# Dissenting Opinion of Judge *ad hoc* Treves

1. To my regret, I could not join the Tribunal in finding that it had jurisdiction and that Panama's Application was admissible. I do not share the approach taken in the Judgment, as I am convinced that the Tribunal lacks jurisdiction and that Panama's request is inadmissible. The present Opinion sets out the main reasons supporting this conviction, and should not be read as agreement on my part as regards the aspects not discussed in it.

2. I voted against on the two points of the operative part. Had the operative part been articulated so that a separate vote could have been taken on each of Italy's objections to jurisdiction and admissibility, a more nuanced view of the position of the Members of the Tribunal, including myself as *ad hoc* judge, would have emerged, to great advantage for transparency.

*Panama's Declaration under article 287 of the Convention and the scope of the Tribunal's jurisdiction*

3. The present case is submitted by Panama relying on the declarations made by the Parties under article 287 of the Convention to indicate their preference as to the court or tribunal to which a dispute may be submitted in order to trigger compulsory jurisdiction under article 286. While the Italian declaration was submitted in 1997 and is formulated in general terms, Panama's declaration was submitted in 2015 and concerns only the dispute between Panama and Italy "concerning the interpretation and application of UNCLOS that arose from the detention of the Motor Tanker NORSTAR, flying the Panamanian flag."

4. Whether restricting a declaration under article 287 to one specific case is compatible with that article is debatable. I will not enter into this discussion as the Tribunal, rightly or wrongly, is of the view that the precedent of the *M/V "Louisa"* judgment settles the issue.

5. I refer to Panama's declaration in order to make the point that the jurisdiction of the Tribunal *ratione materiae* cannot extend beyond what is

included in the declaration, namely a dispute arising from the detention of the *Norstar*. "Detention" (the more technical and narrow term "arrest" is used by Panama in its Application together with "detention") is used when a vessel is precluded by a State authority from leaving a port or anchorage under that State's sovereignty. This emerges, *inter alia*, from the use of this term in article 292, paragraph 1, of the Convention.

6. The Judgment, while finding that a dispute exists between Panama and Italy, studiously avoids specifying what its object is. This aims, in my view, at facilitating the connection of the dispute with article 87 of the Convention, which, as I will argue later, is the aspect of the Judgment I find most objectionable. A correct reading of Panama's declaration would have been sufficient to preclude such a connection from being covered by it.

*The position of Mr Carreyó and the requirement of article 283*

7. The Judgment dwells at length on whether various communications sent by Mr Carreyó to Italian authorities may be deemed to come from a representative of Panama and concludes that, from the receipt of Panama's note verbale of 31 August 2004, "Italy had sufficient knowledge of the authorization given to Mr. Carreyo by Panama" and that this note verbale "refers to Mr. Carreyo's powers as representative of Panama in general terms and that these powers are not limited to the procedures under article 292 of the Convention nor do they prevent him from representing Panama during the prelitigation phase" (para. 96).

8. A perusal of the note verbale of 31 August 2004 shows, however, that this conclusion is far from being "clear and unequivocal" as the Tribunal presents it in paragraph 96 of the Judgment. The note verbale states that Mr Carreyó acts as representative of Panama and of the interests of the *Norstar* "before the Court[1] of the International Tribunal for the Law of the Sea in Hamburg". The note refers, as the "means" through which Mr Carreyó acts as a representative, to a note of 2 December 2000. This note was unknown to Italy until Mr Carreyó transmitted to it a copy with a fax of 31 August 2004 which misleadingly described it as authorizing him "to act on behalf of the Government of Panama in the case of the *M/V Norstar*." The text of the note of 2 December 2000 does not, however, give Mr Carreyó such wide powers of representation. It is a letter

1 *Sic*; the Spanish original is correct.

addressed to the Registrar of the Tribunal stating that Mr Carreyó was authorized to represent Panama before the Tribunal "as laid down in article 292 of the United Nations Convention on the Law of the Sea" and that he would represent the interests of the *M/V "Norstar"* before the Tribunal. Mr Carreyó's powers were thus limited to prompt release proceedings, and it was not clear whether it was envisaged that such proceedings should be brought directly by Panama represented by Mr Carreyó, or by Mr Carreyó as representative of the *M/V "Norstar"* "on behalf" of Panama under article 292, paragraph 2.

9. On the basis of these documents, Italy was justified in assuming that Mr Carreyó's powers concerned nothing other than prompt release proceedings. This assumption was even more justified considering that, in 2004 and up to 29 April 2015, prompt release proceedings were the only proceedings for which Italy and Panama could be parties to a case before ITLOS. In fact, up to 29 April 2015, Panama had not made the declaration under article 287, so that the competent forum for a contentious case would have been an Annex VII arbitral tribunal and not ITLOS.

10. The lack of reaction on the part of Italy to Mr Carreyó's communications, and also to the notes verbales of Panama which showed the narrowness of the powers conferred on him, is perhaps to be regretted in terms of courtesy, but understandable and justifiable – and certainly not evidence of bad faith.

