

SEPARATE OPINION OF JUDGE HEIDAR

1. I have voted in favour of the Order. I support its findings that *prima facie* the Annex VII arbitral tribunal would have jurisdiction over the dispute submitted to it and that the urgency of the situation requires the prescription of provisional measures under article 290, paragraph 5, of the Convention. In my view, however, the provisional measures prescribed in the Order do not equally preserve the rights claimed by the Parties and alternative measures were available that would have better fulfilled that objective.

2. According to article 290, paragraph 1, of the Convention, a 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 ...*” (*emphasis added*). This applies equally to proceedings under article 290, paragraph 5, of the Convention and the Tribunal has underlined this objective of provisional measures in all such proceedings.¹

3. The Tribunal has moreover: a) stated that “the Order must protect the rights of both Parties”; b) rejected submissions for provisional measures that “[would] *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”; and c) found that those submissions were therefore not “appropriate” (*emphasis added*).² It has also been stated that, “in prescribing provisional measures, the Tribunal should preserve the

¹ *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, p. 280, at p. 295, para. 67; *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 95, at p. 108, para. 63; *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore)*, Order of 8 October 2003, ITLOS Reports 2003, p. 10, at p. 22, para. 64; “*ARA Libertad*” (*Argentina v. Ghana*), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012, p. 332, at p. 345, para. 74; “*Arctic Sunrise*” (*Kingdom of the Netherlands v. Russian Federation*), Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013, p. 230, at p. 248, para. 82; “*Enrica Lexie*” (*Italy v. India*), Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015, p. 182, at p. 196, para. 75; *Detention of three Ukrainian naval vessels (Ukraine v. Russian Federation)*, Provisional Measures, Order of 25 May 2019, para. 114.

² “*Enrica Lexie*” (*Italy v. India*), Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015, p. 182, at p. 203, paras 125-127.

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

4. The provisional measures prescribed in paragraph 146(1) of the Order call for the release of the *M/T “San Padre Pio”*, its cargo and the Master and the three officers upon a) the posting of a bond or other financial security and b) the issuance of an undertaking by Switzerland to ensure that the Master and the three officers are available and present at the criminal proceedings in Nigeria if the Annex VII arbitral tribunal finds that the arrest and detention of the vessel, its cargo and its crew and the exercise of jurisdiction by Nigeria in relation to the event which occurred on 22-23 January 2018 do not constitute a violation of the Convention.

5. In my opinion, these measures go too far in protecting the rights claimed by the applicant, Switzerland, as the flag State, and do not sufficiently preserve the rights claimed by the respondent, Nigeria, as the coastal State. The measures do therefore *not equally preserve the respective rights of both Parties*. If Switzerland will be prepared to give the undertaking in question, and if the Annex VII arbitral tribunal finds in favour of Nigeria, it is of course to be expected that Switzerland will make every effort to ensure that the Master and the three officers will return to Nigeria to attend the criminal proceedings against them. However, there is no certainty that Switzerland would be able to do so, especially in light of the fact that these individuals are not Swiss nationals. Their absence from Nigeria could render the criminal proceedings without object and, therefore, meaningless. Thus, the provisional measures prescribed in the Order do not sufficiently preserve the rights claimed by Nigeria, including the right to exercise criminal jurisdiction over the Master and the three officers for the alleged violations of Nigerian law. This runs counter to the very objective of provisional measures referred to above.

³ “*Enrica Lexie*” (*Italy v. India*), *Provisional Measures, Declaration of Judge Paik*, *ITLOS Reports 2015*, p. 211, para. 2.

6. In this context, it should be recalled that

[e]xercise 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.⁴

7. In my view, alternative measures were available that would have preserved the rights of both Parties in a more equal manner. I would have preferred that only the *M/T "San Padre Pio"* and its cargo be ordered released, upon the posting of a bond or other financial security, and that the Master and the three officers remain in Nigeria. Such measures would have ensured that the Master and the three officers were no longer located on the vessel in its current dangerous location and instead located at a safe place in Nigeria while, at the same time, ensuring their attendance in the criminal proceedings against them. These measures would have been more balanced and proportionate and would have better achieved the objective of provisional measures set out in article 290, paragraph 1, of the Convention.

(signed) Tomas Heidar

⁴ *"Enrica Lexie" (Italy v. India), Provisional Measures, Declaration of Judge Paik, ITLOS Reports 2015, p. 213, para. 6.*