

Declaration of Judge Paik

1. Once the need for the prescription of provisional measures has been established, the next question is what the content of such measures should be. In this regard, the Tribunal finds in paragraph 126 of the present Order that “the first and the second submissions by Italy, if accepted, will not equally preserve the respective rights of both Parties until the constitution of the Annex VII arbitral tribunal as required by article 290, paragraphs 1 and 5, of the Convention”. It then prescribes the measure set out in the operative part (1), which is similar in substance, though narrower in scope, to the first submission by Italy. On the other hand, the Tribunal rejects the second submission by Italy seeking the immediate lifting of restrictions on the liberty, security and movement of the two Marines. I concur with the above decision of the Tribunal to accept the first submission in part but to reject the second. However, given the extensive argument made by Italy, in particular, with respect to the second submission and also the fact that, in general, risks to human liberty or life are taken seriously in provisional measure proceedings, I find it necessary to explain a little further why I do so.

2. The present dispute between Italy and India comes down to the question which State has jurisdiction over the incident which occurred on 15 February 2012. (As the question of immunity is inextricably linked to that of jurisdiction, it can be considered to be part of the latter question.) Italy claims a right of “exclusive” jurisdiction over the incident. On the other hand, India also asserts a right to exercise jurisdiction and, having taken the two Marines into custody immediately after the incident, has exercised its criminal jurisdiction over them ever since then. In a dispute like the present one, in which the very existence of a right – India’s right to exercise jurisdiction in this case – is contested between the parties, any provisional measures that preserve the rights of one party necessarily prejudice those asserted by the other party. The Tribunal must therefore weigh against each other the respective rights of the parties as affected by the relief sought. After all, in prescribing provisional measures, the Tribunal should preserve the rights of both parties to the dispute, rights which may subsequently be adjudged by the Annex VII arbitral tribunal to belong to “either” party.

3. The first submission of Italy aims to suspend the exercise of jurisdiction by India until the final decision of the Annex VII arbitral tribunal, thus to preserve the *status quo* that existed at the time the dispute was submitted to the arbitral procedure. The provisional measure to suspend the jurisdiction of India would certainly preserve the rights of Italy to which, according to Italy, irreparable prejudice has already been caused, and continues to be caused, by India's unlawful exercise of jurisdiction, which lies exclusively with Italy. What, then, would be the effect that compliance with such a measure might have on India's ability to exercise its right?

4. The provisional measure the Tribunal prescribes in the operative part (1) is similar, though narrower, to the above submission made by Italy. While this measure would prevent India from continuing to exercise its jurisdiction in relation to court proceedings, I do not consider that such suspension would unduly prejudice the rights of India under the circumstances. For one thing, India, in a sense, upholds the very principle or idea underlying the above measure, namely that a criminal trial should be suspended while preliminary jurisdictional issues are decided. In fact, this is why the Supreme Court of India made the order to the special trial court to keep the criminal proceedings over the two Marines in abeyance (Supreme Court of India, Order, 28 March 2014). As a result, the criminal trial before the special court has been stayed since March 2014, and it was submitted during the hearing that there is no prospect that the stay will be lifted in the near future. Now that arbitral proceedings have been instituted to decide the dispute between the Parties over the question of jurisdiction, the measure to suspend domestic criminal proceedings during its pendency would not, in principle or in reality, seriously affect the rights asserted by India. Thus I find the provisional measure requiring both Parties to suspend all court proceedings and to refrain from initiating new ones appropriate for preserving their respective rights under the circumstances of the present case.

5. On the other hand, the second submission seeks to remove all restrictions on the liberty of the two accused imposed by India and to secure their presence in Italy throughout the duration of the arbitral proceedings, thus to preserve, as far as the legal status of the accused is concerned, the *status quo ante* that existed before the allegedly unlawful exercise of jurisdiction by India took place. There is no inherent reason why such a request should not be made or

granted so long as it is appropriate under the circumstances. Without doubt, the provisional measure to the above effect would preserve the rights asserted by Italy with respect to the two Marines, to whom, Italy argues, irreparable prejudice has been caused and continues to be caused. The question is then: what would be the consequence of such a measure for India's ability to exercise the rights it asserts?

