Dissenting Opinion of Judge Heidar

1. I am unable to vote in favour of the present Order because in my view the requirements for the prescription of provisional measures set out in article 290, paragraph 5, of the United Nations Convention on the Law of the Sea (hereinafter "the Convention") are not fulfilled in this case. I concur with the majority that the Annex VII arbitral tribunal would *prima facie* have jurisdiction over the dispute; that the requirements of article 283, paragraph 1, of the Convention regarding an exchange of views between the Parties are satisfied; that the issue of exhaustion of local remedies should not be addressed in the provisional measures phase; and that Italy has demonstrated that the rights it seeks to protect regarding the *Enrica Lexie* incident are plausible.

2. However, as I will explain below, in my view the requirement of urgency is not fulfilled. Additionally, I will attempt to clarify the application of the "plausibility test", as there is an apparent confusion in this regard in paragraphs 84 and 85 of the Order.

The requirement of urgency

3. In its provisional measures proceedings, the Tribunal has in its practice balanced a rather low threshold of *prima facie* jurisdiction with a more stringent application of the main requirement for the prescription of such measures, namely urgency. Provisional measures constitute an exceptional form of relief in the sense that they are not to be ordered as a matter of course but only in those cases where such special measures are considered necessary and appropriate. The prescription of provisional measures is appropriate only where the urgency in the situation so requires. In other words, a court or tribunal may order provisional measures only in cases where there is a risk that rights of one of the parties will suffer serious and irreparable prejudice, and the urgency of the situation is such that the risk cannot be averted otherwise than by ordering such measures.[1]

1 Thomas A. Mensah, "Provisional Measures in the International Tribunal for the Law of the Sea (ITLOS)", in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2002), pp. 43–44.

4. Article 290, paragraph 1, of the Convention provides:

> If a dispute has been duly submitted to a court or tribunal which considers that *prima facie* it has jurisdiction under this Part or Part XI, section 5, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision.

5. By comparison, article 290, paragraph 5, of the Convention provides:

> Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea or, with respect to activities in the Area, the Seabed Disputes Chamber, 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. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4.

6. The functions of the Tribunal under paragraphs 1 and 5 of article 290 are quite different. When the Tribunal examines a request for provisional measures under paragraph 1, it has to consider whether or not to prescribe such measures pending its own final decision on a dispute that has been "duly submitted" to it. However, under paragraph 5, the Tribunal has to consider whether it is appropriate to prescribe such measures in a dispute the merits of which will be dealt with by another body, and the measures it prescribes will be addressed to parties which have not accepted its jurisdiction in respect of the dispute.[2]

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2 Thomas A. Mensah, "Provisional Measures in the International Tribunal for the Law of the Sea (ITLOS)", in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2002), p. 46.

7. Due to these clear differences, the urgency requirement for provisional measures under paragraph 5 of article 290 is stricter than the urgency requirement in paragraph 1 thereof. This applies both to the so-called qualitative dimension and temporal dimension of the requirement of urgency.[3]

8. As far as the qualitative dimension is concerned, the Tribunal and the Special Chamber it constituted under article 15, paragraph 2, of its Statute, have interpreted the urgency requirement of paragraph 1 of article 290 to the effect that provisional measures may not be prescribed unless there is "a real and imminent risk that irreparable prejudice may be caused to the rights of the parties in dispute" (*M/V "Louisa"* (*Saint Vincent and the Grenadines* v. *Kingdom of Spain*), *Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008–2010*, p. 58, at p. 69, para. 72, and *Delimitation of the maritime boundary in the Atlantic Ocean* (*Ghana/Côte d'Ivoire*), *Provisional Measures, Order of 25 April 2015*, para. 74).

9. Unlike paragraph 1 of article 290, paragraph 5 sets out the requirement of urgency explicitly. There would have been no necessity to do so had the intention of the drafters been that this "urgency" be the same as the one inherent in the concept of provisional measures and reflected in paragraph 1.[4] It follows that the qualitative dimension of the requirement of urgency is even more stringent under paragraph 5 of article 290 than under paragraph 1 thereof.

10. Turning to the temporal dimension of the requirement of urgency, paragraph 1 of article 290 provides that any provisional measures prescribed shall apply "pending the final decision", that is until the moment a judgment on the merits has been rendered. The relevant time period is therefore typically more than one year, even a few years, from the adoption of the order for provisional measures.

11. In contrast, paragraph 5 of article 290 provides that any provisional measures prescribed shall apply only "[p]ending the constitution of an arbitral tribunal to which a dispute is being submitted". This has been interpreted to the effect that the measures shall apply until the arbitral tribunal has been constituted and become functional. The relevant time period is a few months from the adoption of the order.

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3 *Southern Bluefin Tuna Cases, Provisional Measures, Separate Opinion of Judge Treves, ITLOS Reports 1999*, p. 316, paras. 4 and 5.

4 *Southern Bluefin Tuna Cases, Provisional Measures, Separate Opinion of Judge Treves, ITLOS Reports 1999*, p. 316, para. 3.

12. Consequently, when the Tribunal considers a request for provisional measures under paragraph 5 of article 290 of the Convention, its task is not to determine whether there is a real risk that irreparable prejudice to the rights of the parties might occur before a judgment is rendered on the merits, but rather whether such prejudice is likely to occur before the arbitral tribunal has been constituted and become functional. This has obviously a major bearing on the issue of urgency which is a precondition for the prescription of provisional measures.[5] The temporal dimension of the requirement of urgency is much more stringent under paragraph 5 of article 290 than under paragraph 1 thereof.[6]

13. It follows from the above that there is no urgency under paragraph 5 of article 290 if the provisional measures requested could, without prejudice to the rights to be protected, be granted by the arbitral tribunal once constituted.[7]

14. In the present case, there is in my view no real and imminent risk that irreparable prejudice to the rights of the Parties might occur before the Annex VII arbitral tribunal has been constituted and become functional. Such prejudice is not likely to occur within the next few months after the adoption of the Order. Taking into account the fact that court proceedings have been ongoing in India since the *Enrica Lexie* incident three and a half years ago, and the current status of the proceedings, it is very unlikely that a criminal trial over the Italian Marines, Sergeant Latorre and Sergeant Girone, will be commenced, let alone completed, within this time period.

