

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



STATEMENT BY

H.E. JUDGE JIN-HYUN PAIK

PRESIDENT
OF THE
INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

ON THE REPORT OF THE TRIBUNAL FOR 2018

AT THE TWENTY-NINTH MEETING OF STATES PARTIES TO THE
UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

17 JUNE 2019

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Mr President,

1 It is a pleasure for me to address the Meeting of States Parties and to present the Annual Report of the International Tribunal for the Law of the Sea for the year 2018. On behalf of the Tribunal, I convey to you, Mr President, our congratulations on your election as President of this Meeting and wish you every success in the completion of your mandate.

Mr President,

Distinguished delegates,

2 The Annual Report of the Tribunal gives an account of the Tribunal's activities for the period 1 January to 31 December 2018. In my statement today, I will refer to some of the main aspects of the report and then concentrate on providing the Meeting with additional information on more recent developments which have taken place since the beginning of the year 2019 – developments which have kept, and continue to keep, the Tribunal busy.

3 I will first address the Tribunal's judicial work and I am glad to note that the Tribunal has been quite active this year.

4 In this respect, I will give an overview of the latest two decisions of the Tribunal: the Judgment in the *M/V "Norstar" case (Panama v Italy)* and the Order on provisional measures in the *Case concerning the detention of three Ukrainian naval vessels (Ukraine v Russian Federation)*. I will also provide you with some information on a further case currently pending before the Tribunal, namely the *M/T "San Padre Pio" Case (Switzerland v Nigeria)*.

5 Let me first address the *M/V "Norstar" Case*. You may recall that this case had been instituted by Panama against Italy on 17 December 2015. In a first phase of the case devoted to the preliminary objections raised by Italy, the Tribunal delivered a judgment on 4 November 2016 in which it found that it had jurisdiction to adjudicate the dispute and that the application of Panama was admissible.

Thereafter, proceedings on the merits resumed. The Tribunal held oral proceedings in September 2018 and delivered its judgment on the merits on 10 April 2019.

6 The case concerns the arrest and detention of the *M/V "Norstar"*, an oil tanker flying the flag of Panama. From 1994 until 1998, the vessel was engaged in supplying gasoil to mega yachts on the high seas in the Mediterranean Sea. In August 1998, an Italian public prosecutor issued a "decree of seizure" against the vessel, in the context of criminal proceedings for tax evasion. In September 1998, the Spanish authorities, at the request of Italy, seized the vessel when it was anchored in the bay of Palma de Mallorca, Spain. An Italian court later, in 2003, revoked the seizure and ordered that the vessel be returned to the owner, however, the owner never collected it. Instead, the vessel remained in port in Mallorca until 2015, when it was sold at public auction.

7 In its Judgment of 10 April 2019, the Tribunal first determined that it was "the bunkering activities of the *M/V "Norstar"* on the high seas" that "constitute[d] not only an integral part, but also a central element, of the activities targeted by the Decree of Seizure and its execution"¹ This gave the Tribunal an opportunity to further clarify the legal status of bunkering under the Convention. In the *M/V "Virginia G" Case*, the Tribunal had found that a coastal State may regulate the bunkering of foreign vessels engaged in fishing in the exclusive economic zone, while the coastal State does not have such competence "with regard to other bunkering activities, unless otherwise determined in accordance with the Convention"² In the *M/V "Norstar"* Case, the Tribunal made it clear that "bunkering on the high seas is part of the freedom of navigation to be exercised under the conditions laid down by the Convention and other rules of international law"³ Therefore, the Tribunal concluded that "the bunkering of leisure boats carried out by the *M/V "Norstar"* on the high seas falls within the freedom of navigation under article 87 of the Convention"⁴

8 The Tribunal went on to examine the possible infringement of the freedom of navigation by Italy in this case. It noted that article 87 of the Convention "proclaims

