Separate Opinion of Judge Lucky

Introduction

1. The Judgment sets out in elaborate terms the arguments of both Parties. Therefore, it is not necessary to reiterate all of them except in order to fortify my opinion on matters with which I agree in principle. However, there are issues and aspects that need elaboration and expansion and clarification because there are matters which necessitate a detailed examination of the relevant law; for example, the questions relating to acquiescence, estoppel and extinctive prescription, all of which are equitable reliefs that are recognised in general principles of law both international and municipal. My approach and views on the exhaustion of local remedies and the application of article 283 of the United Nations Convention on the Law of the Sea ("the Convention") in this opinion are relatively different from what is set out in the Judgment, although my conclusion is the same. I also find that the Ruling on the subsequent Reply of Italy dated 8 July 2016 ought to have been given before the oral hearing. I will deal with this in the next paragraph.

2. Prior to the oral hearing of the Application, Italy filed objections to the Application, setting out grounds as to why the Application should be dismissed. Panama responded to the objections and, on 22 August 2016, asked the Tribunal for a ruling on whether objections filed by Italy on 16 July 2016 should be dismissed and not form part of the hearing on the substantive matter.

3. The Tribunal, after considering the written submissions, decided (by a majority) that each Party would be given an extra 30 minutes during the oral submissions to address the matter. The Parties agreed to the suggestion. In my opinion, the application for a Ruling should have been heard and the Ruling given before the oral submissions were heard in the substantive application. This method, even with the consent of the Parties, is not in conformity with accepted practice in most cases and the Ruling ought to have been given before the oral submissions. Panama had objected to the objections set out in a written submission of the 16 July 2016, because Panama submitted that new objections were included and Panama needed time to respond so that there would

be "equality of arms". Nevertheless, Panama did utilise its 30 minutes at the end of its Agent's oral submissions. However, it is my view that the procedure adopted could have created problems for the Judges because, if the Tribunal had ruled in favour of Panama, then they would have had to disabuse themselves of the so-called supplemental objections. The Tribunal did not accept the arguments of Panama and, in any event, the view is that the further submissions of 26 July 2016 were an expansion or amplification of the original objections, therefore there was no breach of the principles of due process and equality of arms ("*égalité des armes*").

4. In accordance with article 97 of the Rules of the Tribunal, the proceedings on the merits were suspended pending the determination of the objections to the application.

Italy's objections can be briefly summarised as follows:

5. This is not a dispute between the Parties because, inter alia, it is "essentially a question relating to private interests, with no genuine connection with the Panamanian State. It is a claim for damages by the owner of the *M/V "Norstar"* against Italy". The Tribunal does not have jurisdiction to hear the application because there was no exchange of views required by article 283 of the Convention; Panama acquiesced by not pursuing its claim; the claim is time-barred by extensive prescription and the doctrine of estoppel is applicable.

6. In its response, Panama contends that the Tribunal does have jurisdiction; there was in effect an exchange of views in accordance with article 283 of the Convention because Panama sent several letters to the Italian authorities specifying the claim but received no answers from Italy. Panama argues that the fact that Italy did not respond is in itself an indication that there was an exchange of views.

7. The objection to this Application hinges on questions of jurisdiction and admissibility. In order to determine whether the Tribunal has jurisdiction, the following questions must be considered: whether there is a dispute; whether local remedies have been exhausted; whether there was an exchange of views (article 283 of the Convention); whether the claim fails because of the lapse of time before the claim was filed; acquiescence; whether in the circumstances

estoppel is applicable; and whether the claim should have been filed against Italy or Spain and/or against both.

8. The above questions are interrelated and must be examined before determination of the issues in the case and whether the objections of Italy should be dismissed/rejected.

9. Italy and Panama addressed the Tribunal on these issues. In spite of the possibility of these matters being considered during the hearing on the merits, in the light of counsel's persuasive arguments concerning acquiescence, extensive prescription (time bar) and estoppel, it is my view that they deserve mature consideration at this stage of the proceedings.

10. This Application and the Italy's Objections raise certain matters that ought to be considered in greater detail than is set out in the Judgment. I refer specifically to the issues of exhaustion of local remedies, estoppel, acquiescence and extensive prescription (time bar).

11. In order to provide ease of reference in this opinion, the relevant facts and dates that relate to the matter are set out below. The Application is complex because it concerns, amongst others, issues relating to duties of the flag State, notification of a claim for damages, the pleadings which are at variance, the relevant law, oral evidence and legal submissions on the interpretation of the relevant law and whether there is a *prima facie* case set out in the application. Therefore, opposing views have to be assessed and evaluated.

12. Italy objected to the Application on the grounds that the Tribunal did not have jurisdiction and that the application was inadmissible because there is no dispute, local remedies have not been exhausted, there was no exchange of views in accordance with article 283 of the Convention; estoppel is applicable because of the time lapse in filing the claim and acquiescence by Panama. Panama disagreed and submitted that Italy's objections were not sustainable (see article 96 of the Rules of the Tribunal).

13. The possibility of this case resulting in one or more dissenting or separate opinions should come as no surprise or be the cause of any discomfort. In my view, the arguments on the interpretation of the relevant law and findings of

fact will be the subject of the highest regional and international scrutiny and will undoubtedly contribute to the development of the jurisprudence of this specialised court.

Background

14. From 1994 to 1998, the *M/V "Norstar"*, a Panamanian-flagged vessel, owned by Inter Marine & Co AS, a Norwegian-registered company, fitted out by Borgheim Shipping, another Norwegian-registered company, and rented by Nor Maritime Bunker, a Maltese-registered company, carried out bunkering activity off the coasts of France, Italy and Spain, through the brokering of Rossmare International Sas., an Italian-registered company owned by an Italian national.

15. Following the investigations conducted by the Italian Guardia di Finanza since 1997, the Public Prosecutor at the Tribunal of Savona took legal action against four Italian nationals and one Maltese national, for offences of criminal association aimed at smuggling mineral oils and tax fraud. These offences were alleged to be committed through foreign tanker vessels, among them the *M/V "Norstar"*. In the summer of 1998, the *M/V "Norstar"* was located near the Balearic Islands, between Palma de Mallorca and Ibiza.

16. On 11 August 1998, the Public Prosecutor at the Tribunal of Savona ordered the seizure of *M/V "Norstar"* as *corpus delicti* (i.e., the means by which the crime was perpetrated in relation to the aforementioned offences).

