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The M/V “Norstar” Case (Panama v. Italy): Clarifying Freedom of Navigation and Exclusive Flag State Jurisdiction

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ABSTRACT

The M/V Norstar (Panama v. Italy) case, which was decided by the International Tribunal for the Law of the Sea (ITLOS) on April 10, 2019, deals with the interpretation and application of the United Nations Convention on the Law of the Sea (UNCLOS), specifically concerning the principle of freedom of navigation in the high seas. This case analysis explores the doctrinal importance of the ruling, particularly in providing clarity on the scope of freedom of navigation and the principle of exclusive flag state jurisdiction.

Keywords: UNCLOS, ITLOS, Freedom of navigation.

I. INTRODUCTION

The International Tribunal for the Law of the Sea (ITLOS) delivered its decision in the *M/V ‘Norstar’ (Panama v. Italy)* Case on 10th April 2019, concerning the application and interpretation of the United Nations Convention on the Law of the Sea (UNCLOS).² The case revolved around Italy’s alleged violations of obligations due to its actions pertaining to the *M/V Norstar*, an oil tanker flying the Panamanian flag.³ The Tribunal’s scrutiny of the bunkering activities undertaken in the high seas led to the determination that Italy violated Article 87(1) of UNCLOS.⁴ However, it was not found to have violated Article 300 of UNCLOS.⁵ Moreover, Article 87(2) of UNCLOS was deemed inapplicable in this context.⁶ The focal point of the case analysis revolves around the doctrinal contributions of this Judgement to two key aspects: freedom of navigation (as per Article 87(1)(a) of UNCLOS) and the principle of exclusive flag state jurisdiction (as per Article 92(1) of UNCLOS).

II. BACKGROUND

Panama lodged claims against Italy, contending that Italy’s exercise of criminal jurisdiction and

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² *M/V Norstar* (No.25) (Panama v. Italy), Case No.2, Judgment of Apr.10, 2019, ITLOS Rep.2018-2019, 10

³ *Id.* at 22.

⁴ *Id.* at 22, para 469.

⁵ *Id.*

⁶ *Id.*

enforcement of its customs laws resulted in a violation of its obligations by impeding the freedom of navigation of the *M/V Norstar* and hindering legitimate commercial activities.⁷ Additionally, Panama alleged that Italy's actions, such as filing charges against individuals connected to the operations of the Panamanian vessel, further infringed upon the freedom of navigation accorded to flag states and other lawful uses of the sea as stipulated in Articles 87(1) and (2) of UNCLOS.⁸ Moreover, Panama argued that Italy's conduct amounted to a breach of the duty to act in good faith and refrain from abuse of rights, as articulated in Article 300 of UNCLOS, due to the arrest of the vessel and the application of criminal jurisdiction and customs laws for bunkering activities carried out on the high seas.⁹ Consequently, Panama claimed reparation from Italy for the damages incurred.¹⁰ However, Italy, in its counter-memorial, claimed to dismiss all of Panama's claims, contending that either the Tribunal lacks jurisdiction over the matter or that the claims themselves are inadmissible.¹¹

(A) Factual Background

The *M/V Norstar*, an oil tanker bearing the flag of Panama, was owned by a Norwegian-registered company.¹² During the period from 1994 to 1998, the vessel was involved in the supply of gasoil to mega yachts in international waters beyond Italy's Territorial Sea.¹³ The Italian-registered company *Rossmare International S.A.S.* acted as 'bunkering brokers'.¹⁴ In 1997, Italian authorities initiated an investigation against both *Rossmare* and *Norstar*, revealing the latter's engagement in the sale of fuel purchased in Italy without paying tax duties to a trade of Italian and other EU leisure boats operating in international waters.¹⁵

Because of these findings, on 11th August 1998, the court of Savona, Italy, issued a decree of seizure against *M/V Norstar*, deeming the vessel and the transported oil product as objects through which the crime was committed.¹⁶ In addition, criminal proceedings were commenced against eight individuals associated with the vessel, and a request was made to Spain for the enforcement of this decree.¹⁷ As a result, on 25th September 1998, the vessel was seized and anchored in the bay of La Palma.¹⁸ An application for its release was subsequently rejected on

⁷ *Id.* at 27-30.

⁸ *Id.* at 20-22.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 22

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 23.

¹⁸ *Id.* at 23.