¹ *M/V "Norstar"*, Judgment, para. 186

² See *M/V "Norstar"*, Judgment, para. 219

³ *M/V "Norstar"*, Judgment, para. 219

⁴ *Id.*, para. 219

that the high seas are open to all States”⁵ and that, “save in exceptional cases, no State may exercise jurisdiction over a foreign ship on the high seas ”⁶ In this context, the Tribunal observed that the “[f]reedom of navigation would be illusory if a ship – a principal means for the exercise of the freedom of navigation – could be subject to the jurisdiction of other States on the high seas ”⁷

9 In the Tribunal’s view, therefore, “any act of interference with navigation of foreign ships or any exercise of jurisdiction over such ships on the high seas constitutes a breach of the freedom of navigation, unless justified by the Convention or other international treaties ”⁸ According to the Tribunal, this may be the case with “any act which subjects activities of a foreign ship on the high seas to the jurisdiction of States other than the flag State”⁹ and “even acts which do not involve physical interference or enforcement on the high seas” ¹⁰

10 As a consequence, The Tribunal stated that, “if a State applies its criminal and customs laws to the high seas and criminalizes activities carried out by foreign ships thereon, it would constitute a breach of article 87 of the Convention, unless justified by the Convention or other international treaties” ¹¹ This would be so even “if the State refrained from enforcing those laws on the high seas ”¹²

11 On the basis of these considerations, the Tribunal found that “Italy, through the Decree of Seizure , the Request for its execution, and the arrest and detention of the vessel, breached article 87, paragraph 1, of the Convention ”¹³ Panama’s further claims, however, in which it alleged that Italy had breached the good faith obligation under article 300 of the Convention, did not succeed In the view of the Tribunal, they were either not within its jurisdiction or Panama did not provide sufficient evidence in this regard

⁵ *M/V “Norstar”*, Judgment, para 214

⁶ *Id.*, para 216

⁷ *Id.*, para 216

⁸ *Id.*, para 222

⁹ *Id.*, para 224

¹⁰ *Id.*, para 223

¹¹ *Id.*, para 225

¹² *Id.*, para 225

¹³ *Id.*, para 230

12 Italy's breach of article 87, paragraph 1, of the Convention was considered by the Tribunal to be an "internationally wrongful act" entailing Italy's obligation to compensate Panama for damage caused thereby¹⁴ It awarded Panama compensation for the loss of the *M/V "Norstar"* in the amount of US\$ 285,000 with interest However, the Tribunal dismissed Panama's other claims for compensation, including claims relating to loss of profits and loss and damage to the charterer of the *M/V "Norstar"*

13 The Judgment in the *M/V "Norstar"* case represents a long-awaited contribution of the Tribunal to the interpretation and application of the freedom of navigation under article 87 of the Convention, one of the fundamental principles of the law of the sea Further, the Judgment also adds to the development of the rules of evidence by providing a concise overview of the factors that it takes into account in assessing the relevance and probative value of witness and expert testimony¹⁵

Mr President,

14 A further important decision was delivered by the Tribunal last month, on 25 May 2019, namely its Order on provisional measures in the *Case concerning the detention of three Ukrainian naval vessels (Ukraine v. Russian Federation)*

15 The case relates to an incident that took place on 25 November 2018 in the Black Sea near the Kerch Strait During this incident, three Ukrainian naval vessels and the 24 servicemen on board were arrested and detained by authorities of the Russian Federation In the course of the events, force was used by Russian coastguard vessels, which fired shots at one of the Ukrainian vessels, wounding some of the servicemen Criminal proceedings were instituted against the servicemen and they remain in prison in the Russian Federation

16 On 16 April 2019, Ukraine submitted to the Tribunal a Request for the prescription of provisional measures under article 290, paragraph 5, of the Convention Ukraine had previously instituted arbitral proceedings against the

¹⁴ *M/V "Norstar"*, Judgment, para 321

¹⁵ *Id.*, para 99

Russian Federation under Annex VII to the Convention by a Notification and Statement of Claim dated 31 March 2019

17 On 30 April 2019, the Russian Federation informed the Tribunal of its “decision not to participate in the hearing” However, the Russian Federation submitted a Memorandum to the Tribunal regarding its position on the circumstances of the case