17. According to the international letters rogatory to the Spanish authorities, the *M/V "Norstar",* while moored in the Bay of Palma de Mallorca, was seized by the Spanish Authorities on 25 September 1998. The said letters rogatory were issued in accordance with the provisions of the European Convention on Mutual Assistance in Criminal Matters, adopted in Strasbourg in 1959 ("the Strasbourg Convention"). Both Italy and Panama are parties to the said Convention.

18. Apparently, the said letters rogatory specified that the Spanish authorities should arrest and detain the *M/V "Norstar"* as *corpus delicti* for criminal offences committed by the crew, who were individually charged and put on trial before the Italian criminal court. It must be noted that at the basis of the instant case there is the seizure of the *M/V "Norstar"*, a Panamanian-flagged vessel, owned by Inter Marine & Co. AS, a Norwegian company. The latter and

the *M/V "Norstar"* were managed by another company, Borgheim Shipping, also established in Norway. Inter Marine chartered out the vessel through Borgheim Shipping to Nor Maritime Bunker, a Maltese company, which was *de facto* managed again by Borgheim Shipping. The seizure was executed by the competent Spanish authority on 28 September 1998 when the *M/V "Norstar"* was moored in the Spanish Bay of Palma de Mallorca, following a request for judicial assistance from the Public Prosecutor at the Tribunal of Savona in accordance with the European Convention on Mutual Assistance in Criminal Matters of 1959.

19. The rationale of seizing the *M/V "Norstar"* was to acquire what was deemed to be a *corpus delicti* by the Public Prosecutor of Savona during criminal preliminary investigations into the alleged offences of criminal association aimed at smuggling mineral oils and tax fraud. The essence of the conduct under scrutiny by the Italian prosecuting authority consisted in the purchase of oil products as ship's stores in non-European Union countries, in Italy and in other European Union ports under a customs-free regime. These oil products were then to be used to refuel yachts and mega yachts, including many registered in Italy. These yachts and mega yachts subsequently introduced the fuel into the Italian territorial sea without making a declaration for customs purposes. The *M/V "Norstar"* loaded marine gas oil on four occasions in the ports of Gibraltar, Livorno, Barcelona and Livorno again. The loading operations at the Italian port of Livorno were carried out on 28 June 1997 and 12 August 1997. In particular, Nor Maritime, through an Italian national, purchased and loaded on *M/V "Norstar"* at the port of Livorno marine gas oil totalling about 1,844,000 litres, exempt from taxes as it was declared to be intended for the stores of that motor vessel. This disputed trade was always brokered by an Italian company, Rossmare International Sas., whose managing director was also Italian. The preliminary investigations directed by the Public Prosecutor at the Tribunal of Savona started with a tax audit of Rossmare and ended with the criminal prosecution of four Italian nationals and four foreign citizens (three Norwegians and one Maltese). With the judgment of 13 March 2003, the Court of Savona acquitted all the accused of all the charges of smuggling mineral oils and tax fraud and the Court ordered that the seizure of the *M/V "Norstar"* be revoked and returned to the owner (this was five years after the *M/V "Norstar"* was seized).

20. An answer to the following question is important: why did Spain (the Spanish authorities) carry out the order of the Public Prosecutor of Italy? It seems to me that, since both Italy and Spain are Parties to the Strasbourg Convention, Spain was obliged to comply because the request was not contrary to the provisions of articles 2 and 5 of the Convention.

> Article 2 Assistance may be refused:
>
> (a) if the request concerns an offence which the requested Party considers a political offence, an offence connected with a political offence, or a fiscal offence;
> (b) if the requested Party considers that execution of the request is likely to prejudice the sovereignty, security, *ordure public* or other essential interests of its country.
>
> Article 5
> 1. Any Contracting Party may, by a declaration addressed to the Secretary General of the Council of Europe, when signing this Convention or depositing its instrument of ratification or accession; reserve the right to make the execution of letters rogatory for search or seizure of property dependent on one or more of the following conditions:
> (a) that the offence motivating the letters rogatory is punishable under both the law of the requesting Party and the law of the requested Party;
> (b) that the offence motivating the letters rogatory is an extraditable offence in the requested country;
> (c) that execution of the letters rogatory is consistent with the law of the requested Party.
> 2. Where a Contracting Party makes a declaration in accordance with paragraph 1 of this article,
> any other Party may apply reciprocity.

21. On 15 August 2001 (three years after the seizure), Mr Carreyó, acting on behalf of the Panamanian Government, sent a letter to the Italian Government asking Italy to lift the seizure of the *M/V "Norstar"* "within a reasonable time" and to compensate the owner for damages. He asserted by letter to the Italian Minister of Foreign Affairs that the Panamian Government would apply to the Tribunal for the prompt release of the vessel and reiterated this in similar

communications on 7 January 2002 and 6 June 2002. It must be noted that at that time the criminal proceedings against the crew of the *M/V "Norstar"* were still in progress, the *M/V "Norstar"* being a *corpus delicti*. Therefore, adhering to the principle of the separation of powers, the Minister could not intervene during the judicial proceedings in the Italian criminal courts.

22. The Preliminary Objections of Italy and Observations and Submissions of Panama do not set out all the events between the seizure, the acquittal of all the accused and the lifting of the seizure by the Spanish authorities (in accordance with the Judgment of 13 March 2003). What is set out is that, on 18 March 2003, the Public Prosecutor appealed against the decision of the Court and that the appeal was dismissed on 25 October 2005. I have to record that there is no evidence in regard to what the status of the accused during and after the cases were dismissed was.

23. Two factors have to be noted: pursuant to Article 585 of the Italian Code of Criminal Procedure, the latter decision became *res judicata* on 9 December 2005; and, pursuant to article 2043 of the Italian Civil Code, the owner of the vessel (the *M/V "Norstar"*), had a five-year limit to file a claim before the Italian domestic courts for damages allegedly caused by the order of seizure, arrest and detention of the *M/V "Norstar"* as a *corpus delicti* and its crew. The time-limit would have expired on 9 December 2010.

24. It is also noted that, on 31 August 2004, Mr Carreyó forwarded a document to the Italian Embassy in Panama specifying that he was authorised to represent Panama for the purposes of filing/activating a prompt release procedure before the Tribunal (this action was not pursued because it is alleged that the owner had no funds. It is also submitted that the *M/V "Norstar"* had to be repaired before it could sail). Apart from the *ipse dixit* of the Agent of Panama, there is no evidence to support this assertion.

