and maintenance works carried out after the seizure, Italy declined its responsibilities when the detained vessel fell within its jurisdiction *ratione materiae*. It asserts that the ship owner and Panama were in possession of documentation stating that they did not have access to those documents, which remained on board the ship after the seizure. The documents were therefore placed under the authority and control of the Italian authorities, through the

Spanish authorities, from the arrest until the destruction of the *M/V "Norstar"* in 2015.

Italy was thus in a position to provide the documents to the Tribunal, as the Italian expert Mr Esposito enlightened the Tribunal. He stated, in response to the question whether Italian law permitted files in criminal cases to be produced as evidence, that "[t]he law provides for this … it must be acknowledged that the law makes it possible to transfer files from one case to another, having due regard to the rules".

Accordingly, Panama was legally entitled to request the whole files. Italy's refusal to grant access to those files was therefore contrary to Italian law.

Italy states in its letter to the Tribunal of 27 September 2018 that it is not in possession of any relevant documents. In its view, Panama's alleged justifications for not providing information on the issue at stake are untenable. It maintains that not only is Panama's answer speculative in nature, but the exercise of speculation is particularly extreme and riddled with contradictions.

The present case seems to centre on the question of the production of documents.

The relevance of the facts give rise to the relevance of the rules governing those facts. Such relevancy translates the application of the law, as the legally relevant facts permit the characterization and determination of the applicable law, allowing the judicature to give a ruling in order to settle the dispute. Note should also be taken of the comment made by Italy which seems to refer to extinctive prescription.

According to Italy, Panama cannot shift the blame to it for its own failure to provide adequate evidence in this case. In this regard, it claims that Panama must bear the evidential consequences of its significant delay in commencing this case.

That late commencement of the proceedings is in fact imputable to Italy. This question was examined in the Preliminary Objections phase. Paragraph 214 of the Judgment of 4 November 2016 states:

> The Tribunal observes that, in spite of several attempts by Panama to initiate discussion on the detention of the *M/V "Norstar"* and seek compensation for related damages, Italy maintained silence by not responding to the communications from Panama.

And paragraph 217 states:

> The Tribunal is of the opinion that by disregarding correspondence from Panama concerning the detention of the *M/V "Norstar"*, Italy in effect precluded possibilities for an exchange of views between the Parties.

The Tribunal should be cautious on this point. This is an approach which infers acquisitive prescription from extinctive prescription. A concept from the domestic order is simply transposed into the international order, the "time" element and the need to settle the claim having been highlighted. Since the subject-matter to which the concept is applicable is completely different in the two orders, prudence must be exercised in the way it is used. Furthermore, the centralized element (the State in the domestic order) is lacking in the international order.

As is stated by Judge Anzilotti,

> International law does not have the institution of either acquisitive or extinctive prescription, even in the form known as "immemorial" prescription; as a general rule, the passage of time is not sufficient to determine the acquisition or the loss of a right.
> (Cours de droit international, pp. 336–337, cited by Krystina Marek, *Identity and Continuity of States in International Law*, Geneva, 1954, p. 576; see also T.M. Ndiaye, "Les Falklouines et le droit international", *Annales Africaines, Revue de droit de Dakar*; 1983, pp. 25–59, in e-book, T.M. Ndiaye; Ecrits de Droit 2019, p. 44, footnote 49)

It is impossible for the judicature to make inquiries itself to establish all the facts of a case. To that end, it must benefit from the support of the parties to the proceedings in accordance with the relevant rules. It is for the parties to provide the court or tribunal with the facts. The burden of proof, that is to say, "[the

obligation] on the litigant who relies on a fact to demonstrate its existence, upon pain of it being discounted in the decision on the case" (J. Salmon, *Dictionnaire de droit international public*, Jean Salmon, *op. cit.*, p. 168), may take time.

The burden of proof requires the parties to bring to the attention of the Tribunal, in the forms prescribed by the Statute and the Rules, all the legally relevant facts whose characterization allows the dispute to be settled. This means that the applicant must prove the facts on which its action is based and the respondent must prove those on which its objection is based. Proof is to be furnished by the party alleging a fact rather than by the party denying it. Proof lies with the parties, not with the judicature.