6. Exercise of criminal jurisdiction is a duty of the State. It is indispensable to the maintenance of law and order, a fundamental basis of any society, which no State can take lightly if it is not to neglect its duty as a State. In exercising criminal jurisdiction, obtaining the custody of the accused is crucial. Criminal proceedings without obtaining and maintaining the custody of the accused would be largely a fiction. Thus the question of the custody of the accused should be approached with utmost caution. The Tribunal was informed during the hearing that Indian law precludes a trial in absentia in a case like the present one (ITLOS/PV.15/C24/2, p. 41, lines 16–20). The second submission, if accepted, would then deprive India of any possibility, whether actual or legal, to exercise the rights it asserts over the *Enrica Lexie* incident during the pendency of the arbitral proceedings because the accused would no longer be subject to its jurisdiction. Furthermore, to me, requiring India virtually to “hand over” the accused to Italy goes beyond the function of provisional measures as interim relief and comes close to prejudging the merits of the dispute.

7. Due to the crucial role of the custody of the accused in the exercise of criminal jurisdiction, it is quite common in most legal systems for restrictions in one form or another to be imposed on their liberty and movement before the final determination of guilt. The level and extent of such restrictions may vary in accordance with the gravity of the alleged offence. In this case, the two Marines are accused of serious crime and the restrictions on their liberty need to be assessed in that context. During the hearing, Italy compared the present case with several other cases brought before the Tribunal, including the “*Arctic Sunrise*” Case, to make its case that the restrictions on the liberty of the Marines should be lifted immediately to enable them to return to and remain in Italy. However, there are differences between the present case and those other cases, the most critical one being the difference in terms of the gravity of the offence allegedly committed by the accused. In addition, I do not find

the present case comparable to prompt release cases in which the Tribunal decides the question of release upon application made under specific provisions of the Convention such as article 73, paragraph 2, and article 226, paragraph 1, of the Convention.

8. I acknowledge that overly lengthy restrictions on the liberty and movement of the accused should certainly be a concern for the Tribunal, which has underscored over and over again that considerations of due process of law must be applied in all circumstances (see *“Juno Trader”* (*Saint Vincent and Grenadines v. Guinea-Bissau*), *Prompt Release, Judgment, ITLOS Reports 2004*, p. 17, at pp. 38–39, para. 77; *“Tomimaru”* (*Japan v. Russian Federation*), *Prompt Release, Judgment, ITLOS Reports 2005–2007*, p. 74, at p. 96, para. 76; *M/V “Louisa”* (*Saint Vincent and Grenadines v. Spain*), *Merits, Judgment, ITLOS Reports 2013*, p. 4, at p. 46, para. 155). During the hearing, the two Parties presented to the Tribunal different views on what has caused the current impasse. Whatever the cause may be, this lamentable state is an element that deserves scrutiny in assessing the provisional measure to be prescribed and has been scrutinized. However, it should also be recalled that those restrictions have been relaxed and the conditions of the accused made less onerous by the measures taken by the Supreme Court of India over the past few years.

9. Weighing and balancing the above considerations, I came to the conclusion that the provisional measure to lift immediately all restrictions imposed upon the liberty of the accused and to allow them to return to and remain in Italy during the pendency of the arbitral proceedings would not “equally” preserve the rights of the respective Parties to the present dispute. Moreover, given that at the heart of the present dispute is the custody of the two accused Marines, such a measure would amount to prejudging the merits of the case to be decided by the Annex VII arbitral tribunal.

10. Provisional measures are an exceptional form of relief. An applicant can obtain substantial relief without having to show conclusively the existence of jurisdiction or the validity of its claims. The provisional measures prescribed have binding force and the parties to a dispute are thus required to comply with them. It is unclear whether a party can be compensated for any injury it has suffered in complying with provisional measures in the event that the rights in dispute are ultimately adjudged to belong to that party. Given this nature of provisional measures, the Tribunal should exercise caution in assessing not

only whether to prescribe provisional measures but also what measures to prescribe. I believe that the decision of the Tribunal partly to accept the first submission but to reject the second has been made with such caution with a view to preserving the respective rights of Italy and India under the circumstances of the present case.

(*signed*) J.-H. Paik