25. On 7 January 2005, the Panamanian Ministry of Foreign Affairs sent a new communication – a *note verbale* – urging Italy to lift the seizure of the *M/V "Norstar"*. By that time the Italian Court of First Instance had acquitted the accused, who had been charged, and ordered the release of the *M/V "Norstar"*.

26. On 6 September 2006 the Spanish authorities asked the Court of Appeal of Genoa to provide instructions with regard to the possibility of demolishing the *M/V "Norstar"*. On 13 November 2006 the Court of Appeal of Genoa replied, informing the Spanish authorities that it was not entitled to provide an answer (apparently the matter was *res judicata*). As stated above, the Public Prosecutor had appealed against the acquittal of the accused; however, he did not appeal against the order to release the *M/V "Norstar"*. It seems to me that there was little or no communication of the Court's order to the Spanish authorities, who seemingly had the *M/V "Norstar"* in their custody and under their control. If evidence is provided at the hearing on the merits, the Tribunal will be able to arrive at a finding on this issue.

27. On 17 April 2010 Mr Carreyó wrote to the Italian Minister of Foreign Affairs in order to claim for damages caused to the *M/V "Norstar"* because of the seizure in Spain. This was within the time frame specified in the Italian Civil Code. The question is: why was the action for damages not filed in Italy before the Italian court? The answer may be that Article 2043 of the Italian Civil Code would have been applicable, because the five-year time-limit had passed. Therefore, it seems to me that the only avenue open was for the matter to be filed before an international court where a time bar is not set out in the rules or specifically in international law, where there seems to be flexibility and the rules pertaining to estoppel are broad and variable.

28. With respect to such claims, it is noted that it is in the interest of the international community that a matter should be dealt with promptly, especially where human rights are involved (Human Rights Today, A United Nations Priority, 2000). This is important when it is a matter of a time bar before an action for damages is filed before an international court or tribunal.

Is there a dispute?

29. Italy says that there is no dispute between it and Panama because, at the time of the seizure and detention of the vessel, Mr Carreyó was acting in a private capacity as counsel for the owner and not on behalf of Panama. The *M/V "Norstar" was* arrested in the internal waters of Spain by Spanish authorities; therefore Spain *de jure* and *de facto* is the correct respondent. It seems to me that Italy is contending that Spain is vicariously liable; however, I do not agree because the charges and trials were conducted by the Italian Public Prosecutor and in the Italian courts. Italy argues that Mr Carreyó – counsel and agent of

Panama – was briefed by the owner of the *M/V "Norstar"* and authorised to seek compensation for damages to the *M/V "Norstar"*. Apart from correspondence from Mr Carreyó seeking compensation, an action for damages was not filed in any court at that time. Therefore; Italy submits that there was no dispute between itself and Panama.

Panama argues that there is a dispute

30. Panama complained that the *M/V "Norstar"* was unlawfully detained and, by written communication, made a request for compensation. Italy did not acknowledge or reply to the request. It appears that, by its failure to respond, Italy seems to have taken the approach that it is not liable, and by its silence indicated a form of disagreement. The disagreement appears to be based on law and fact. For instance, Italy submits that the offences occurred in the territorial waters of Italy while Panama submits that the actual transfer of supplies occurred outside the territorial waters of Italy (the cases were dismissed) (see *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon v. Nigeria*), *Preliminary Objections* (Nigeria *v.* Cameroon), *Preliminary Objections, Judgment, I.C.J. Reports, 1998*, p. 315, paragraph 89). The existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is expected. I refer to paragraphs 15 to 21 of my Dissenting Opinion in the *M/V "Louisa" Case* (*Saint Vincent and the Grenadines* v. *Kingdom of Spain*), *Judgment, ITLOS Reports 2013*, in which I expressed the view that the provisions of article 283 were satisfied in circumstances similar to the instant case. Further, the *M/V "Louisa" Case* can be distinguished from the instant case in that the *M/V "Louisa"* was arrested and detained for offences allegedly committed in the internal waters of Spain. The documentary evidence discloses that, in the case of the *M/V "Norstar",* the alleged offences occurred in international waters. This is confirmed in the judgments of the first instance criminal court and the appeal court of Italy.

Exhaustion of local remedies

31. It is not disputed that the *M/V "Norstar"* was seized and detained in accordance with the order given by the Italian Authorities to the Spanish Authorities. Further, the captain and crew of the *M/V "Norstar"* were arrested and charged for criminal offences. These charges were dismissed by the Court of First Instance. The Public prosecutor appealed. However, the appeal was

dismissed. It seems clear to me that local remedies were exhausted, because the processes in the local courts in Italy had been completed. The right to seek redress for damages before an Italian court was not pursued and, as I stated earlier, the time for filing had elapsed. Hence, while there was an opportunity for Panama or the owner of the *M/V "Norstar"* to seek a local remedy, neither availed themselves of the opportunity. Consequently, the only legal remedy open to Panama would have been to make a claim before an international court. The chosen court or tribunal is the International Tribunal for the Law of the Sea.

32. I have to point out that the owner of the *M/V "Norstar"* and/or Panama could have made use of the procedures for filing an action as set out in Articles 283, 257 and 324 of the Italian Code of Criminal Procedure. These articles, in my opinion, deal with seizure of an item *per se.* An application to order release of the item on payment of a bond depends on the reason for the seizure and detention. However, the circumstances in this case are different and must be distinguished from seizure of a vessel or similar item. This is a case where the vessel – the *M/V "Norstar"* – was seized and arrested as a *corpus delicti* – the means by which the crime was committed. Therefore, the *M/V "Norstar"* was an integral exhibit in the criminal trials and could not be released in these circumstances. A court must consider all the elements of this case with distinctive objectivity. In other words, if the vessel was released on a bond, it would and could not have been acceptable because, had the Court found the perpetrators guilty, the *M/V "Norstar"* would have been a fundamental part of the process and liable to forfeiture. If the vessel is declared forfeited, the rhetorical question is: would a reasonable ship owner return the vessel for forfeiture? It is also important to note that, while criminal proceedings are in progress, proceedings for damages before a civil court are usually adjourned to a date subsequent to the completion of the criminal trial. Criminal and civil proceedings concerning the same matter do not take place concurrently. If the owner had entered into a bond and the vessel had been released, it would certainly be impractical to ask him to return the vessel for forfeiture. This is an issue for the hearing on the merits; however, at this stage, it is my view that in reality local remedies were *de facto* exhausted; in fact these remedies were not pursued. In the light of the circumstances, Panama did not file a claim for damages in the Italian civil court, perhaps because the proceedings in the criminal court were protracted. The question will have to be determined by application of the preponderance test, and that can only be fully determined after a hearing on the merits.