18th January 1999.¹⁹

Nevertheless, during the preliminary investigation on 24th February 1999, the judge considered releasing the confiscated goods and later, on 11th March 1999, informed the ship-owner about the release conditional on the payment of bail.²⁰ However, no payment was made, and consequently, the vessel remained under seizure.²¹ Subsequently, on 14th March 2003, all individuals facing charges were acquitted, and the court again ordered the revocation of the seizure of the motor vessel, instructing its return to the owner.²² However, in a letter dated 21st March 2003 to the owner, it was stated to reconstitute the vessel, with the possibility of it being sold in the case of non-withdrawal.²³ Despite this communication, no possession of the *Norstar* was taken by the shipowner.²⁴ On 25th March 2015, the Port Authority of the Balearic Islands announced the public auction of the vessel, and according to a press article, it was acquired by a company dedicated to waste management for scrapping, subsequently being removed from the port in August 2015.²⁵ On 16th November 2015, Panama filed an application against Italy.²⁶

III. TRIBUNAL'S JUDGMENT

• Article 87 of the UNCLOS

Does the decree of seizure, request for execution, arrest, and detention of *M/V Norstar* amount to a violation of Article 87 of the convention?

Article 87 (1) (a) reads:

Freedom of the high seas

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States:

(a) freedom of navigation

Panama contended that the arrest of *M/V Norstar*, in relation to its bunkering activities on the high seas, impinged upon the principles of freedom of navigation and other internationally lawful uses of the seas. It was emphasized that the vessel did not physically cross into Italian

¹⁹ *Id.* at 24.

²⁰ *Id.* at 33-34.

²¹ *Id.* at 24.

²² *Id.* at 34.

²³ *Id.* at 34-35.

²⁴ *Id.* at 35.

²⁵ *Id.* at 22-26.

²⁶ *Id.*

territory, as indicated using the term ‘constructive presence’ in the seizure decree.²⁷

On the other hand, Italy classified the bunkering activities as instances of smuggling and tax evasion. Italy countered Panama’s claim by asserting that the seizure decree targeted not the activities conducted on the high seas, but rather crimes, smuggling, and tax evasion committed within the jurisdiction of Italian territory, in accordance with Italy’s Criminal code.²⁸

The Tribunal observed that the letter requesting the execution pertaining to *M/V Norstar* documented the following actions:²⁹

1. The acquisition of marine gasoil with tax exemption in an Italian port, which was subsequently loaded onto *M/V Norstar*.
2. *M/V Norstar* provided bunkering services to mega yachts beyond the territorial waters of Italy.
3. The mega yachts returned to an Italian port without declaring the possession of the aforementioned product.

Except for the second activity, which occurred outside Italian territory, the remaining two activities were conducted within the jurisdiction of Italy.³⁰ Therefore, the Tribunal sought to determine whether the degree in question pertains to the offenses committed within Italian territory, the activities carried out on the high seas, or both.³¹ If the degree applies to the activities conducted on the high seas, Article 87 would be relevant. Conversely, if the degree pertains to activities conducted within the territorial boundaries of Italy, Article 87 would not be applicable. If the activities occurred entirely outside the Italian territory, no charges for the offense would be sustainable.³² The Tribunal rendered that the subsequent examination by the court revealed that the bunkering activities of *M.V. Norstar* on the high seas did not constitute an offense, leading to the revocation of the seizure decree.³³ In this context, Article 87 was found to be relevant, and the crucial inquiry was whether Italy had violated its provisions.³⁴

The significance of the principle of ‘freedom of navigation’ became paramount in the context of this case, specifically concerning the question of whether it can be utilized to prevent coastal states from applying their criminal and customs laws beyond their territorial boundaries to

²⁷ *Id.* at 42.

²⁸ *Id.* at 43.

²⁹ *Id.* at 45.

³⁰ *Id.*

³¹ *Id.* at 55.

³² *Id.* at 56-57.

³³ *Id.* at 52.

