

Declaration of Judge *ad hoc* Francioni

1. I have joined the decision of the majority on all the preliminary questions concerning prima facie jurisdiction under article 290, paragraph 5, and admissibility, as well as on the substantive question concerning the existence of the basic conditions justifying prescription of provisional measures in this case pending the constitution of the Annex VII tribunal.

2. In particular, I fully share the opinion of the majority that this is a legal dispute between Italy and India, that this dispute arises under the Law of the Sea Convention, that in view of the nature of the dispute the decision on the applicability of the rule of prior exhaustion of local remedies belongs to a later stage in accordance with this Tribunal's jurisprudence (see, in particular, *M/V "Louisa" (Saint Vincent and the Grenadines v. Spain, Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008–2010, p. 58)*, that the rights invoked by the Applicant are "plausible" under international law, and that there has been no "abuse of legal process" by the Applicant within the meaning of article 294, nor that any right of Italy to access this Tribunal may be deemed to have been forfeited because of Italy's participation in the Indian judicial process. Recognition by the Tribunal that the rights claimed by Italy in relation to the exclusive jurisdiction over the *Enrica Lexie* incident and over the two members of its armed forces arrested, detained and prosecuted after the incident meet the plausibility threshold required for the prescription of provisional measures has led to the further logical step of deciding that under the circumstances of the case the adoption of provisional measures is appropriate and that, in view of preserving the respective rights of the parties to the dispute, an order for provisional measures should be issued to Italy and India to the effect that they

... shall both suspend all court proceedings and shall refrain from initiating new ones which might aggravate or extend the dispute submitted the Annex VII arbitral tribunal or might jeopardize or prejudice the carrying out of any decision which the arbitral tribunal may render.

3. I concur with this decision. However, the Tribunal has been much at pains in dealing with two fundamental issues that are at the heart of the granting of provisional measures: 1) the meaning and scope of the Tribunal's duty “to preserve the respective rights of the parties to the dispute . . .” (article 290, paragraphs 1 and 2) and the requirement of “urgency of the situation” (article 290, paragraph 5). This has led to the adoption of provisional measures that, in my opinion, meet only in part the objective of preserving the respective rights of the parties and of taking into account the urgency of the situation in this specific case. This is why, pursuant to article 125, paragraph 2, of the Rules, I am filing this declaration, which does not concern the provisional measures that the Tribunal has prescribed, which are appropriate and legally necessary, but rather the measures that the Tribunal has failed to prescribe with regard to Italy's second request.

4. With this request, Italy asked the Tribunal to prescribe that India shall take

... all measures necessary to ensure that restrictions on the liberty, security and movement of the Marines be immediately lifted to enable Sergeant Girone to travel to and remain in Italy and Sergeant Latorre to remain in Italy throughout the duration of the proceedings before the Annex VII Tribunal.

(Para. 31 of the Statement of Claim and para. 57 of the Request)

The Tribunal has declined to prescribe the measures indicated in the second request of Italy mainly on the basis of the explicit argument that granting such request would have amounted to an anticipation of a ruling on the merits, which belongs to the Annex VII arbitral tribunal. The reasoning of the Tribunal is also based on the assumption that the circumstances of the case did not meet the strict test of urgency under article 290, paragraph 5. While I fully understand the hesitation of the Tribunal in light of the imminent constitution of the arbitral tribunal, which will have competence to deal with the merits of the dispute and to decide on provisional measures, nevertheless I wish to state in this declaration why, in my view, the provisional measures prescribed by the Tribunal should also have included the *pro tempore* lifting of the restrictions on the liberty of the two marines. To explain this I will first focus on the need to preserve the respective rights of the parties and then on the requirement of urgency.

“... To preserve the respective rights of the Parties”

5. The standard for what is required to “preserve the respective rights of the Parties” was effectively set by Judge Jiménez de Arechaga as President of the International Court of Justice in his separate opinion in *Aegean Sea Continental Shelf*:

[T]he essential justification for the impatience of a tribunal in granting relief before it has reached a final decision on its competence and on the merits is that the action of one party *pendent lite* cause or threatens a damage to the rights of the other of such nature that it would not be possible fully to restore those rights, or remedy the infringements thereof, simply by a judgment in its favor.

(Order on provisional measures 11 September 1976, *Aegean Sea Continental Shelf (Greece v Turkey) I.C.J. Reports 1976*, pp. 16–17)

6. The Tribunal has recognized that the nature of the rights involved in this dispute requires the prescription of a provisional measure to the effect that India and Italy shall suspend the exercise of criminal proceedings and refrain from initiating new ones which may aggravate or extend the dispute. But how can such order be effective without a *pro tempore* lifting of the Indian measures of constraint on the personal liberty and movement of the two marines, one of whom is still confined, three and a half years after the incident, in the premises of the Italian Embassy in Delhi and required to submit to Indian criminal jurisdiction by periodically reporting to Indian judicial police?