18 The hearing on the case took place on 10 May 2019 and, in its final submissions, Ukraine requested the Tribunal to prescribe provisional measures “requiring the Russian Federation to promptly [r]elease the Ukrainian naval vessels . and return them to the custody of Ukraine, [s]uspend criminal proceedings against the twenty-four detained Ukrainian servicemen and refrain from initiating new proceedings, and [r]elease the twenty-four detained Ukrainian servicemen and allow them to return to Ukraine ”¹⁶

19 Re-affirming its jurisprudence in the “*Arctic Sunrise*” Case, the Tribunal stated that “the absence of a party or failure of a party to defend its case does not constitute a bar to the proceedings and does not preclude the Tribunal from prescribing provisional measures, provided that the parties have been given an opportunity of presenting their observations on the subject ”¹⁷

20 Under article 290, paragraph 5, of the Convention, the Tribunal may prescribe provisional measures if, among other requirements, it considers that *prima facie* the arbitral tribunal which is to be constituted would have jurisdiction

21 One of the key questions that the Tribunal had to decide with regard to the *prima facie* jurisdiction was “whether article 298, paragraph 1(b), of the Convention is applicable, thus excluding the present case from the jurisdiction of the Annex VII arbitral tribunal ”¹⁸ It may be noted that both Parties had made declarations under

¹⁶ *Detention of three Ukrainian naval vessels (Ukraine v Russian Federation), Provisional Measures, Order of 23 April 2019*, para 23

¹⁷ *Id* , para 27

¹⁸ *Detention of three Ukrainian naval vessels (Ukraine v Russian Federation), Provisional Measures, Order of 23 April 2019*, para 46

article 298, paragraph 1(b), of the Convention, excluding from the compulsory mechanism for the settlement of disputes under the Convention disputes concerning military activities

22 The Russian Federation maintained that “the dispute submitted to the Annex VII arbitral tribunal concerns military activities” and was therefore excluded from the jurisdiction of the arbitral tribunal ¹⁹ Ukraine, however, asserted that “the dispute does not concern military activities, but rather law enforcement activities” and was therefore not excluded from the arbitral tribunal’s jurisdiction ²⁰

23 In the view of the Tribunal, “the distinction between military and law enforcement activities cannot be based solely on whether naval vessels or law enforcement vessels are employed in the activities in question”²¹ Rather, the distinction “must be based primarily on an objective evaluation of the nature of the activities in question, taking into account the relevant circumstances in each case”²² Three such circumstances were examined by the Tribunal in this regard

24 First, it appeared to the Tribunal “that the underlying dispute leading to the arrest concerned the passage of the Ukrainian naval vessels through the Kerch Strait”²³ In this respect, the Tribunal observed that “it is difficult to state in general that the passage of naval ships *per se* amounts to a military activity”²⁴ It also emphasized that, “[u]nder the Convention, passage regimes, such as innocent or transit passage, apply to all ships”²⁵

25 Second, the Tribunal found that “[t]he facts indicate that at the core of the dispute was the Parties’ differing interpretation of the regime of passage through the Kerch Strait”²⁶ In the view of the Tribunal, “such a dispute is not military in nature”²⁷

¹⁹ Id , para 50

²⁰ Id , para 50

²¹ Id , para 64

²² Id , para 66

²³ Id , para 68

²⁴ Id , para 68

²⁵ Id , para 68

²⁶ *Detention of three Ukrainian naval vessels (Ukraine v Russian Federation), Provisional Measures, Order of 23 April 2019*, para 72

²⁷ Id , para 72

26 Third, considering the context in which the Russian Federation used force when arresting the Ukrainian vessels and the sequence of events, the Tribunal held the view that “what occurred appears to be the use of force in the context of a law enforcement operation rather than a military operation.”²⁸