³⁴ *Id.* at 53.

activities conducted on the high seas.³⁵

Panama contended that the concept of ‘freedom of navigation’ encompasses all activities and rights associated with this fundamental principle.³⁶ Freedom of Navigation not only entails the right to navigate the high seas but also includes the right to access and utilize these waters. In the case of *Norstar’s* bunkering of gasoil to other vessels, this activity was considered to fall within the scope of freedom of navigation.³⁷ Interfering with a vessel on the high seas, such as through intervention or unlawful arrest in a port to prevent its return to the high seas, can be regarded as a breach of the principle of freedom of the high seas.³⁸ It is possible to evade the provisions of Article 87 by choosing to arrest the vessel in a port for bunkering activities conducted on the high seas, which are lawful, instead of physically interfering with the vessel while it is on the high seas. However, if the law of a coastal state extends extraterritorially, it renders the freedom of navigation meaningless and undermines the exclusive jurisdiction of the flag state.³⁹ The Italian court also acknowledged that the arrest of *Norstar* was wrongful because it occurred in a location where the vessel was not committing any offense, particularly regarding the provision of bunkering services on the high seas. Consequently, the arrest of vessels engaged in bunkering activities on the high seas, which falls under the criminal jurisdiction of the flag state of Panama, constitutes a violation of the relevant convention.⁴⁰

Italy’s response contended that ‘freedom of navigation’ refers to the rights of any flag state to sail through the high seas without interference from other states, except in cases of restrictions prescribed by the UNCLOS or international law.⁴¹ Italy acknowledged the lawfulness of bunkering activities, which fall under the purview of freedom of the high seas. However, it emphasized that the focus of concern lies in activities conducted within territorial seas, as freedom of navigation is not an inherent right enjoyed by states in all maritime zones, but rather specifically in the high seas.⁴² Particularly, the degree in question was enforced within Spain’s internal waters, which means it does not enjoy the benefit of freedom of navigation. The *M/V Louisa* case ruling established that Article 87 does not apply universally, but only to the high seas and the exclusive economic zone under Article 58 of UNCLOS.⁴³ The violation of freedom of navigation can occur if a state interferes with vessels on the high seas through enforcement

³⁵ *Id.*

³⁶ *Id.* at 53-54.

³⁷ *Id.* at 52-53.

³⁸ *Id.* at 54-55.

³⁹ *Id.* at 54-56.

⁴⁰ *Id.*

⁴¹ *Id.* at 56.

⁴² *Id.* at 56-57.

⁴³ *Id.* at 57.

actions or physical interventions.⁴⁴ However, in the present case, no interference with *Norstar* on the high seas occurred.⁴⁵ Although limitations on extraterritorial jurisdiction may be applicable under various provisions, it is contended that such constraints do not apply when considering Article 87.⁴⁶ Italy maintains that its prescriptive jurisdiction was expanded while still respecting the principles of freedom of navigation on the high seas.⁴⁷ Article 87 does not primarily address the concepts of territoriality or extraterritoriality.⁴⁸

The Tribunal's findings indicated that the high seas are accessible to all states, and no state possesses sovereignty or jurisdiction over foreign vessels navigating in those waters.⁴⁹ The principle of exclusive jurisdiction is vested in the flag state, as exemplified in the *S.S. Lotus case*, which asserts that vessels on the high seas are subject to the authority of the state whose flag they fly.⁵⁰ Notably, bunkering activities carried out on the high seas are considered to fall within the scope of freedom of navigation, subject to adherence to the conditions outlined in the convention and international law. It is crucial to recognize that the navigational rights enjoyed by foreign ships may differ in various maritime zones.⁵¹ Any act of interference with the navigation of foreign ships or the exercise of jurisdiction over such ships on the high seas constitutes a violation of the freedom of navigation, unless justified by the provisions of the convention.⁵² Even acts that do not involve physical interference or enforcement on the high seas may still be considered a breach of freedom of navigation.⁵³ Consequently, any action subjecting the activities of a foreign ship on the high seas to the jurisdiction of states other than the flag state is deemed to violate the freedom of navigation.⁵⁴

In this context, Italy's application of its criminal and customs laws to the bunkering activities of the *Norstar* on the high seas was deemed to be a violation of freedom of navigation.⁵⁵ The principle of exclusive jurisdiction vested in the flag state not only prohibits any state other than the flag state from exercising enforcement jurisdiction on the high seas but also prevents the extension of prescriptive jurisdiction to lawful activities conducted by foreign ships in those waters.⁵⁶ Italy's contention that the degree of seizure was enforced within internal waters is

⁴⁴ *Id.*

⁴⁵ *Id.* at 57-59.

⁴⁶ *Id.* at 58.

⁴⁷ *Id.* at 57.

⁴⁸ ⁴⁸ *Id.* at 58.

⁴⁹ *Id.* at 60-61.