7. Much relevance in de-coupling the two provisional measures requested by Italy, and in finally denying the second request, has been given by the majority of the Tribunal to two considerations: first, that the rights of the two marines are not in imminent danger in light of the fairness and alleged benevolence shown by the Indian judicial system in dealing with two persons accused of a serious crime; second, because allowing Sergeant Girone to return to Italy would prejudice India’s right to exercise jurisdiction in the event of a decision of the arbitral tribunal finding that Italy and India have “concurrent” jurisdiction over the incident.

8. The argument has also been advanced that allowing the temporary return of Sergeant Girone to Italy would amount to inappropriate anticipation of a decision on the merits which belongs exclusively to the Annex VII arbitral tribunal.

9. On the first point, I do not see how the granting of the second request of the Applicant would have caused a prejudice to the rights of, or would put an undue burden on, India pending the adjudication of the merits of the case. On this question, the majority seems to have accepted the Respondent’s argument that it would be unrealistic to expect that Italy would return Sergeant Girone and Massimiliano Latorre to India in the event the arbitral tribunal were to decide that jurisdiction in this case is vested in Indian courts or that Italy and India have concurrent jurisdiction over the case.

10. In support of this argument it has been repeatedly affirmed that because of the political sensitivity of the case in Italy, it would be unrealistic to expect that the Italian authorities would allow the return of the two marines if this were required by a future award of the arbitral tribunal. In this connection a misleading reference has been made to a recent ruling of the Italian Constitutional Court which has declared unconstitutional for breach of fundamental rights of the individual a piece of legislation enacted by the Italian Parliament in order to comply with a decision of the International Court of Justice (*Corte Costituzionale*, judgment 238/2014, of 22 October 2014).

12. In my view, both these arguments are unfounded and should have been totally disregarded by the Tribunal.

13. First, because Italy has undertaken, and placed on the record of these proceedings, a commitment to unconditionally abide by any final decision of the Annex VII tribunal and to return the two marines to India, as it has done more than once, if required by the final award (Italy’s Agent statement, PV.15/3, p. 19, I. 35–39). I cannot see how the Tribunal can proceed on the assumption of Italy’s lack of trustworthiness on this important aspect of the dispute.

14. Second, pursuant to the bail order of the Indian Supreme Court, Italy has provided surety for each marine and has declared in the course of these proceedings its readiness to consider further arrangements for the provision of surety to India, as might have been required by an order of the Tribunal.

15. Third, any reference to the recent decision of the Italian Constitutional Court is misplaced and ill-conceived. This is so because that decision concerned a case of undisputed war crimes and crimes against humanity committed during the Second World War which could not be more far removed

from the present case, which concerns a conflict of jurisdiction over a maritime incident. Further, the judgment of the Italian Constitutional Court shows exactly the opposite of what India has tried to infer from it. Contrary to India's regrettable and repeated assertion that Italy's promise is tainted by an alleged disposition to shun compliance with international judgments, the case shows that Italy not only promptly complied with a decision of the International Court of Justice (*Jurisdictional Immunities of the State (Italy v. Germany: Greece Intervening)*, Judgment, I.C.J. Reports 2012, p. 99), but went as far as to adopt an ad hoc legislative measure in order to ensure effective implementation of such decision in its internal legal order. Further, even after the Constitutional Court's decision affirming the inalienable right of access to justice for victims of international crimes, legislative measures have been adopted in order to ensure that no enforcement measures are taken with regard to foreign States' assets in violation of the decision of the International Court of Justice in *Jurisdictional Immunities of the State* (see Law n. 162, 10 November 2014, Article 19-bis), which was not mentioned by counsel for India, either intentionally or for lack of adequate information. Italy's trust in international adjudication and its commitment to fully comply with international decisions is further confirmed by its filing on 25 November 2014 of a declaration of acceptance of the compulsory jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Court's Statute.

16. Having said this, it is hard to understand what prejudice the rights invoked by India would have suffered had the Tribunal granted provisional measures extending to the situation of the two marines and allowing them the freedom to return to Italy. India has already allowed the return of the two marines to Italy more than once and Italy has ensured their return to India. India's right to exercise jurisdiction would not have been compromised in the least by the release of Sergeant Girone pending the determination of the rights of the Parties by the arbitral tribunal. By India's own admission, criminal proceedings are already at a standstill pending the decision of the Supreme Court of India on jurisdiction.