The judicature has the capacity freely to assess evidence submitted to it. Although there are no general, predetermined rules on the probative force of a certain category of evidence, the circumstances in which it was determined must be taken into account. In the case at issue, what must be proven was limited by what could be proven, such that it is justified to adjust the applicable standard of proof. The Tribunal should have adjusted the standard of proof to be satisfied by the Applicant on the ground that the Respondent refused the request for evidence submitted to it.

III. REPARATION

As regards reparation, it should be borne in mind that the law on responsibility is now regulated by the International Law Commission's Draft Articles on Responsibility, article 1 of which provides that "[e]very internationally wrongful act of a State entails the international responsibility of that State."

There must therefore be an internationally wrongful act, that is to say, a breach of an international norm, and the wrongful act in question must be carried out by a State, which entails its responsibility.

The breach of the international obligation can be seen as a failure by a State to comply with the conduct required by an international norm which prescribes, prohibits or permits a certain attitude. The wrongful act is thus manifested in a discrepancy between what should be done and what is done, either by going beyond what is permitted by the norm or by doing less than what should be done, thereby giving rise to non-compliance. In addition, the norm laying down the obligation must be in force for the State concerned at the time of

the act whose wrongfulness is at issue, in accordance with article 13 of the ILC Draft Articles. In the present case, Panama and Italy are both States Parties to the United Nations Convention on the Law of the Sea.

The rules on reparation are well established in international law. As the Tribunal and the PCIJ state:

> It is a well-established rule of international law that a State which suffers damage as a result of an internationally wrongful act by another State is entitled to obtain reparation for the damage suffered from the State which committed the wrongful act and that "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed".
> (*M/V "SAIGA"* (*No. 2*), (*Saint Vincent and the Grenadines* v. *Guinea*), *Judgment, ITLOS Reports 1999*, p. 10, at p. 65, para. 170; *M/V "Virginia G"* (*Panama/Guinea-Bissau*), *Judgment, ITLOS Reports 2014,* p. 4, para. 428; *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47)

Under article 31, paragraph 1, of the ILC Draft Articles on State Responsibility, "[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."

Reparation can take various forms. It may be in the form of restitution in kind, compensation, satisfaction, assurances or guarantees of non-repetition. It may also take the form of monetary compensation for economically quantifiable damage as well as for non-material damage, depending on the circumstances of the case, including such factors as the conduct of the State which committed the wrongful act and the manner in which the violation occurred. (*M/V "SAIGA"* (*No. 2*), *op. cit.*, para. 171)

In the present case, by the Decree of Seizure of the *M/V "Norstar"* issued by the Public Prosecutor at the Tribunal of Savona, by the request for execution and by the arrest and detention of the vessel, Italy breached article 87, paragraph 1, of the Convention and, pursuant to the abovementioned rules on reparation, Italy is under an obligation to make reparation for the damage caused which engages its responsibility.

It is not easy to deal with responsibility without the essential facts, given the associated risk of speculation. In the absence of the most relevant evidence, the circumstances of the case at issue should be examined.

There are three important elements: the extension of the application of Italy's criminal legislation to the high seas; the Decree of Seizure; and the arrest and detention of the *M/V "Norstar"*. The probative seizure should give rise to the inspection, the report from which determines: the condition of the vessel, the security system, maintenance and related costs depending on the duration of the detention. With the inspection report and the logbook, it is possible to determine the damage and thus the reparation, whether in the form of a *restitutio in integrum*; *lucrum cessans* or *damnum emergens*, depending on the circumstances.

By ordering the arrest of the *M/V "Norstar"* and requesting its execution, within the framework of its criminal jurisdiction, in respect of offshore bunkering activities, and by applying its customs laws to those activities, Italy breached article 87, paragraph 1, of the Convention by hindering the vessel's ability to navigate and conduct lawful activities. Thus, the right of Panama and of vessels flying its flag to enjoy freedom of navigation was breached. Consequently, as the State responsible for an internationally wrongful act, Italy is under an obligation to make reparation for the damage caused by its breach of article 87, paragraph 1, of the Convention. Reparation covers in particular the damage caused by the arrest and detention of the *M/V "Norstar"*. Italy claimed that the causal link was broken because Panama failed to retrieve the *M/V "Norstar"* in 1999 and again in 2003, after the Italian courts ordered the release of the vessel against payment of a bond.

