

## Separate Opinion of Judge Jesus

1. I voted for the Order, and I concur with its reasoning. Nonetheless, as it does not address some issues raised in the context of this case on provisional measures, I felt that I should state in this brief separate opinion the details of my position on those issues. They concern the *prima facie* jurisdiction of the Annex VII arbitral tribunal, urgency for the prescription of provisional measures, the preservation of the respective rights of the Parties to the dispute and, finally, the provisional measures prescribed by the Tribunal.

I will address these issues in the order in which they are listed above.

### (a) On the issue of *prima facie* jurisdiction

2. In order for the Tribunal to entertain a request for provisional measures pending the constitution of an Annex VII arbitral tribunal to which a dispute has been submitted, it has to satisfy itself that such an arbitral tribunal has *prima facie* jurisdiction to deal with the dispute concerning the interpretation or application of the Convention (see articles 288, paragraph 1, and 290, paragraph 5).

3. To assess whether the Annex VII arbitral tribunal has *prima facie* jurisdiction, the Tribunal has only to satisfy itself that the dispute arises out of conflicting interpretation or application by the Parties of, at least, one provision of the Convention and that, on this basis, it is possible or plausible that the arbitral tribunal will assert its jurisdiction to deal with the case in accordance with article 288, paragraph 1, of the Convention.

4. In the present case, in the course of the proceedings Italy invoked several articles of the Convention over which it believes there is a dispute of interpretation and application of the Convention between itself and India concerning the incident on 15 February 2012 involving the Italian flagged vessel *Enrica Lexie* and the Indian registered fishing vessel *St. Antony*, an incident that led to the unfortunate death of two Indian citizens.

5. The articles presented by Italy as a basis for the jurisdiction of the Annex VII arbitral tribunal include: article 87 of the Convention, on freedom of the high seas, which is applicable to the exclusive economic zone, the maritime area where the incident took place, by operation of article 58, paragraph 2, of the Convention; article 92 of the Convention, making ships sailing under the flag of one State only subject to its exclusive jurisdiction on the high seas; and article 97, on penal jurisdiction in matters of collision or any other incident of navigation.

6. While Italy maintains, on the basis of those articles, that India breached the Convention by its “exercise of jurisdiction over the *Enrica Lexie*” and its “interference with Italy’s freedom of navigation” and that India also breached the Convention by its “exercise of jurisdiction over the *Enrica Lexie* incident and the Marines notwithstanding Italy’s exclusive jurisdiction over the same by virtue of the undisputed fact that the incident took place beyond India’s territorial sea”, India argues that “the Annex VII tribunal that Italy requests be constituted does not have jurisdiction to rule on the case that it seeks to submit to it” and that “the subject-matter of the dispute does not fall within the ambit of the Convention”, contending that “this case is not covered by Article 97” and that “there was no ‘incident of navigation’ nor any collision between the two ships”, and arguing that, with reference to the two ships involved, “[t]hey had no physical contact and Article 97 of the UNCLOS [...] is irrelevant by any means”.

7. In my opinion, as is stated in the Order, some of the articles of the Convention presented by Italy seem to be relevant in establishing the *prima facie* jurisdiction of the arbitral tribunal. The opposing views of the two Parties as to whether or not these articles of the Convention apply to the present dispute confirm that there is, indeed, a dispute concerning the interpretation or application of the Convention, as referred to in article 288, paragraph 1, of the Convention. Such a dispute can only be resolved through the competent means of settlement, which in the present case is the Annex VII arbitral tribunal to be constituted. As a result, I am of the opinion that there is *prima facie* jurisdiction of the Annex VII arbitral tribunal and this Tribunal may therefore entertain the request for provisional measures made by Italy.

**(b) On the issue of urgency**

8. To prescribe provisional measures, once it has accepted the *prima facie* jurisdiction of the Annex VII arbitral tribunal to deal with the dispute, the Tribunal has to satisfy itself that the urgency of the situation requires the prescription of the requested provisional measures or other appropriate measures, as referred to article 290, paragraph 5.

9. Italy's main arguments in favour of urgency were premised on two factors:

- (a) the long-term detention or restrictions on the movement of the two marines and the effect on their state of health and on the health of certain of their family members; and
- (b) the irreparable prejudice to Italy that will occur if the Indian domestic court proceedings are to continue, in light of the fact that the Annex VII arbitral tribunal has been seised of the dispute to determine which of the Parties has jurisdiction to adjudicate the dispute concerning the incident.

10. With regard to the first factor, that is to say the issue of the long-term detention or restrictions on the movement of the two marines, which includes restrictions preventing them from leaving India's territory without the authorization of the Indian courts, I am of the view that the Tribunal should have concluded that the urgency requirement under article 290, paragraph 5, had been met, especially taking into account the effects on the health of the marines and their family as a result of a detention that has continued without charges for three and a half years.

11. I share the view that detention or restrictions on the movement of persons who wait excessively long to be charged with criminal offences is, per se, a punishment without trial. In such situations, every day that a person is under detention or subject to restrictions on movement is one day too many to be deprived of his or her liberty. Such situations, assessed in the context of a request for provisional measures, carry with them a built-in need for urgency, as considerations of humanity are important in this regard.

