

Separate Opinion of Judge Laing

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INTRODUCTION

1. This Separate Opinion explains my position on several aspects of the case in view of the novelty of article 290 and differences of the provisions on prescription of provisional measures in the United Nations Convention on the Law of the Sea (UNCLOS) from those of the Statute of the International Court of Justice (I.C.J. Statute). Since this aspect of the Tribunal's instruments is based on the I.C.J. model, it is important that these differences, and related matters, be addressed early in the Tribunal's life, in order that the Tribunal can promptly make informed decisions on vital aspects of its jurisdiction and of the law that it administers, and be able to perform its vital functions. I therefore believe that the length, style and degree of detail in this Opinion are necessary.

2. Attention must first be drawn to the apparent purposes behind the authorization of provisional measures in a large number of unrelated treaties. One is the accommodation of requests by one party for the preservation of the *status quo pendente lite*, which the other party is allegedly seeking to alter.¹ Other purposes may be gleaned from the scope of those treaties and from the subject-matter of many of the disputes involving provisional measures which have come before the I.C.J. and the Permanent Court of International Justice (P.C.I.J.). *Inter alia*, the treaties cover: the settlement of disputes; the protection of human rights, and the establishment of institutions for the preservation of international peace and good order and of treaty regimes for general pacific settlement.² The disputes involving provisional measures have concerned armed conflict, acts of administration in disputed territory, holding consular and diplomatic staff as hostages, petroleum prospecting and related rights of alien corporations, the rights of aliens generally, passage through international straits, exploration of a disputed continental shelf, nuclear testing and alien fishing rights. Together, these various concerns suggest that, in addition to preserving the *status quo pendente lite*, the maintenance of international peace and good order are the probable purpose of the general institution of provisional measures.³

3. The language of article 290, paragraph 1, referring to preservation of rights and the prevention of serious harm to the marine environment, also evinces the concern of preservation of the *status quo pendente lite*. It also appears that UNCLOS has categorically reaffirmed the rationale of maintaining peace and good order, since the Convention regulates established categories of maritime and marine concerns of world order scope and significance and adds such other categories of similar scope and significance, but of recent vintage, as the international seabed area.

4. However, the 1982 Convention has expanded the rationale for provisional measures since, firstly, the ambitious ambit of UNCLOS, and therefore article 290, is not limited to the traditional aspects, actors and subjects of the maintenance of world peace and good order. For instance, article 290, paragraph 1 itself, in acknowledgement of the vital importance of Part XII of the Convention, on protection of the marine environment, adds the above-mentioned concern of protection hitherto not fully recognized – the prevention of serious harm to the marine environment. Secondly, provisional measures under UNCLOS are

¹ See generally Lawrence Collins, *Essays in International Litigation and the Conflict of Laws* (1994), pp. 169-171. This rationale for provisional measures is readily evident in a significant majority of the cases mentioned in notes 10, 19 and 24 where the I.C.J. ordered measures.

² See Jerzy Sztucki, *Interim Measures in the Hague Court – An Attempt at a Scrutiny* (1983), pp. 1-15.

³ J. G. Merrills, "Interim Measures of Protection and the Substantive Jurisdiction of the International Court," 36 *Cambridge Law Journal* (1977), pp. 86-109, at p. 108; Collins, pp. 169-170.

prescribed, not indicated, and therefore are binding, arguably unlike measures under article 41 of the I.C.J. Statute.⁴ Thirdly, article 290, paragraph 6, requires parties to whom they are directed to comply with them. Fourthly, paragraphs 1 and 5 of article 290 require that decision-makers on provisional measures should conclude that the trier of the merits has or would have *prima facie* jurisdiction, a standard which is categorical, compared with some of its pre-UNCLOS predecessors, and is relatively easy to attain. In applying this new law in an expanded framework, Judges will act prudently. However, these developments are so far-reaching that any interpretation of article 290 which would unduly limit its application to “grave” situations and restrictive operational ambits would be retrogressive. Furthermore, as the international legal system increasingly takes on the habiliments of domestic legal systems, with numerous new global and regional adjudicatory bodies with very substantial jurisdictions, it is imagined that international law might commence to demonstrate more of the tolerant attitude towards provisional measures that prevails in domestic legal systems.⁵

