Dissenting Opinion of Vice-President Bouguetaia

(*Translation by the Registry*)

1. The Tribunal has just delivered its Order in the *"Enrica Lexie"* case, acceding to Italy's request and prescribing provisional measures. This is not an easy case: as seen in the voting, the Tribunal was firmly divided, resulting in five dissenting opinions and five opinions or declarations expressing differing views, in particular on *prima facie* jurisdiction and urgency. The case is thus *sui generis*, even if some counsel and judges tried to analogize it to the "*Louisa*" or "*Sunrise*" cases.

2. I can understand that the Parties sought to draw on the Convention in all its provisions in their search for arguments and support for their positions. Clearly, it would have been necessary to do so were there the slightest connection between the case and the Law of the Sea Convention. Regrettably, however, there is not, at least not any I can find, and that is why, I am sorry to say, I have been unable to join the Tribunal in its decision.

3. I shall not address all the many issues raised by the case. These (exhaustion of local remedies, abuse of right and so forth) could have been the subject of lengthy comment in this opinion.

I shall confine myself to focusing in these few paragraphs on what I find essential and on what justifies my position.

4. On 15 February 2012, during an incident occurring some 20.5 miles off the coast of India two Italian marines aboard an Italian-flagged oil tanker opened fire on an Indian fishing boat, killing two fishermen and seriously damaging the vessel.

5. On 26 June 2015, pursuant to article 287 of the Law of the Sea Convention, Italy initiated proceedings against India under Annex VII of the Convention.

6. On 21 July, Italy submitted a request to the Tribunal for the prescription of provisional measures under article 290, paragraph 5, of the Law of the

Sea Convention in its dispute with India. That provision clearly states: the "Tribunal . . . may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires" (emphasis added). The Tribunal thus had to satisfy itself that there was a *dispute* between the Parties, that the Annex VII arbitral tribunal would have *prima facie* jurisdiction and that the *urgency* of the situation required the prescription of provisional measures by the Tribunal.

7. It was easy under the facts and the law to establish the existence of a dispute between the Parties: the case involves an incident between an Italian tanker and an Indian fishing vessel and each Party claims jurisdiction over it. It therefore fell to the Tribunal to satisfy itself before prescribing provisional measures under article 290, paragraph 5, that:

– the arbitral tribunal would have *prima facie* jurisdiction (that is to say, that the dispute between the Parties concerned the interpretation or application of the Convention, article 287, paragraph 1);
– the urgency of the situation required that provisional measures be prescribed.

8. It is on precisely these two points, which are the essential requirements to be met before provisional measures may be prescribed, that I am in complete disagreement with the Tribunal.

I. *Prima facie* jurisdiction

9. That the Annex VII arbitral tribunal would have *prima facie* jurisdiction is a condition on the jurisdiction of the Tribunal for the Law of the Sea (article 290, paragraph 5). In order for the Annex VII arbitral tribunal to have jurisdiction, the dispute must relate to the interpretation or application of the Convention.

10. The Tribunal thus had to satisfy itself at this stage of the proceedings "that any of the provisions invoked by the Applicant appears *prima facie* to afford a basis on which the jurisdiction of the Annex VII arbitral tribunal might be founded" (paragraph 52 of the Order).

11. In confining itself to merely rehashing the arguments of the Parties without assessing their weight or implications, the Tribunal has "decreed" the existence of such jurisdiction, stating "[*c*]*onsidering* that, for the above reasons, the Tribunal finds that the Annex VII arbitral tribunal would *prima facie* have jurisdiction over the dispute" (paragraph 54 of the Order). This sounds like a premise divorced from any cogent legal reasoning. In fact, within the entire series of Convention articles enumerated by Italy for the purpose of establishing a relationship between the dispute and the Convention, not one provision can demonstrate the existence of *fumus boni iuris*, in the words of counsel for India.

12. Italy even took care not to quote a single one of these provisions in its Statement of Claim dated 26 June 2015, knowing full well that they were irrelevant to its claim. None of the Convention articles cited by Italy,

– Articles 2 (paragraph 3), 27, 33, 56, 58, 87, 89, 92, 94, 97, 100 and 300, can effectively and objectively found the *prima facie* jurisdiction of the Annex VII arbitral tribunal. While all its arguments were hopeless, Italy laid particular stress on article 97 of the Convention, maintaining that "in the event of an incident of navigation which gives rise to the penal responsibility of any person in the service of the ship, no penal proceedings may be instituted against such a person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national". By this ad hominem argument Italy undermines its own position. It repeatedly stated that the marines were State officials for whom it claimed a special status, incidentally one not provided for in the Convention; they cannot therefore be considered persons in the service of the ship.