12. I therefore believe that in the present case the urgency requirement was satisfied and this would have justified the imposition of provisional measures by the Tribunal, releasing the two marines from the detention or restrictions on movement that have been imposed on them by the Indian courts, especially having regard to the guarantees given by the Agent of Italy in his concluding remarks in the course of the hearings to the effect that Italy undertakes to hand over the marines to the Indian courts if the Annex VII arbitral tribunal were to decide that India has jurisdiction concerning the dispute over the incident.

13. With regard to the second factor, that is the irreparable prejudice to Italy that may occur if the Indian domestic court proceedings are to continue, in light of the fact that the Annex VII arbitral tribunal has been seised of the dispute to determine which of the Parties has jurisdiction to adjudicate the dispute concerning the incident, I am of the view that, here again, the urgency requirement under article 290, paragraph 5, had been met.

14. Indeed, if the Indian court system is to continue with the criminal trial of the two Italian marines, this might cause irreparable prejudice to Italy's rights, as the possible punishment of the imprisonment of the marines would render ineffective, or even moot, any decision of the Annex VII arbitral tribunal determining which of the Parties has jurisdiction to deal with the incident, in the event that the arbitral tribunal decided the issue of jurisdiction in favour of Italy. This alone justifies the urgency of the situation with respect to the prescription of provisional measures to suspend any exercise of criminal jurisdiction by either of the Parties pending a decision of the arbitral tribunal.

15. It may also be easier for India to halt the ongoing criminal prosecution of the two marines at this stage, allowing the proceedings of the arbitral tribunal to run their course, rather than doing it at a much later stage, by which time the possible transfer of the marines to Italy's jurisdiction, if that were the decision of the Annex VII arbitration, may prove far more difficult.

16. For these reasons I am therefore of the opinion that there is urgency in respect of the prescription of provisional measures on both counts.

(c) **On the issue of preserving the respective rights of the Parties**

17. India argues that its right “to continue the judicial process that has been set in motion” should be preserved and that if the first provisional measure requested by Italy were granted “the right of India to pursue its judicial review of the case would be severely prejudiced”, adding that “if granted, Italy’s second requested provisional measure [...] would prejudice the decision of the Annex VII Tribunal or preclude its implementation”.

18. Regrettably, I do not share this view. As a matter of fact, as has been stated, an objective assessment of the rights of the Parties to be preserved would indicate that if India were to continue exercising its jurisdiction over the incident and a final decision were taken by the Indian court that led to the imprisonment of the two marines or any other form of punishment, such a decision would, by its very nature, render ineffective any decision that the Annex VII arbitral tribunal might take in the case submitted to it to determine which of the Parties should exercise jurisdiction over the incident, in the event that the arbitral tribunal decides that it is Italy that has jurisdiction over the case concerning the incident.

19. It might therefore prove to be difficult, if not impossible, for India to nullify any decision the Indian court might take in the criminal trial of the marines. It is evident that, if such situation were to occur, it would indeed cause irreparable damage to Italy. Therefore, the continued exercise of criminal jurisdiction by India in this case, pending a decision of the Annex VII arbitral tribunal, does not preserve the rights of Italy.

20. Conversely, and in order to establish a balanced approach to the rights of the two Parties that need to be equally preserved, one must raise the question as to what would be the irreparable prejudice to the rights of India if it were to suspend the exercise of its jurisdiction over the incident and if the marines were to stay in Italy pending a decision of the Annex VII arbitral tribunal on which Party has jurisdiction over the case concerning the incident.

21. In my view, there would be no irreparable damage to India in either situation, for the following reasons:

- (a) If the Indian court trial is suspended pending a decision of the Annex VII arbitral tribunal, India’s right to resume and conclude the trial of the marines would be preserved if that arbitral tribunal were to decide the issue of jurisdiction in favour of India;

- (b) On the other hand, if the two marines were allowed to stay in Italy pending a decision of the Annex VII arbitral tribunal, there would be irreparable prejudice to the rights of India only if the two marines did not return to India for trial in the event that the Annex VII arbitral tribunal decided that India has jurisdiction to deal with the incident. This scenario may not occur since, as has been mentioned, in his concluding statement, the Agent for Italy solemnly undertook to send the marines for trial in India if the Annex VII arbitration decided that India has jurisdiction in the case concerning the incident.

**(d) On the measures prescribed**

22. While I am in favour of the measure prescribed by the Tribunal in paragraph 141 of the Order, stating that “Italy and India shall both suspend all court proceedings and shall refrain from initiating new ones which may aggravate or extend the dispute submitted to the Annex VII arbitral tribunal or might jeopardize or prejudice the carrying out of any decision which the arbitral tribunal may render”, I would also have favoured the prescription of a provisional measure that would have enabled the two marines to be in Italy pending the decision of the Annex VII arbitral tribunal, for the reasons explained above.

*(signed)*

José Luíz Jesus