However, since the arrest of the *M/V "Norstar"* was wrongful, the Respondent had the duty to order the release of the vessel without any consideration or bond. The demand for a bond for the release of a vessel which should not have been arrested was unlawful. Furthermore, as the Applicant states, the ship owner should not have been expected to take possession of the *M/V "Norstar"* in 2003, five years after the seizure, as the vessel had not received the necessary maintenance work and had not been the subject of the corresponding mandatory surveys. In addition, it is apparent from the case file (Reply, para. 30)

that, although the Italian courts ordered the release, that decision was never executed, nor has Italy taken any further steps to comply with it.

It should be observed that, by reason of the letters rogatory, it was Italy, and not the ship owner or the flag State, that had the responsibility for maintaining the vessel after its arrest. It was therefore its responsibility for showing acknowledgment of the surveys required for the *M/V "Norstar"* to maintain its class, because it is for the party responsible for the arrest to provide for the maintenance of the vessel. It must update the ship's class certificate and designation of the *M/V "Norstar"*.

It should be noted, lastly, that Panama was refused access to the vessel, that is to say, the internationally wrongful act continued and the causal link was never broken. This conclusion should have been reflected in the obligation of mitigation and compensation. This consists in the payment of a sum of money as reparation for damage suffered by the victim of a wrongful act. As the International Law Commission states:

> 1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
> 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.
> (ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001 version), article 37)

In the present case, the damage has not been made good by restitution, as the *M/V "Norstar"* was detained for a very long period under Italy's control and authority. It decayed so much that it had to be sold in public auction as scrap.

In what condition was the *M/V "Norstar"* at the time of its arrest? The parties have presented conflicting assertions concerning the seaworthiness of the vessel. They rely on documentary and testimonial evidence of doubtful probative value. It can be noted that there is no record of the bad physical condition of the *M/V "Norstar"* at the time of its arrest in the "Report of Seizure" issued by the Spanish authorities on 25 September 1998. The Report indicates

that the captain "resides in the mv Norstar" and that "it is possible to locate him at the vessel". This reflects the fact that the Respondent's view that the *M/V "Norstar"* was in a state of abandonment at the time of its arrest cannot be accepted. In addition, insufficient evidence was produced before the Tribunal to conclude that the vessel was not seaworthy at the time of its arrest.

As regards the value of the *M/V "Norstar"* at the time of arrest, it should be noted that the "Statement of Estimation of Value" produced by the Applicant is based on an estimation made without a physical inspection of the vessel and its class records. The Applicant acknowledges that the estimation was given on the assumption that the equipment of the *M/V "Norstar"* was stated to be in good working order; that the vessel had been described as being maintained in a condition normal for its age and type; and that the class had been maintained without recommendation. It transpires that this assumption is not supported by evidence produced before the Tribunal.

Accordingly, the Tribunal will have to exercise its discretionary power in establishing the amount of compensation to be paid to Panama in respect of the loss of the *M/V "Norstar"*.

In short, the causal link is determined *ab initio* once and for all. In this instance, reparation covers damage directly caused by the arrest and detention of the *M/V "Norstar"*, which had not received the necessary maintenance work and had not been the subject of the corresponding mandatory surveys. Furthermore, Italy had a duty to take the necessary steps to enforce the order and place the vessel at the disposition of the ship owner so that he could appraise its condition through the intermediation of a competent authority.

As regards the value of the *M/V "Norstar"* at the time of the arrest, it must be noted that the Tribunal is unable to adjudicate on this point for lack of information and documentary and testimonial evidence produced by the Parties on the facts of the case at issue. It had to resolve to accept the estimate of the value of the *M/V "Norstar"* made by the expert called by Italy, which has not been disputed by Panama.

It should be borne in mind that Panama claims that damages should include the market value of the vessel, the loss of profits and the financial damage to the ship owner and charterer, along with other heads of damage arising from the arrest and detention of the *M/V "Norstar"*.

(*signed*) Tafsir Malick Ndiaye