Jurisdiction

It should be noted that the matter can be heard within the framework of the merits (article 97 of the Rules).

33. Italy contends that the Tribunal lacks jurisdiction for the following reasons:

(i) There is no dispute. I do not agree for the reasons set out above.

(ii) Italy is not the proper respondent in this case. Panama contends that the detention of the *M/V "Norstar"* was based on an order given by Italy, not by Spain.

34. The question is why, and what are the circumstances and reasons for Spain's action or conduct? The answer is set out in paragraphs 15 to 17 above. There must be some evidence providing cogent compelling reasons why Spain carried out the instructions of the Public Prosecutor of Italy. The current documentary evidence does not supply reasons. Perhaps such evidence will be given at the hearing on the merits. Italy submits that Spain was an "indispensable party" in accordance with the "indispensable party principle" and should have been a respondent (see *Monetary Gold Removed from Rome in 1943, I.C.J. Reports 1954; East Timor* (*Portugal* v. *Australia*), *I.C.J. Reports 1995; Certain Phosphate Lands in Nauru* (*Nauru* v. *Australia*), *I.C.J. Reports 1992*). With reference to the *dicta* in the aforementioned cases, the "indispensable party principle" is not applicable in this case. Spain was a "delegated operative". What, therefore, is the legal responsibility of a delegated operative? The answer seems to be that the "operative" is obliged to follow the order of the principal, in this case Italy, in accordance with the provisions of Articles 2 and 5 of the European Convention on Mutual Assistance in Criminal Matters.

(iii) Panama failed to appropriately pursue the settlement of the dispute by negotiation in accordance with article 283, paragraph 1, of the Convention.

35. I do not agree with the above submission. It is necessary to consider the provisions of article 283 in the light of the circumstances and the evidence provided in this case. Therefore, the jurisprudence of the Tribunal is important (see *Land Reclamation in and around the Straits of Johor* (*Malaysia* v. *Singapore*), paras. 38–47; *"Juno Trader"; M/V "Louisa", Dissenting Opinion of Judge Lucky*, paras. 15–20). Article 283 of the Convention provides for an exchange of views regarding settlement by negotiation or other peaceful means. Article 283 also specifies an obligation to exchange views (article 283, paragraphs 1 and 2). The article is silent on whether non-compliance will result in the failure of a claim.

36. As I suggested earlier, in accordance with the meaning ascribed to the word "dispute" in the jurisprudence of international and municipal law and in the light of the conduct of the Parties prior to the filing of the action, a dispute does exist.

37. Construed as a whole, article 283 provides for, and sets out, a method of settling disputes. It appears to me, in the light of Panama's communications to Italy and Italy's failure to respond, that Italy disagreed with what was set out and claimed in the communications. In my view, the tenor and purport of Part XV, Section 1, and articles 279 to 285 of the Convention is to provide means of settlement. Apparently, the article provides a roadmap for settlement if the parties so desire. This cannot mean that an action or claim will fail if there is no exchange of views. The article does not provide for non-compliance with its terms. It is primarily concerned with settlement before third party proceedings or determination by a court or international tribunal.

38. There is a school of thought that opines that an action or claim will not be successful if there has been no exchange of views regarding settlement by negotiation or other peaceful means. I do not agree with that view. In effect, it seems to prevent a person or party from seeking redress in accordance with due process and deprive them of the right to be heard. In other words, a party should not be deprived of a fair hearing. It is said that "fairness transcends the strict requirements of the law" (*The Dietrich Case*, High Court of Australia).

39. Article 283 is primarily concerned with settlement by negotiation and does not seem to envisage settlement by a third party, an international court or tribunal. To dispel any doubt, if the word "shall" is construed as "may", it would be realistic. Where a dispute exists, States will have the right to exchange views or not.

40. Since the Convention came into force, there has been a proliferation of international courts and tribunals. Article 283 should be construed and applied in a pragmatic sense, allowing parties with disputes to file a claim at a court or tribunal directly when one or other party is of the view that settlement by negotiation will not be successful. I find the following passage from Bennion on Statutory Interpretation useful:

> In construing an ongoing Act the interpreter is to presume that Parliament intended the act to be applied at any future time in such a way as to give effect to the true intention. Accordingly, the interpreter is to make allowances for any relevant changes that have occurred since the Act's passing, in law social conditions, technology the meaning of words and other matters. An enactment of former days is thus to be read today in the light of dynamic processing received over the years, with such modification of the current meaning of its language as will now give effect to the original legislative intention. The reality and effect of dynamic processing provides the gradual adjustment. It is constituted by judicial interpretation year in and year out; it also comprises processing by executive officials (*Bennion on Statutory Interpretation*, 5th edition 2008, p. 887).

41. If, as Italy says, "Panama announced its intention to have recourse to litigation without ever advancing any genuine proposal for the peaceful settlement of the putative dispute", then it seems to me that Italy knew there was a dispute; yet neither Italy nor Panama took any steps to resolve the issue by any form of negotiation.

42. It should be noted that article 58 of the Rules provides that, if there is a dispute as to whether or not the Tribunal has jurisdiction, the matter shall be decided by the Tribunal. It is obvious that the issue will be determined on the basis of the law and evidence provided.

Article 300 of the Convention

43. It is accepted that, for article 300 to be applied, there must be a link with, and/or violation of, one or more of the articles of the Convention (see *M/V "Louisa"* (*Saint Vincent and the Grenadines* v. *The Kingdom of Spain*), *Judgment, ITLOS Reports 2013*, p. 4).

44. In its application, Panama invites the Tribunal to adjudge and declare that Italy has violated articles 33, 73, paragraphs 3 and 4, 87, 111, 226 and 300 of the Convention. Is there evidence that the *M/V "Norstar"* was within the contiguous zone of Italy and or Spain when the offences were committed? The answer is that there is no evidence. Therefore I can appreciate and agree with the decisions of the Italian Court of First Instance and the Court of Appeal to acquit the accused and release the vessel. However, I maintain my view that, seemingly, the provisions of article 33 were misapplied and the *M/V "Norstar"* was wrongly seized and detained, and its right to freedom to ply its trade on the high seas thereby denied (article 87 of the Convention).