11. In light of the foregoing, I cannot share the Tribunal's view according to which the fault for the lack of the exchange of views under article 283 must be attributed to Italy. The fact remains, nonetheless, that such exchange of views has not taken place. A necessary pre-requisite for jurisdiction is thus missing.

*The alleged dispute and article 87 of the Convention*

12. The legitimate doubts as to the status of Mr Carreyó in my view justify the fact that Italy did not contradict his allegations and give support to its view that there was no dispute in the legal sense between Panama and Italy. The

Tribunal nevertheless reaches the conclusion that a dispute existed although it does not specify its object. The Tribunal, moreover, accepts the view that the dispute concerned the interpretation or application of the Convention. The reason put forward is that Panama had invoked a possible violation of article 87 of the Convention, arguing on the basis of the fact that the decree of seizure of the Public Prosecutor of the Court (*Tribunale*) of Savona concerned activities conducted on the high seas.

13. I do not agree with this argument, which could perhaps be utilized in provisional measures proceedings in order to support the view that jurisdiction existed *prima facie.* But a decision on preliminary objections to jurisdiction, such as the present one, is decided by a judgment and not *prima facie*. In my view, it would have required, in my view, to submit the claim of the existence of jurisdiction to be subjected to a more rigorous test. Such a test should not have been limited to the arguments of the Parties. In matters of jurisdiction, the Tribunal must be satisfied that it has jurisdiction.

14. In particular, the following should have been taken into account by the Tribunal. Italy exercised its sovereign right to adjudicate alleged criminal acts consisting of violation of its fiscal and customs laws utilizing the *M/V "Norstar"* as an instrument. During the proceedings, on 11 August 1998, the Public Prosecutor of Savona issued a decree of seizure of the *"Norstar"* as *corpus delicti*; the vessel was effectively seized, owing to the cooperation of the Spanish authorities, in the Bay of Palma de Mallorca in September 1998. On 13 March 2013, the Court (*Tribunale*) of Savona acquitted the accused and revoked the seizure of the vessel. The revocation became final as there was no recourse in appeal concerning it, while the acquittal of the persons accused was submitted to appeal and later confirmed by the Court of Appeal of Genova.

15. There is no difference of views between Panama and Italy as to whether the bunkering of yachts on the high seas is legal. Both affirm that it is – Italy through the voice of its judiciary following the proceedings before the Tribunal of Savona and the Court of Appeals of Genova. The issue that remains open between the two States is only the question of damages incurred by the *M/V "Norstar"* in the exercise of Italy's sovereign right to adjudicate suspected crimes. It cannot be said, however, that these damages are the consequence of a wrongful act. It may be argued that reparation may be claimed nonetheless. Italy's domestic legislation provides means for obtaining such reparation. There may perhaps also be room for arguing that reparation may be claimed under international law. But it would not be reparation for a wrongful act.

Moreover, would it be a claim in some manner connected with the interpretation or application of the Convention? I submit that it would not. There is one clear example of a provision of the Convention prescribing the compensation of damage caused by acts that are not wrongful. This is article 110, paragraph 3. But the present case is not encompassed by it.

16. The foregoing seems to me sufficient to argue that the dispute arising from the detention of the *M/V "Norstar"* has nothing to do with the interpretation or application of the Convention.

17. The Tribunal also states that article 300, and not only article 87, of the Convention may be relevant in determining its jurisdiction. In light of the precedents, duly recalled in the Judgment, according to which article 300, concerning good faith and abuse of rights, cannot be invoked on its own, it would become necessary to hold that abuse of rights or lack of good faith applies in connection with the application or interpretation of article 87. This, in light of the previous arguments, cannot be sustained.

18. I recognize that some of the above points might be seen as belonging to the merits. This would have been a reason for declaring, under article 97, paragraph 6, of the Rules of the Tribunal, that the objection was not of an exclusively preliminary character.

*Exhaustion of local remedies*

19. Another aspect of the Judgment with which I disagree concerns the Tribunal's rejection of Italy's objection to the admissibility of Panama's Application on the basis of the non-exhaustion of local remedies. Although it refers to it, the Tribunal does not discuss the position held by it in the *M/V "Virginia G"* Judgment, relying on the ILC Articles on Diplomatic Protection, whereby, in order to establish whether in a given case a claim is "direct" or "indirect", a "preponderance test must apply". The Tribunal simply asserts that, as it has concluded that articles 87 and 300 are "relevant", Panama's claim is "brought on the basis of an injury to itself", so that, consequently, the claim for damage to the persons and entities arises from the alleged injury to Panama and thus is not subject to the exhaustion of local remedies rule.

20. Thus, the claim for damages to persons and entities, which is at the origin of, and certainly the reason for, this case, is not even assessed in order to determine its preponderance or lack of preponderance as compared with the direct injury allegedly suffered by Panama. Following this approach, mixed cases to which the preponderance test may apply would never exist. The practical effect would be to eliminate or drastically reduce the relevance of article 295. Such effect would obviously be contrary to the Convention and prejudice the wisely crafted relationship between domestic and international law that it represents.

(*signed*) T. Treves