5. Against this background, it is very encouraging that, in this first provisional measures proceeding under the Convention, both parties have taken matters so seriously. Neither the Applicant nor the Respondent can be counted among the larger or more affluent States. Yet they have striven to address the difficult questions which had to be argued in this novel type of proceeding. This affirms the importance of the expanded scope of the purposes of provisional measures that UNCLOS and article 290 proceedings have introduced into international law and relations.⁶

APPROPRIATENESS OF MEASURES

6. The view is well known that the power to order provisional measures is in principle discretionary.⁷ This is reminiscent of the formal allocation, in the common law world, of analogous domestic proceedings to the field of equity, the parallel and twin main branch of the *corpus juris*. This discretionary conception is associated with a somewhat more tolerant approach to provisional measures. The conception and approach are both confirmed by article 290, paragraph 1, which provides that “the court or tribunal may prescribe any provisional measures which *it considers appropriate* under the circumstances ...”⁸ The different formulation in article 41 of the I.C.J. Statute can be compared – “[t]he Court shall have the power to indicate, if it considers that circumstances so require ...” The change in the wording of the UNCLOS text somewhat underscores the point.

7. Any party to a dispute before the Tribunal can readily invoke article 290 and set in train expedited proceedings seeking provisional measures which temporarily shunt aside the

⁴ Art. 290, para. 1, provides for the prescription, not indication, of provisional measures. To some, it may be encouraging to perceive that sovereigns would so agree that they could be bound by a judicial order. Nevertheless, the potential addressees of this provision and of provisional measures also include non-State parties to disputes (commercial entities and certain intergovernmental agencies). The addition of this range of addressees underscores the point in the text.

⁵ It is useful to recall that two of the leading works on provisional measures are squarely based on comparative law precedents and analogies and propose that a general principle of law governs the topic. See the books by Elkin and Dumwald referred to at notes 9 and 14. In his recent work, Collins firmly states his support of the notion that the principle underlying provisional measures is a general principle of law. Collins, pp. 169-171.

⁶ The same can be said in relation to the novel and unprecedented institution of prompt release of ships and crews in art. 292.

⁷ Sztucki, p. 15.

⁸ Emphasis added.

proceedings on the merits and associated incidental proceedings, including preliminary objections. The apparently far-reaching nature of the power is counterbalanced by the temporary ambit of its exercise and the gravity which imbues global judicial institutions, preoccupied with their weighty functions.

PRECONDITIONS FOR PRESCRIPTION OF MEASURES

8. The foregoing requires that there should be relatively modest formal pre-conditions to the exercise by the Tribunal of its power and discretion under article 290 of UNCLOS. The Tribunal should not fetter its discretion by tolerating excessive or inappropriately restrictive pre-conditions.

Jurisdiction

Generally

9. It is therefore noteworthy that in recent jurisprudence under article 41 of the I.C.J. Statute, one does not discern a restrictive attitude towards finding jurisdiction *ratione personae* and *ratione materiae*⁹ in provisional measures proceedings. In this case, this Tribunal has acted in a similar manner. At the end of the oral proceedings, Respondent introduced the argument, based on UNCLOS article 295, that local remedies had not been exhausted. No action could be taken on it at that time due to its timing. However, it would appear that such matters, which generally entail complex issues, are not appropriate for decision at the stage of provisional measures, which are required to be expeditious and procedurally urgent.¹⁰

Prima facie Jurisdiction

10. One particular pre-condition, which must be satisfied, is that of *prima facie* jurisdiction over the merits. The language of article 290, paragraph 1, is that the “dispute has been duly submitted [to the Tribunal which] considers that *prima facie* it has jurisdiction under” Part XV of the Convention, dealing with the settlement of disputes. Relying on the Court’s jurisprudence, the Tribunal has applied the test that:

“before prescribing provisional measures the Tribunal need not finally satisfy itself that it has jurisdiction on the merits of the case and yet it may not prescribe such measures unless the provisions invoked by the Applicant appear *prima facie* to afford a basis on which the jurisdiction of the Tribunal might be founded ...”¹¹

⁹ Matters respectively covered by UNCLOS art. 288 and UNCLOS, Annex VI, art. 21, on the one hand, and UNCLOS, Annex VI, art. 20, on the other. See Jerome B. Elkind, *Interim Protection – A Functional Approach* (1981), pp. 170-177, 192. Note Merrills 1997, pp. 97-104, esp. p. 101.

¹⁰ See, e.g., *Anglo-Iranian Oil Co. [United Kingdom v. Iran]*, *Interim Protection, Order of 5 July 1951*, I.C.J. Reports 1951 (hereafter “*Anglo-Iranian Oil Co. Case*”), p. 93.