45. Apparently, the gas oil was supplied to vessels in international waters. Therefore, the Court in Savona held that the seizure was illegal because the supply of gas oil was in international waters (see Annex 3, Appendix to the Observations and Submissions of Panama).

46. The arrest of the *M/V "Norstar"* occurred in Spanish internal waters. The seizure was undertaken in the context of criminal proceedings relating to alleged offences of criminal association aimed at smuggling mineral oils and tax fraud. The order for seizure of the *M/V "Norstar"* sets out that "the supplying of oil to offshore mega yachts constituted a criminal act under various articles of Italian Criminal law and thereby making money by avoiding customs duties." The vessel and the oil transported were considered by Italy as *corpus delicti* consequently justifying the arrest.

47. Article 33, paragraph 1(a), of the Convention provides for an infringement of customs, fiscal immigration or sanitary laws and regulations in the contiguous zone of a State. The documentary evidence does not disclose an infringement of laws or regulations in the contiguous zone of Italy. Further, the cases against the crew of the *M/V "Norstar"* were dismissed by the Italian Courts, both at first instance and at the Court of Appeal.

48. In my opinion, the authorities incorrectly applied the provisions of article 33, paragraph 1 (a), of the Convention in these circumstances. In other words, the said provisions which relate to the contiguous zone were applied to an alleged offence committed in international waters.

The question is: if a State applies an article incorrectly, would this create a link to article 300 of the Convention? Article 300 reads:

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

In my opinion, article 300 is applicable because Italy infringed the right of the *M/V "Norstar"* by the incorrect application of article 33, paragraph 1 (a), of the Convention, thereby infringing the right of the *M/V "Norstar"* set out in article 87 of the Convention.

49. It seems to me that the incorrect application of an article of the Convention could establish a link to article 300, especially when it constitutes an abuse of right.

50. Panama had submitted that Italy infringed the provisions of article 73, paragraphs 3 and 4, of the Convention, but during the oral submissions withdrew this contention.

51. In my opinion, the provisions of article 73 are clear and unambiguous. The article provides for the "[e]nforcement of laws and regulations of the coastal State" in relation to "its sovereign rights to explore, conserve and manage the living resources in its exclusive economic zone". Fisheries laws and regulations were not infringed by the *M/V "Norstar"* and, since the article must be construed as a whole and not in part, article 73, paragraph 4, is not applicable (the Agent for Panama withdrew this contention).

52. Article 87 of the Convention provides for "Freedom of the High Seas". One of the freedoms specified is "freedom of navigation" (article 87, paragraph 1(a)).

53. Article 86 provides a general meaning for the "high seas" as "all parts of the sea that are not included in the exclusive economic zone, the territorial sea or the internal waters of a State, or the archipelagic waters of an archipelagic State." The final sentence of the article is important: it specifies that "[t]his article does not entail any abridgment of the freedoms enjoyed by States in the exclusive economic zone in accordance with article 58."

54. Article 58 reads in part:

> 1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the provisions of this Convention, the freedoms referred to in article 87 of navigation and … other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships … and compatible with the other provisions of this Convention.

55. The *M/V "Norstar"* was supplying mega yachts with fuel, in other words bunkering. The Convention is silent on the question of bunkering. Apparently this exercise was not carried out within the contiguous zone. However, it seems as though it may have been in Italy's exclusive economic zone. Nevertheless, as concerns the crew of the *M/V "Norstar",* they were not charged with bunkering. All criminal charges against the crew were dismissed.

56. In my opinion, the actions of the *M/V "Norstar"* and its crew were legitimate; therefore, in the light of articles 87 and 58 of the Convention, its right to freedom of navigation was infringed. The *M/V "Norstar"* was under arrest and detained in the port, therefore it is argued, and I agree, that the vessel was deprived of its right to continue its business on the high seas. Consequently, the vessel was unable to exercise its right of freedom on the high seas.

57. Subject to the production of further evidence, I do not think that article 111 of the Convention is relevant.

58. Article 226 does not seem to be relevant. There is no allegation of any infringement of articles 216, 218 and 220 of the Convention.

59. Assuming that the provisions of articles 33 and 87 are applicable, a link with the provisions of article 300 is established. In my view, there is an abuse of right. It follows that the very important issues of acquiescence, time bar and estoppel have to be determined before the claim for damages is decided at the hearing on the merits.

Admissibility of the claim

Estoppel, time bar/lapse of time for filing the action/limitation of actions

60. Italy contends that this claim should be rejected as inadmissible because: (a) it "is preponderantly, if not exclusively, of a diplomatic protection character, [yet] the requirements for its exercise i.e., that of the nationality of the alleged victims and that of the exhaustion of remedies have not been met" (see paragraphs 12 to 18 above); and (b) "Panama is time-barred, and estopped from validly bringing this case before this Tribunal due to lapse of eighteen years since the seizure of the [v]essel and Panama's contradictory attitude throughout that time" (paragraph 52 of the Observations and Submissions of Panama).

61. I think it is necessary to determine when time begins to run for a time bar or the limitation of an action to begin. As I mentioned above, on 25 September 1998, the *M/V "Norstar"* was seized while moored in the Bay of Palma de Mallorca in Spain. On 13 March 2003, the criminal charges against the crew of the *M/V "Norstar"* were dismissed. On 18 March 2003 the public prosecutor appealed against the decision of the Court and, on 25 October 2005, the Court of Appeal dismissed the appeal. On 15 August 2001, while the criminal proceedings against the accused were in progress, counsel for Panama asked the Italian Government to lift the seizure of the *M/V "Norstar"* within a reasonable time "and to compensate for damages incurred". He asserted by letter to the Italian Minister of Foreign Affairs that he would apply to the Tribunal for the prompt release of the *M/V "Norstar"* and reiterated this request in similar communications on 7 January 2002 and 6 June 2002. An application was never filed at the Tribunal and, in my opinion, even if it had been filed, the Tribunal could not have heard the matter while the cases were pending in the Italian courts (see my Opinion in the *"Hoshinmaru"* and *"Tomimaru" Cases, ITLOS Reports 2005–2007*, p. 18 and p. 74; see also the Judgment of the Supreme Court of Nigeria in

the *"ARA "Libertad" Case* (*Argentina* v. *Ghana*)). Briefly, a judgment of the commercial court was in effect and had to be overturned before the vessel could be released. An application to abridge time was granted and the Supreme Court, by an order of *certiorari* based on the applicable law regarding warships and the Order of the Tribunal, permitted the release of the vessel.