27 For the Tribunal, these circumstances “suggest[ed] that the arrest and detention of the Ukrainian naval vessels by the Russian Federation took place in the context of a law enforcement operation”²⁹ In addition, the “subsequent proceedings and charges against the servicemen further support[ed] the law enforcement nature of the activities of the Russian Federation”³⁰ Accordingly, the Tribunal “consider[ed] that *prima facie* article 298, paragraph 1(b), of the Convention does not apply in the present case”³¹

28 The Tribunal then examined the plausibility of the rights asserted by Ukraine Ukraine claimed rights to “the immunity of warships and naval auxiliary vessels and their servicemen on board under the Convention and general international law”³² In the view of the Tribunal, two of the Ukrainian vessels “are warships within the meaning of article 29 of the Convention” and the third “is a ship owned or operated by a State and used only on government non-commercial service, as referred to in article 96 of the Convention”³³ On this basis, it considered that “the rights claimed by Ukraine on the basis of articles 32, 58, 95 and 96 of the Convention are plausible under the circumstances”³⁴

29 The Tribunal further found that “there is a real and imminent risk of irreparable prejudice to the rights of Ukraine pending the constitution and functioning of the Annex VII arbitral tribunal”³⁵ In this context, recalling its statement in *ARA Libertad*, the Tribunal observed that “a warship, as defined by article 29 of the

²⁸ Id , para 74

²⁹ Id , para 75

³⁰ Id , para 76

³¹ Id , para 77

³² Id , para 96

³³ Id , para 97

³⁴ Id , para 97

³⁵ *Detention of three Ukrainian naval vessels (Ukraine v Russian Federation), Provisional Measures, Order of 23 April 2019*, para 113

Convention, 'is an expression of the sovereignty of the State whose flag it flies' ³⁶ It also emphasized that "[t]his reality is reflected in the immunity [the warship] enjoys under the Convention and general international law" ³⁷

30 In the Tribunal's view, "any action affecting the immunity of warships is capable of causing serious harm to the dignity and sovereignty of a State and has the potential to undermine its national security" ³⁸ The Tribunal also noted that "the continued deprivation of liberty and freedom of Ukraine's servicemen raises humanitarian concerns" ³⁹

31 As provisional measures, the Tribunal prescribed that "[t]he Russian Federation shall immediately release the Ukrainian naval vessels and return them to the custody of Ukraine" ⁴⁰ In addition, "[t]he Russian Federation shall immediately release the 24 detained Ukrainian servicemen and allow them to return to Ukraine" ⁴¹ Furthermore, "Ukraine and the Russian Federation shall refrain from taking any action which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal" ⁴²

32 Finally, the Tribunal fixed 25 June 2019 as the date by which both Parties have to submit to the Tribunal a report and information on compliance with any provisional measures prescribed pursuant to article 95, paragraph 1, of the Rules ⁴³

Mr President,

33 I wish to report to you that most recently, on 21 May 2019, a further request for the prescription of provisional measures under article 290, paragraph 5, of the Convention was submitted to the Tribunal by Switzerland. The Request relates to a dispute between Switzerland and Nigeria concerning the arrest and detention of the vessel *M/T "San Padre Pio"*, its crew and cargo. Previously, by a notification

³⁶ Id., para. 110

³⁷ Id., para. 110

³⁸ Id., para. 110

³⁹ Id., para. 112

⁴⁰ Id., para. 124

⁴¹ Id., para. 124

⁴² Id., para. 124

⁴³ Id., paras. 121, 124

addressed to Nigeria on 6 May 2019, Switzerland had instituted arbitral proceedings under Annex VII to the Convention in this dispute

34 According to the Request, the *M/T "San Padre Pio"*, a motor tanker flying the flag of Switzerland, "was intercepted and arrested by the Nigerian Navy on 23 January 2018" while it was engaged in ship-to-ship transfers of gasoil in the exclusive economic zone of Nigeria. The vessel was then ordered to proceed to Port Harcourt (Nigeria), where it is still detained.

35 I will of course refrain from making any comments on this case as it is currently pending before the Tribunal. I may however inform you that the Tribunal will hold a public hearing on 21 and 22 June 2019. It is to be expected that the Tribunal will deliver a decision in the *M/T "San Padre Pio" Case* in early July 2019.