17. The same cannot be said for the rights of Italy. Italy claims that the restraints on personal liberty and continuing exercise of criminal jurisdiction over the *Enrica Lexie* incident and the two marines constitute a continuous breach of India's obligations under the Convention. This is a matter for the arbitral tribunal to decide. However, in the event of an award favourable to Italy's claim of exclusive jurisdiction the prejudice to Italy's rights would be

irreparable. The exercise of criminal jurisdiction in the face of Italy’s opposition and complaint that this constitutes an injury to its sovereign right to its exercise of competence and punitive powers over members of its armed forces would not be reversible. The time spent in preventive detention by Sergeant Girone would not be repairable, considering also the exceptionally long period of time he has been subjected to measures limiting his personal freedom.

18. This leads me to conclude that the Tribunal had ample reasons for extending provisional measures to the temporary lifting of restrictions imposed by India on the personal liberty of the two marines “in order to preserve the respective rights of the parties to the dispute”.

Urgency

19. There is no dispute that article 290, paragraph 5, makes the prescription of provisional measures contingent upon the existence of a situation of urgency in light of the circumstances of the case. The Tribunal has implicitly accepted that the circumstances of this dispute meet the test of urgency and has consequently decided to prescribe provisional measures to the effect “that both Italy and India suspend all court proceedings and refrain from initiating new ones which might aggravate or extend the dispute”.

20. However, when the test of urgency was applied to the situation of the two marines, the Tribunal declined to prescribe provisional measures because, in the opinion of the majority, that situation “touches upon issues related to the merits of the case” (para. 132 of the Order).

21. I agree that the issue of maintaining or lifting the measures restricting the personal liberty of the two marines touches upon the fundamental issue of who has the right to exercise criminal jurisdiction over the *Enrica Lexie* incident. But it would be misleading to assess the “urgency of the situation” only in the limited time frame of the weeks or months that will pass before the Annex VII tribunal is constituted and can rule on the question.

22. The assessment of urgency requires that we look at the situation in its whole context. The incident that ignited this dispute happened three and a half years ago. The exercise of enforcement jurisdiction by India over a ship flying the Italian flag and navigating in international waters remains contested

by Italy. Equally contested is the exercise of criminal jurisdiction by India over the incident in which the regrettable death of two Indian fishermen has been attributed to members of Italy’s armed forces deployed on the ship on a counter-piracy mission in a high risk area. The jurisdictional dispute has not been resolved by diplomatic means. India remains adamant in its position that it had a right to intercept the *Enrica Lexie* in international waters and detain and prosecute the two marines. In my view, the urgency of the situation is manifest and the fact that final adjudication of the issue belongs to the merits does not undermine the case for interim measures of protection of the two marines after such an exceptionally long period of restriction of their personal liberty.

23. In point of law, my conclusion is supported by the very precedents of this Tribunal, such as the *M/V “SAIGA” (No. 2)*, the *M/V “Louisa”*, and most recently the *“Arctic Sunrise”*, which show that the Tribunal has always considered situations of deprivation of personal liberty as matters of urgency. All the more so in this case, which is characterized by an exceptionally long period of time in which restrictions on personal liberty have remained in force, which has entailed serious health and humanitarian concerns, and which involves the status of the two marines as members of the armed forces in the exercise of their official functions. I hardly need to recall that the International Law Commission, in its report on “the immunity of state officials from foreign criminal jurisdiction”, defines in article 2(f) an act of a State official as “any act performed by a State official in the exercise of State authority”. (ILC, Report on the work of its sixty-sixth session, UN Doc. A/CN.4/L.865) The report leaves no doubt that military personnel in the exercise of their functions are *par excellence* State officials (ILC, Third Report on the immunity of State officials from foreign criminal jurisdiction, 2 June 2014, UN Doc, A/CN.4 / 673 (2014), para. 36.

24. From a policy perspective it would have been appropriate for the Tribunal to have taken into account, even at the stage of provisional measures, the status that members of armed forces enjoy under international law. International cooperation in countering piracy, terrorism, human trafficking, supporting peace-keeping, as well as in carrying out humanitarian missions, requires the overseas deployment of members of the armed forces. It would be disastrous

for international law if cooperation in these matters were to be stifled by the perceived risk that members of the armed forces engaged in official duty could be systematically subjected to the criminal jurisdiction of the coastal State for incidents occurring in international waters and in the accomplishment of their official mission. It is regrettable that in written and oral proceedings in this case the two marines have been called “murderers”. I have objected to this qualification, which prejudices culpability. But what I want to stress in these concluding remarks is that the two marines at the centre of this endless dispute belong to the same military corps whose members every day risk their lives in search and rescue operations that the Italian navy, and other navies, have conducted for months in order to mitigate the human tragedy of thousands of migrants drowning in their attempt to cross the Mediterranean. Giving them the benefit of the doubt at this stage of provisional measures would have sent a positive message to the outside world that this Tribunal is fully aware of the importance of keeping cooperation alive in these crucial matters in view of the general interest of the international community and beyond the respective rights of the Parties to this dispute.

(signed)

F. Francioni