15. As far as the second request by Italy is concerned, it must be taken into account that the restrictions on the liberty of the Italian Marines are as lenient as can be expected in the circumstances. Due to his health condition, Sergeant Latorre was granted a new six months leave to stay in Italy by the Supreme Court of India on 13 July 2015. Presumably, the Annex VII arbitral tribunal will have been constituted and become functional when this leave expires,

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5 Thomas A. Mensah, "Provisional Measures in the International Tribunal for the Law of the Sea (ITLOS)", in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2002), p. 47.

6 *ARA Libertad,* (*Argentina* v. *Ghana*), *Provisional Measures, Declaration of Judge Paik, ITLOS Reports 2012*, p. 352, para. 3.

7 *Southern Bluefin Tuna Cases, Provisional Measures, Separate Opinion of Judge Treves, ITLOS Reports 1999*, p. 316, para. 4. See also Rüdiger Wolfrum, "Interim (Provisional) Measures of Protection", in *Max Planck Encyclopedia of Public International Law*, Oxford Public International Law (2006), para. 36.

but even if that should not be the case, there is no reason to believe that the leave would not be extended as on several previous occasions if required. The restrictions on the liberty of Sergeant Girone in India are quite lenient as he enjoys freedom of movement there and has received frequent family visits. I am therefore of the view that not granting the second request does not leave Italy in a situation where there would be a real and imminent risk that irreparable prejudice might occur to it before the Annex VII arbitral tribunal has been constituted and become functional. Taking into account the objective of provisional measures to preserve the rights of both parties, I am also of the view that granting the second request by Italy would not be appropriate as it would prejudice the asserted rights of India.

16. As this case is to be decided on the basis of the law and not *ex aequo et bono*, and the requirement of urgency set out in article 290, paragraph 5, of the Convention, is not fulfilled, the prescription of any provisional measures in this case is unwarranted.

The plausibility test

17. International courts and tribunals have only recently started to apply the so-called plausibility test explicitly in provisional measures proceedings. The International Court of Justice has applied this test since 2009 in six such proceedings.[8] The Tribunal has so far not applied the plausibility test explicitly but the Special Chamber of the Tribunal in *Delimitation of the maritime*

8 1. *Questions relating to the Obligation to Prosecute or Extradite* (*Belgium* v. *Senegal*), *Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 139; 2. *Certain Activities Carried Out by Nicaragua in the Border Area* (*Costa Rica* v. *Nicaragua*), *Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011*, p. 6; 3. *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear* (*Cambodia* v. *Thailand*) (*Cambodia* v. *Thailand*), *Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011*, p. 537; 4. *Certain Activities Carried Out by Nicaragua in the Border Area* (*Costa Rica* v. *Nicaragua*); *Construction of a Road in Costa Rica along the San Juan River* (*Nicaragua* v. *Costa Rica*), *Provisional Measures, Order of 22 November 2013, I.C.J. Reports 2013*, p. 354; 5. *Construction of a Road in Costa Rica along the San Juan River* (*Nicaragua* v. *Costa Rica*); *Certain Activities Carried Out by Nicaragua in the Border Area* (*Costa Rica* v. *Nicaragua*), *Provisional Measures, Order of 13 December 2013*, I.C.J. Reports 2013, p. 398; and 6. *Questions relating to the Seizure and Detention of Certain Documents and Data* (*Timor-Leste* v. *Australia*), *Request for the Indication of Provisional Measures, Order of 3 March 2014*.

boundary in the Atlantic Ocean (*Ghana/Côte d'Ivoire*), *Provisional Measures,* did apply the test.[9]

18. The objective of the plausibility test is to establish whether the rights asserted by the party requesting provisional measures are plausible. This entails "that there is a realistic prospect that when the Court rules upon the merits of the case they will be adjudged to exist and to be applicable".[10] The fulfillment of the test of plausibility of rights asserted by the applicant in provisional measures proceedings, which is closely linked to the analysis of *prima facie* jurisdiction, is one of the requirements for admissibility.

19. In paragraphs 84 and 85 of the present Order, the plausibility test appears to be applied not only to the applicant, Italy, as it should be, but also to the respondent, India. This may be due to a confusion of the plausibility test with an entirely different, and subsequent, step in the consideration of a request for the prescription of provisional measures, namely the assessment of the rights of both parties for the purpose of their preservation in accordance with article 290 of the Convention.

20. It must be emphasized that the plausibility test by its very nature only applies to the applicant, the party requesting provisional measures. This is confirmed in the jurisprudence referred to in paragraph 17 above and supported by the fact that in the present case only the Applicant, Italy, attempted to demonstrate that its asserted rights are plausible and not the Respondent, India.

(*signed*) T. Heidar

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9 *Delimitation of the maritime boundary in the Atlantic Ocean* (*Ghana/Côte d'Ivoire*), *Provisional Measures, Order of 25 April 2015*, paras. 58–62).

10 *Questions relating to the Seizure and Detention of Certain Documents and Data* (*Timor-Leste* v. *Australia*), *Request for the Indication of Provisional Measures, Order of 3 March 2014*, Dissenting Opinion of Judge Greenwood, para. 4.