Mr President,

36 I would now like to make a few remarks regarding organizational matters. In this respect, I wish to inform the Meeting that the Registrar of the Tribunal, Mr Philippe Gautier, has announced his resignation effective 31 July 2019 further to his election as Registrar of the International Court of Justice on 22 May 2019. Mr Gautier has served the Tribunal for 22 years, first as Deputy Registrar from 1997 to 2001, then as Registrar from 2001. On behalf of the Tribunal, I wish to express our gratitude and appreciation to Mr Gautier for his outstanding service to the Tribunal for more than two decades. While we regret that he is leaving the Tribunal, we also congratulate Mr Gautier upon his election and wish him every success in the discharge of his new responsibilities.

37 The registrar is one of the key officials of the Tribunal and, therefore, steps have been taken to fill this vacancy as soon as possible. On [12 June] 2019, the Tribunal issued a vacancy announcement which has been notified to the Permanent and observer missions in New York and will be published shortly in different media and formats to ensure it is widely disseminated. After the closing date for applications/expressions of interest, the Tribunal will proceed to elect the new registrar in accordance with its Statute and Rules. I wish to recall that, pursuant to

article 32 of the Rules of the Tribunal, the “Tribunal shall elect its Registrar by secret ballot from among candidates nominated by Members ”

38 Let me also mention that in 2018, as in previous years, the Tribunal held two sessions devoted to legal and judicial as well as organizational and administrative issues. The Annual Report which is before you includes a review of these issues. As usual, the Registrar will address the budgetary matters of the Tribunal in a separate statement.

Mr President,

39 In addition to its judicial and administrative work, the Tribunal conducts various activities with the aim of providing capacity building in the law of the sea and of expanding knowledge of the Tribunal’s role in the settlement of disputes. As in previous years, I would like to take this opportunity to update you on these activities.

40 During the period 2018-2019, for the twelfth time, a nine-month capacity-building and training programme on dispute settlement under the Convention was conducted with the support of the Nippon Foundation. Fellows from Argentina, Benin, Comoros, Papua New Guinea, Singapore and Ukraine participated this year. I am glad to inform you that the selection process for the thirteenth edition of the programme, for the period 2019-2020, has now been completed and the new fellows will arrive in Hamburg in July. I wish to express the Tribunal’s deep appreciation of the ongoing support given to this programme by the Nippon Foundation.

41 In addition, the Tribunal’s internship programme offers training opportunities to university students. During a three-month internship, they can gain an understanding of the work and functions of the Tribunal. In 2018, 14 persons from 14 different States served as interns at the Tribunal.

42 The Tribunal also provides support to the International Foundation for the Law of the Sea, which organizes an annual Summer Academy. Last year, the twelfth session of the Academy was held at the Tribunal’s premises from 22 July to 17 August 2018 and 39 participants from 29 different countries attended it.

43 In order to provide financial assistance to participants from developing countries in the internship programme and the Summer Academy, special trust funds have been established with the support of the Korea Maritime Institute, the China Institute of International Studies and the Government of China. I wish to express our sincere appreciation to these bodies for their contributions to the trust funds.

44 The Tribunal also regularly organizes regional workshops that further enhance capacity building in the law of the sea. Thirteen of those workshops have been held so far, the most recent one being in May 2018 in Cabo Verde. Another workshop was planned to be held in May 2019 in Montevideo (Uruguay). It had to be postponed, however, as the Tribunal was seized with an urgent case. It is now planned to hold the Montevideo workshop in November 2019.

Mr President,
Distinguished delegates,

45 This brings me to the end of my statement. Before I conclude, let me emphasize that the Tribunal benefits from the excellent cooperation with the United Nations and in this respect, I wish to express our gratitude to the Secretary-General, the Legal Counsel and the Director of the Division for Ocean Affairs and the Law of the Sea and her staff for their support and cooperation.

I thank you all for your kind attention.