62. The Tribunal would have been acting *ultra vires* its jurisdiction if it had interfered with proceedings in the Italian domestic court. Pursuant to Article 2043 of the Italian Civil Code, the owner of the *M/V "Norstar"* or Panama – the flag State – acting on his behalf; had a five-year limit to file a claim for the damages allegedly caused by the seizure of the *M/V "Norstar"* and the arrest of its crew. Further, the independence of the judiciary is respected in all countries and a minister or ministry cannot and should not interfere in judicial proceedings.

63. It should also be noted that, with respect to a contention/plea of estoppel and time bar, local limitation of action laws come into effect. Pursuant to Article 585 of the Italian Code of Criminal procedure, the decision of the Court of Appeal became *res judicata* on 9 December 2005. Consequently, the time for filing a claim before the Italian Court expired on 9 December 2010. It seems to me that time for bringing a claim to an international court or tribunal began to run from 9 December 2005 (i.e., 11 years ago).

Estoppel/Time bar

64. This is a claim in equity for equitable relief. Therefore, the relevant maxims of equity apply. First, "he who comes into equity must come with clean hands". Secondly, "delay" defeats "equity". A court of equity will refuse to aid a claimant who has not pursued his right and acquiesced for a great length of time. In support, I refer to the following cases: *Goldsworthy* v *Brickell* [1987] (I All ER 853 at p. 6772), Nourse L.J. The defence of Laches or unconscionable delay is allowed where there is no statutory bar, and *Re Pauling's Settlement trusts, Younghusband* v. *Coutts and Co*. [1963] 3 All ER 1 p. 20.

65. In the light of the Parties' submissions and the wealth of information provided, I think it is necessary to consider the relevant law, both national and international, commencing with Article 38 of the Statute of the International Court of Justice ("the ICJ"), the ICJ judgments and the judgments of domestic courts.

66. Unlike the rules and statutes in municipal law, the Rules of the Tribunal do not provide for estoppel or a specific period of limitation for filing a claim.

67. Consequently, it is necessary to consider this matter in the light of the jurisprudence of the International Tribunal for the Law of the Sea, the ICJ, other international tribunals, and the relevant law and decisions of municipal courts. While there is a clear distinction between international law and municipal law, because each system or order is superior in its own sphere (Fitzmaurice, the General Principles of International Law, 92 HR 1957, p. 5 and pp. 70–80), there are nevertheless instances, such as in this case, where it would be helpful to refer to the decisions of municipal courts on estoppel and time bar or limitation of actions.

68. An article by Alexander Ovchar, Estoppel in the jurisprudence of the ICJ, *Bond Law Review, Vol. 21 Issue 1*, is not only helpful but interesting. After reviewing several cases heard and determined by the ICJ, he concludes – and I agree – that the Court's findings were not definitive. Although the Court suggested various approaches to the doctrine, it did not set a precedent. However, the guidelines set out in the judgments are very helpful. Judges Cot and Wolfrum, in their Separate Opinion in the above-mentioned *"ARA Libertad"* Case, referred to the ICJ cases on the subject and I find their views very helpful.

69. I find the following passage enlightening:

> In any system of law, a situation may very well arise where the court considering a case before it realizes that there is no law covering exactly that point, neither parliamentary statute nor judicial precedent. In such instances the judge will deduce a rule that will be relevant, by analogy to existing rules or directly from the general principles that guide the legal system, whether they are referred to as emanating from justice, equity or considerations of public policy (Malcolm N., Shaw *International Law*, Fourth edition, p. 77).

The jurisprudence of the ICJ on issues of estoppel and limitation of time for filing an action for damages is not very clear or conclusive.

70. The principle underlying estoppel is often expressed by the Latin maxim "*allegans contraria non est andiendus*" – one should not benefit from his or her inconsistency" (see *Temple of Preah Vihear* (*Cambodia* v. *Thailand*), *Merits, Judgment, I.C.J. Reports 1962*, p. 6, 39; *North Sea Continental Shelf Cases* (*Denmark* v. *Federal Republic of Germany, Netherlands* v. *Federal Republic of Germany*) *I.C.J. Reports 1960*, p. 4, 120; see the Separate Opinion of Judge Ammoun).

71. Estoppel consists of three elements: (i) one State must make representation to the other; (ii) the representation must be unconditional and made with proper authority; and (iii) the State invoking estoppel must rely on the representation.

My questions on this issue are: what, if any, is the representation of Italy? Can such representation be inferred by its conduct? Is acquiescence relevant? Presentation of evidence by the Parties is crucial. Can estoppel be inferred? Is there evidence to show that Italy clearly, cogently and convincingly established acquiescence?

72. In cases such as the instant one, the tenets of domestic law on the question of time bars and estoppel will be helpful; for example, statutes governing limitation of time for filing a claim for damages and the relevant case law.

73. In this regard the provisions of Article 38 of the Statute of the ICJ are important:

> Article 38
>
> 1. The Court, whose function is to decide in accordance with international Law such disputes as are submitted to it, shall apply:
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

74. Article 38 of the Statute of the ICJ provides that "general principles of law recognized by civilized nations" shall apply (i.e., general principles of fairness and justice which are applied universally in legal systems around the world). Examples of these general principles of law are laches, good faith, *res judicata*, and the impartiality of judges. International tribunals rely on these principles when they cannot find authority in other sources of international law. I include due process of law and abuse of process.

75. The following must be examined: the reasons for the delay in filing the action and whether they are valid; and whether the Applicant (Panama) signalled its intention to file a claim for damages before the relevant court. Why was it not filed in the Italian court after the judgment was delivered in the Italian criminal court and court of appeal? Why did Panama allow the Italian statute of limitation to apply? If the answers are acceptable then was there or is there an abuse of process whereby Panama and the crew of the *M/V "Norstar"* are denied their right to damages? Further, if there is a justifiable claim for damages, is it fair to deny Panama its right to a hearing in a court of law? Finally, is Panama's tardiness in filing the claim a question of mitigation of damages? With respect to Italy, does the fact that 18 years passed before the action was filed a justifiable reason to apply for an estoppel, because circumstances in Italy may have changed and Italy would have had a legitimate expectation that it would not have to face court actions? In other words, would it be fair to all the Parties concerned?