13. What is more, there was in fact no "incident of navigation" or collision because there was no physical contact between the two vessels. Shots were fired from the Italian vessel at an Indian fishing boat registered in India which was fishing in the contiguous zone; the *corpus delicti* is to be found on this vessel.

14. It may be added that article 97 of the Convention is found in Part XII, which concerns the high seas, and the incident took place 20.5 miles off the Indian coast, that is to say in the contiguous zone. The dispute lies completely outside the scope of article 97 of the Convention.

15. In truth, this case is about determining which State has jurisdiction over a shooting in the exclusive economic zone of India which led to the deaths of two Indian fishermen. The subject of the dispute does not fall within the scope of the Convention, which is silent on these questions as well as on those relating to a use of firearms in the EEZ resulting in the taking of lives.

16. I shall not address this aspect of the question but shall merely point out the conflicting interpretative declarations made by the Parties when ratifying the Convention. In India's view, "the provisions of the Convention do not authorize other States to carry out in the exclusive economic zone and on the continental shelf military exercises or manoeuvres, in particular those involving the use of weapons or explosives without the consent of the coastal State." The incident occurred 20.5 miles off the Indian coast, plainly in the exclusive economic zone of India.

17. In a show of the creative ingenuity it exercises so well, the Tribunal nevertheless decided to consider the *prima facie* jurisdiction of the arbitral tribunal to have been established. To use a term far from the most elegant perhaps, I would characterize this jurisdiction as "prefabricated".

18. Even so, before prescribing provisional measures the Tribunal still had to find that the situation was one of *urgency* (one of the requirements of article 290, paragraph 5).

II. Urgency

19. Italy waited three-and-a-half years from the time of the incident before applying to the Tribunal for provisional measures. During that period it participated in all the proceedings in the Indian courts. Where is the urgency? Have any new developments justified a finding of urgency? The answer is no.

20. It is specious to argue that "'urgency is demonstrated by the fact that the exercise of jurisdiction' by India is 'certain and ongoing'" (paragraph 98 of the Order): the proceedings in India have been stayed and India has undertaken to refrain from any action pending the decision of the arbitral tribunal, which is to be rendered within four months at the latest. And be it noted at this juncture that the Special Court of India will have to rule on immunity and on its own jurisdiction before opening the criminal trial and that Italy will be able to assert its claim of exclusive jurisdiction before that Court.

21. The Additional Solicitor General of India himself confirmed before the Tribunal that the Supreme Court had indeed stayed the case and that "[i]t would not be going too far to say that until the tribunal is constituted and hears the matter, there is no compelling assumption that the matter will be taken up and that there will be an adverse decision against" Italy (PV.15/2, Narasimha, pp. 12–13, lines 47–2).

22. But then, in view of the purported detention of the marines and the circumstances in which they find themselves, it is maintained that urgency "can be humanitarian". Mr Latorre is now in Italy, where he is recovering in the bosom of his family from the illness for which he has received extensive treatment thanks to the many leaves to return to Italy so generously granted him by the Indian Supreme Court. He is currently benefiting from an authorization which will expire on 13 January 2016 and is eligible for extension.

23. Mr Girone, the other marine, is living an untroubled life in the Italian Embassy in New Delhi, where he sees family and friends, and he has already returned twice to Italy thanks to the benevolence of the Indian courts. What is more,

> the urgency of authorizing him to go back to and stay in Italy is belied by his own behaviour . . . he formally withdrew his interim application seeking to relax bail conditions so that he may be allowed to travel to Italy. (paragraph 105 of the Order)

24. In masterly cryptic terms the Tribunal finds "*mezza voce*" that there is urgency without using the word even once in its reasoning. It confines itself merely to considering "that the above consideration requires action on the part of the Tribunal to ensure that the respective rights of the Parties are duly preserved" (paragraph 107 of the Order).