⁵⁰ *Id.* at 61.

⁵¹ *Id.* at 62.

⁵² *Id.* at 62, para 222.

⁵³ *Id.* para 223.

⁵⁴ *Id.*

⁵⁵ *Id.* at 63, para 224.

⁵⁶ *Id.* para.225.

considered irrelevant to the issue at hand.⁵⁷

The Tribunal also highlighted the significance of Article 87(2), which imposes an obligation on states enjoying the freedom of navigation to acknowledge the rights of other states.⁵⁸

Article 87(2)- These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

In the specific context of this case, which centred on Panama's freedom of navigation rather than Italy's, there was no dispute or uncertainty regarding Italy's compliance with this obligation.⁵⁹

• Article 300 of the UNCLOS

Article 300 of the convention reads:

Good faith and abuse of rights: States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of rights.

The jurisdiction of the Tribunal in this matter was limited to the potential breach of Article 300 in relation to Article 87 of the Convention.⁶⁰ Italy found the notion that a violation of Article 300 occurs whenever a state acts contrary to the convention to be illogical.⁶¹ Italy opposed the use of the concept of good faith to establish a connection between Article 87 and Article 300 through an extensive or liberal interpretation, emphasizing the importance of adhering strictly to what is explicitly expressed or implied in the treaty.⁶²

The Tribunal's rejection of Panama's argument that a violation of Article 87 leads to a breach of Article 300 highlights the need for substantial evidence to substantiate the presumption of a breach of good faith.⁶³ This principle was clarified in the *M/V Louisa* case, where it was established that a state must establish a direct link between its claim under Article 300 and the specific obligations under the convention that were not upheld in good faith or were conducted

⁵⁷ *Id.* at 63, para 226.

⁵⁸ *Id.* at 65.

⁵⁹ *Id.*

⁶⁰ *Id.* at 65.

⁶¹ *Id.* at 66.

⁶² *Id.* at 67.

⁶³ *Id.* at 67-68.

in an abusive manner.⁶⁴ Following a comprehensive assessment of the claims put forth by both Panama and Italy, alleging a breach of good faith, the tribunal ultimately determined that Article 300 had not been violated.⁶⁵ The arrest of *Norstar* in 1998, after four years since the bunkering activities in Spain's internal waters after departing from the high seas, cannot be regarded as a breach of good faith.⁶⁶

IV. DISSENTING OPINION

In the dissenting opinion, they opined that the central inquiry revolves around the applicability of Article 87(1) and whether Italy has contravened it.⁶⁷ At the outset, it is essential to determine the applicability of Article 87(1) for any potential violation to occur.⁶⁸ However, it is crucial to note that mere relevance of this article does not automatically indicate its applicability.⁶⁹ While relevance may be sufficient to establish jurisdiction, it falls short of demonstrating the actual applicability of Article 87(1).⁷⁰ Hence, Article 87(1) is deemed relevant in the context of jurisdictional considerations but does not, by itself, confirm its applicability.⁷¹

Moreover, it is imperative to acknowledge that the freedom of navigation for vessels on the high seas inherently restricts the enforcement and extension of prescriptive jurisdiction to lawful activities conducted in those waters.⁷² Nonetheless, it should be noted that nothing in the text, along with Article 92, precludes non-flag states from exercising their prescriptive criminal jurisdiction in relation to unlawful activities on the high seas.⁷³ The judgment explicitly focused on the prohibition of prescriptive jurisdiction over lawful activities of vessels on the high seas, but it does not eliminate the possibility of exercising prescriptive jurisdiction over unlawful activities of vessels in those waters.⁷⁴ In this case, Italy refrained from exercising its criminal jurisdiction, both in terms of enforcement and prescriptive measures, regarding the bunkering activities of the *Norstar* on the high seas.⁷⁵ Italy did not subject these activities to criminalization.⁷⁶ Rather, it employed its criminal jurisdiction in relation to alleged offenses of tax evasion and smuggling, which were deemed to have taken place within the territorial

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 68-70.

⁶⁷ M/V *Norstar* (No.25) (Panama v. Italy), Case No.2, dissenting opinion of Apr.10, 2019, ITLOS Rep.2018-2019, 257.

⁶⁸ *Id.* at 259-260.

⁶⁹ *Id.* at 260.

⁷⁰ *Id.* at 260, para 14.