76. "Detrimental reliance should be established for an estoppel to arise". The questions are: Did Italy depend on the fact that no claim was made for 18 years? (10 years after the action was time-barred in the Italian jurisdiction). Did Panama rely on the fact that Italy had been informed of a claim during that time? (Evidence in support is necessary and may be provided at the hearing on the merits). On what date did the claim for action occur? It must be noted

that "the party invoking the rule must have relied on the statements or conduct of the other party, either to its own detriment or to the other's advantage" (Judge Fitzmaurice, *Case concerning the Temple of Preah Vihear* (*Cambodia* v. *Thailand*), *Merits, Judgment of 15 June 1962, I.C.J. Reports,* p. 63–64). Further, "International estoppel is based on good faith and consistency in international relations".

77. The question is whether the requirements of estoppel have been met.

78. The Applicant seeks equitable relief in the form of damages. "He who comes into equity must come with clean hands". Equity will not suffer a wrong to be without a remedy. However, there must be a wrong. In this case was there a wrong and who committed it? It must be noted that the Italian Court of First Instance dismissed the cases against the accused for lack of evidence and the Court of Appeal dismissed the appeal (see reports of the Ghanaian courts). When seeking equitable relief, the one that has been wronged has the stronger hand. The stronger hand is the one who is entitled to ask for a legal remedy (judicial relief). In equity, this form of remedy is usually one of specific performance or an injunction (injunctive relief). These are superior remedies to those administered under common law, such as damages. The Latin legal maxim is *ubi jus ibi remedium* ("where there is a right, there must be a remedy"), sometimes cited as *ubi jus ibi remediam*. The maxim is necessarily subordinate to positive principles and cannot be applied either to subvert established rules of law or to give the courts hitherto unknown jurisdiction, and it is only in a general not in a literal sense that the maxim has force. Case law dealing with principles of this maxim in law includes *Ashby* v. *White* and *Bivens* v. *Six Unknown Named Agents*. The application of this principle of law was key in the decision of *Marbury* v. *Madison*, wherein it was necessary to establish that Marbury had a right to his commission in the first place in order for Chief Justice Marshall to make his more wide-ranging decision.

Reasons for the delay in filing the claim

79. In my view the following factors are crucial to the determination of the claim.

80. First, the Tribunal should consider whether there are sufficient reasons to prove that the delay in filing the claim is acceptable; second, whether the action is time barred; third, whether Panama can be estoppel from pursuing the

claim; and fourth, assuming but not admitting that the foregoing are proven, the question of assessment of damages becomes relevant.

81. In its Application, Panama states that, in January 1999, the owner's application for the release of the arrested vessel was refused by the Italian authorities, who offered release against a security of two hundred and fifty (250) million Lire, an amount which the owner of the *M/V "Norstar"* could not provide since, owing to the length of the arrest, the market for such business had been destroyed and no further income had been earned.

82. It must be noted that, at that time, Mr Nelson Carreyó was not retained as counsel for Panama. The first notification to Italy of a possible legal claim was by letter dated 15 August 2001 to the Italian Ministry of Foreign Affairs.

83. The hearing before the Savona Tribunal began late 2002. On 13 March 2003 the Criminal Court of Savona delivered its judgment according to which "all persons were absolved of criminal charges" and the release of the *M/V "Norstar"* and the restitution to its owner were also ordered. However, the judgment was not full and final. The Italian prosecutor appealed to the Court of Appeal of Genoa, whose judgment was finally delivered in October 2005, confirming the Court of Savona's first instance decision.

84. As I mentioned earlier, in my opinion, the time for submitting a claim in the Italian courts commenced when the cases against the accused were dismissed by the Court of Appeal. The time for filing a claim before the Italian courts ended in 2010. It was only in 2015 that the claim was filed at the Tribunal. In effect, ten years had elapsed before a claim was submitted to the Tribunal.

85. Italy contends that 18 years have elapsed, therefore the action is time-barred and Panama should be estopped from proceeding with the claim. Assuming that the Tribunal has jurisdiction and also assuming – but not admitting – that the action is admissible, the claim will be statute-barred in common law in the domestic courts and in this international tribunal. Even in equity, a claimant must come "with clean hands". There is no evidence that

Italy committed fraud or misled the owner and Panama into thinking that a claim or request for damages would be entertained, thereby providing Panama with a legitimate expectation that it would succeed. While Italy may have been silent or ignored the requests to return the *M/V "Norstar"* and to compensate the owner, Panama and the crew, Panama did not pursue the claim at an international court for 17 or 18 years. Further, it must be noted that "it is in the interest of the international community that a matter should be dealt with promptly where the human rights of a person is involved and that due process of law is recognised".

86. It is in the context of the above paragraphs that the following must be considered. On 2 December 2000, just over two years since the *M/V "Norstar"* was seized on 25 September 1998, the Minister in charge at the Ministry of Foreign Affairs in Panama informed the Secretary [presumably he meant the Registrar, Mr Chitty] of the Tribunal that Mr Nelson Carreyó was authorised to represent the Panamanian Government, "without prejudice to the proceedings pending before the Court of Savona in Italy".

87. On 15 August 2001 Mr Carreyó wrote to the Minister of Foreign Affairs in Rome, informing him that he was authorised to take legal action against Italy before the Tribunal for compensation and damages caused by the arrest of the *M/V "Norstar"*. He briefly reiterated the facts relating to the seizure and its connection to criminal charges against Rossi Silvio and others for crimes allegedly committed in Savona and other Italian ports during 1997. He claimed, *inter alia,* that the arrest was illegal, that the damages at the time amounted to US$6 million, and that the damages continued to increase day by day because the *M/V "Norstar"* was unable to continue its activities of selling gas oil to pleasure boats in international waters.