25. This suspicious lack of candour is certain to give rise to much questioning of the supposed urgency.

26. India argued, in vain, that "well-being and humanitarian considerations in favour of persons accused of a serious crime have to be balanced with that of the victims of the crime" and that "[i]t is a generally accepted principle that the latter should prevail in case of conflict" (paragraph 94 of the Order). The effort went to waste and this comes as no surprise since urgency no longer obtains in respect of the Indian fishermen: they are dead!!! That perhaps explains the

selective invocation of humanitarianism. Here again, I regret that I am unable to bring myself to go along with the reasoning of the Tribunal when it finds "urgency" where there is none.

27. I shall conclude this note with a few comments on the plausibility of the rights of the Parties and on the impact of the measure prescribed by the Tribunal.

28. The Tribunal acknowledges that, "before prescribing provisional measures, [it] does not need to concern itself with the competing claims of the Parties, . . . it needs only to satisfy itself that the rights which Italy and India claim and seek to protect are at least plausible" (paragraph 84 of the Order).

29. Once it has found that these rights are plausible, the Tribunal may prescribe provisional measures only if "there is a *real and imminent risk* that irreparable prejudice could be caused to the rights of the parties to the dispute pending such a time when the Annex VII arbitral tribunal to which the dispute has been submitted is in a position to modify, revoke or affirm the provisional measures" (emphasis added) (paragraph 87 of the Order).

30. There is nothing in this dispute to suggest that there is a real and imminent risk of irreparable prejudice to the rights of the Parties. Were there such a risk, the Tribunal should have weighed the respective rights of the Parties to determine which Party would suffer the greater prejudice and which would be excessively burdened.

31. As the Special Chamber of the Tribunal made clear in its Order of 25 April 2015, "the decision whether there exists imminent risk of irreparable prejudice can only be taken on a case by case basis in light of all relevant factors" (Order of 25 April 2015, paragraph 43).

32. On one side, we have two victims whom no form of reparation can bring back to the widows and orphans whom they left in India and who wait to see justice done; on the other, two marines living in the circumstances described above and taking advantage of the generosity of the Indian courts and the benevolent protection of their own country.

33. Regrettably, the provisional measure prescribed by the Tribunal upsets the balance between these rights. While addressed to both Parties, it in fact burdens only India, implicitly denying it any jurisdiction over the dispute. India alone has undertaken investigations and judicial proceedings and it will have to discontinue these pursuant to the Order of the Tribunal.

34. In implicitly removing the two Italian marines from Indian jurisdiction, the provisional measure in reality amounts to a preliminary judgment.

35. As worded, the provisional measure ordered can be read in two ways, both problematic:

– Either Italy will interpret the measure ordering that all court proceedings be suspended and no new ones initiated as lifting all restrictions on Mr Girone, and it seems obvious that Italy will waste no time in adopting this interpretation; the marine will be fully free to go back to Italy without any guarantee of his return should the arbitral tribunal find that jurisdiction lies with the Indian courts.
– Or India will interpret the measure as suspending judicial proceedings alone and having no effect on the administrative measures imposed on Mr Girone, and he will therefore have to remain in India pending the decision of the arbitral tribunal.

36. This is the kind of unfortunate situation that can arise when matters are decided on an extra-legal basis or when the law is applied loosely. This is why a judge must never stray from the requisite impartiality and the strict application of existing legal standards.

37. In this dispute the Tribunal would been better off applying the law and the law alone; it preferred to seek "an arrangement" that will in fact satisfy no one. Even the judge *ad hoc* chosen by Italy, Mr Francioni, has stated that he is not fully satisfied with the measure (see the Declaration of the judge *ad hoc*).

38. Even though the *Enrica Lexie* incident occurred at sea, even though it involved two vessels, even though the Tribunal did its best to identify legal solutions in humanitarian law, human rights law and general international law, it remains that this is an incident calling into play two conflicting claims of jurisdiction over a crime and bearing no relation to the provisions of the Law of the Sea Convention. Regrettably, the Convention does not cover situations of this kind.

39. A number of dissenting voices needed to be heard in response to the approach taken by the Tribunal. The dissent by the holder of the vice-presidency may seem odd given the awkward position in which it places its author, but it nevertheless attests to the robust health and credibility of an institution ever working for the development and progress of the law of the sea.

(*signed*) B. Bouguetaia