⁷¹ *Id.*

⁷² *Id.* at 261

⁷³ *Id.* at 261-262, para 20

⁷⁴ *Id.* at 262.

⁷⁵ *Id.* at 262, para 21.

⁷⁶ *Id.*

boundaries of Italy.⁷⁷ Hence, a mere assertion that Article 87(1) is applicable and Italy has violated it does not hold as a sufficient argument.⁷⁸

For the sake of presenting an argument, it was posited that even if Article 87(1) were considered applicable, it remains unviolated.⁷⁹ Italy's investigative focus was not solely directed towards bunkering activities, but rather centred on the vessel's utilization for transporting and supplying fuel, wherein appropriate taxes were purportedly evaded in Italian territory and subsequently, this fuel was smuggled into the same territory.⁸⁰ In light of this alleged criminal scheme, Italy was justified in investigating this illicit act as an integral component of the overall offense.⁸¹ In the context of territorial jurisdiction, offenses were deemed to have occurred within the territory where one of their essential elements took place.⁸² Consequently, if such offenses were considered to have transpired within Italy, the extension of prescriptive criminal jurisdiction became applicable.⁸³ In the present case, even if Italy exercised its prescriptive criminal jurisdiction with regard to activities on the high seas, it was done in connection to a fundamental aspect of the alleged crime (specifically, tax evasion).⁸⁴ This criminal conduct originated within Italian territory through the purchase of fuel with false declarations in Italian ports, was completed within Italian territory through the reintroduction of non-declared fuel into its internal waters, and resulted in consequential effects within the Italian territory, such as financial damage arising from the non-payment of taxes.⁸⁵ Given that the alleged crime had its inception and conclusion within Italian territory, it is clear that the location of the offense was Italy and not the high seas.⁸⁶ As a result, Italy's prescriptive jurisdiction, exercised through the Decree of Seizure and the Request for its execution, pertaining to the supply of mega yachts on the high seas with fuel for which taxes were purportedly unpaid within its territory and subsequently smuggled into its territory, was deemed to be consistent with international law.⁸⁷

V. CONCLUSION- ANALYSIS

This case indeed carries significant importance as it involves the Tribunal's clarification on the concept of freedom of navigation on the high seas. Tribunal clarified that Italy's utilization of

⁷⁷ *Id.*

⁷⁸ *Id.* at 263-264, para 27.

⁷⁹ *Id.* at 264, para 28.

⁸⁰ *Id.* para 30.

⁸¹ *Id.*

⁸² *Id.* 264.

⁸³ *Id.*

⁸⁴ *Id.* at 265.

⁸⁵ *Id.* para 32.

⁸⁶ *Id.*

⁸⁷ *Id.* at 266, par 36.

prescriptive jurisdiction over the bunkering activities of the vessel ‘*M/V Norstar*’ on the high seas amounted to a violation of Article 87(1) of UNCLOS. The Tribunal reaffirmed the application of Article 87 of UNCLOS in situations where elements of extraterritorial prescriptive jurisdiction are involved. The exercise of such extraterritorial prescriptive jurisdiction by non-flag states over foreign vessels on the high seas is considered to breach the freedom of navigation, except in exceptional cases outlined in the Convention or other relevant international treaties. This clarification reinforces the protection of vessels against non-flag state prescription lacking a valid legal basis.

Nevertheless, the implementation of extending exclusive flag state jurisdiction gives rise to apprehensions. The Tribunal’s expansive understanding of Article 92 of UNCLOS, extending it to prescriptive jurisdiction, lacks substantial justification and endorsement from legal precedents, state practices, or subsequent treaty law. The Tribunal could have greatly benefited from furnishing a more comprehensive analysis and elucidation of the term ‘lawful activities’ as stipulated in Article 92. Such clarification would have been instrumental in resolving the existing discrepancies in interpretation and promoting enhanced legal assurance for both states and vessels.

Furthermore, this case lacks clarity concerning the assessment of non-flag state prescription. The Tribunal’s ruling does not clearly define the standard of appreciation necessary to ascertain a breach of Article 87 of UNCLOS. While the Tribunal acknowledged that Italy’s jurisdictional practice encompassed both territorial and extraterritorial aspects of prescription, it failed to adequately weigh the competing interests to determine whether a satisfactory jurisdictional nexus existed, thus avoiding a breach of Article 87. To ensure greater legal certainty, the development of a clear test for determining breaches of Article 87 is imperative.