88. On 7 January 2002, Mr Carreyó wrote to the Ministry of Foreign Affairs Italy. The relevant part of his communication is set out below:

> Subject: Republic of Panama/Republic of Italy, Proceedings before the International Tribunal for the Law of the Sea based in Hamburg, for the compensation of the damages caused by the ongoing detention of the M/V Norstar as a result of a precautionary order requested by the

> Italian & W/5, G. (Savona), carried out in the port of Palma de Mallorca (Balearic Islands, Spain) for having supplied gasoil to mega yachts in international waters off the Ligurian Sea.
> I take note that to date your Ministry has still not answered to our application dated 15/8/2001.
> Therefore, you are herewith informed that, on the expiry of 21 days from the date of this letter, we will institute proceedings before the competent Court of Hamburg without any further notice.

89. On 3 August 2004, Mr Carreyó wrote to the Minister of Foreign Affairs, referring to previous correspondence and once more reiterating the facts and informing him that, if the Italian State did not adhere to the request to pay the damages so that repairs to the vessel could commence, he would have no alternative but to file an action against Italy for damages. He also offered to have the dispute settled in accordance with article 287 of the Convention.

90. Italy did not reply to any of his letters. In other words, Italy ignored the claim and took no action whatsoever to resolve the matter. Italy did not make any admission of culpability; presumably, Italy was relying upon the fact that the matter was before the Italian criminal court, at first instance, and the Court of Appeal during the period 1997 to 2005. The Court of Appeal upheld the decision of the first instance judge and confirmed the acquittal of the accused. The Court ordered the release and/or demolition of the *M/V "Norstar"*. The correspondence reflects that the communication between the Court and the relevant authorities was not clear and specific. During that time Panama did not make any claim before the civil court in Italy. The afore-mentioned Italian statute of limitation of actions applied. The limitation period being five years, there was no right of action after 2010. It was only in 2015 that Panama brought this Application before the Tribunal. The question is: why did Panama not file these proceedings before October 2015? Did Panama acquiesce? Based on the documentary evidence, I do not think so (see the letters to the Italian Foreign Minister set out above). Are the reasons advanced by Panama for the delay reasonable and acceptable? Does the fact that Italy did not respond to the Applicant's claim for restitution and damages give Panama a legitimate

expectation that Italy would pay the compensation requested? And/or was Italy under the impression that the claim would not be pursued in the courts?

91. I do not think that Panama acquiesced, as Mr Carreyó continued to make the requests for compensation and damages (see the letter of 15 August 2001 and *note verbale* no. 2227 of 31 August 2004, in which Panama expressly confirmed to Italy that its Ministry of Foreign Affairs had certified that Mr Nelson Carreyó was empowered to act as the representative of the Republic of Panama before the International Tribunal for the Law of the Sea; see also *note verbale* no. 97 of 7 January 2005 that confirmed the representative power of Mr Carreyó).

92. As I suggested earlier, the Rules of the Tribunal and rules of international law do not provide for limitation of actions (time bar). Therefore, a court must in these circumstances consider customary international law and case law, both international and municipal, and then arrive at a conclusion. If claims are encouraged or accepted after such a long time, there will be no end to litigation. Therefore it is necessary to suggest a solution after consideration and examination of the relevant law, the documentary evidence, the submissions and observations and the oral submissions of counsel.

93. For ease of reference, I refer to the relevant dates set out in paragraphs 12 to 22 of this Opinion, summarised as follows:

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

(g) 17 April 2010: Mr Carreyó wrote to the Italian Minister of Foreign Affairs, reiterating the facts and seeking compensation for the damages caused by the illegal arrest of the *M/V "Norstar".*

94. It must be noted that, from the time of seizure until the acquittal of the accused and later the dismissal of the appeal, the *M/V "Norstar"* was still in the port of Mallorca, Spain, apparently under the control of the Spanish authorities. For reasons which may become clear during the hearing on the merits, the *M/V "Norstar"* was and apparently still has not been released.

95. Two important questions arise: when does time begin to run and did Panama acquiesce? Further, did each party by its conduct give the other a legitimate expectation that an action for release of the *M/V "Norstar"* or damages would not be pursued?

96. Panama submits that time ceased to run in 2010 when another formal claim was made in a letter dated 17 April 2010 to the Foreign Minister of Italy There was no response to that letter. Therefore, the lapse of time between 2010 and the filing of the claim in December 2015 is justified. Italy has submitted that 18 years have elapsed since the arrest and detention of the *M/V "Norstar"* and another further five years since April 2010. The question as to whether the time bar is 18 years or five years will certainly be addressed during the hearing on the merits when, after the submissions of counsel have been heard, the Tribunal will be able to reach a definitive decision. However, subject to the hearing on the merits, I think that in the light of the submissions heard in this application, a time-limit for filing the action can be determined. Counsel referred to statutes of limitation of actions in several countries, including Panama and Italy, the time-limits being from one year to six years. However, these limits relate to domestic law, which is subject to statute law. In international law there are no such statutes. As stated earlier, the Statute of the Tribunal and that of the ICJ do not set out a limitation for filing an action. A defence of unconscionable delay, as distinguished from and analogous to specific statutes of limitation, may furnish a defence. However, defence based on this ground renders it necessary to consider the balance of justice or injustice in affording or refusing relief. Therefore, the need for evidence arises in this case; a final decision will have to be made when the merits are heard.

97. I alluded earlier to the relevant law. In summary, the Rules of the Tribunal do not specify a time-limit for filing an action for damages. Case law of the ICJ and international tribunals is also not definitive, although the ICJ has provided guidelines according to the circumstances of the case. Statute law in most countries provides for limitations of actions for claims. These vary from country to country; for example, in Italy it is five years, in Panama three years, and in most other countries it is from one to six years. There is no time bar in international law. The Convention does not provide for a time-limit. Therefore, bearing in mind that in common law, statutory law is strict, in equity, "fairness in certain instances and circumstances transcends the strict nature of the law". In this case it is accepted that Panama has a right of action owing to the illegal arrest of the *M/V "Norstar"* and subsequent damage to the vessel. At this stage of the proceedings, I find that the action cannot fail because of lapse of time and acquiescence. Therefore, subject to hearing arguments on this subject, at this stage of the proceedings, the doctrine of estoppel is not applicable.

98. For the aforementioned reasons, I am of the view that the Tribunal has jurisdiction over the application and the application is admissible.

99. For the reasons set out above the Objections of Italy are rejected.

100. Jurisdiction, admissibility, exhaustion of local remedies and extinctive prescription (laches) (time bar) are also questions that may require further consideration at the hearing on the merits.

(*signed*) A.A. Lucky