¹¹ See case concerning the *Land and Maritime Boundary between Cameroon and Nigeria [Cameroon v. Nigeria]*, *Provisional Measures, Order of 15 March 1996*, I.C.J. Reports 1996 (hereafter “*Land & Maritime Boundary*”), p. 21, para. 30; case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide [Bosnia and Herzegovina v. Yugoslavia, Serbia and Montenegro]*, *Provisional*

In fact, simple quotation of the above-quoted language of article 290, paragraph 1, adequately states the requirement, since the juridical understanding of “*prima facie*” is that, at first sight or impression (on its face), the evidence adduced by the Applicant¹² sufficiently establishes the Tribunal’s jurisdiction.¹³ A *prima facie* finding has no bearing whatsoever on the Tribunal’s final determinations at the merits stage.

Miscellaneous Adjectival Matters

11. For the reasons previously advanced, in proceedings for provisional measures before this Tribunal, adjectival matters should not be interposed as presumptively, *prima facie* or *a priori* restrictive pre-conditions to the prescription of such measures as the Tribunal considers appropriate.

Evidence and Standards of Evaluation

12. Neither does the jurisprudence require nor does persuasive doctrine suggest that in comparable I.C.J. proceedings there is what the Applicant in this case calls a *prima facie* standard by which this Tribunal must adjudge the existence and sufficiency of the circumstances and other elements which relate to the discretion to prescribe measures.¹⁴ If it existed, such jurisprudence would be unreliable, since such circumstances, elements and

Measures, Order of 13 September 1993, I.C.J. Reports 1993 (hereafter “*Genocide Convention #2*”), pp. 337-338, para. 24; case concerning *Passage through the Great Belt (Finland v. Denmark)*, *Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991* (hereafter “*Great Belt*”), p. 15, para. 14; case concerning *United States Diplomatic and Consular Staff in Tehran, Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979* (hereafter “*U.S. Staff Case*”), p. 13, para. 15; *Nuclear Tests (New Zealand v. France)*, *Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973* (hereafter “*Nuclear Tests Case – New Zealand*”), p. 137, para. 14; *Nuclear Tests (Australia v. France)*, *Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973* (hereafter “*Nuclear Tests Case – Australia*”), p. 101, para. 13.

¹² Generally, the citation of jurisdictional provisions in the Convention or other source and a basic factual background.

¹³ It will be noted that this formulation does not address the issue of the adequacy or otherwise of rebuttal evidence by the Respondent. *Black’s Law Dictionary* (6th ed., 1990), pp. 1189-90. Presumably the Respondent has the liberty of coming forward and developing a case based on such contradictory evidence and the decision-maker will take this into consideration.

¹⁴ See Sep. Op. of Judge Weeramantry in *Genocide Convention #2*, suggesting the “highest standards of caution ... for making a provisional assessment of interim measures.” (at p. 371); Sep. Op. of Judge Shahabudeen in *id.*, calling for “substantial credibility” (at p. 360). He quotes I.M. Dumwald, *Interim Measures of Protection in International Controversies* (1933), p. 161. That author also notes that in view of the summary nature of the proceeding the rules of evidence should be relaxed. Elsewhere Dumwald argues “[I]t is not necessary that the measures be absolutely indispensable; it is sufficient if they serve as a safeguard against substantial and not easily reparable injury. The degree of necessity varies with the nature of the measure” (at p. 163).

Previous to the *Genocide Convention #2* case, in the *Great Belt* case, the I.C.J. stated that evidence had not been adduced of any invitation to tender which could affect Finnish shipyards at a later date, nor “had it been shown” that the shipyards had suffered a decline in orders. Proof of damage had not been supplied (at pp. 18-19, para. 29). However, in his Separate Opinion in that case, Judge Shahabudeen, quoting Judge Anzilotti in the *Polish Agrarian Reform and German Minority, Order of 29 July 1933, P.C.I.J., Series A/B, No. 58*, p. 175 at p. 181, urged that a State requiring interim measures of protection was “required to establish the possible existence of the rights sought to be protected” (at pp. 34, 36).

For useful recent doctrinal views, see Collins, pp. 177-181; J.G. Merrills, “Interim Measures of Protection in the Recent Jurisprudence of the International Court of Justice,” 44 *International Comparative Law Quarterly* (1995), pp. 90-146, at pp. 114-116.

contextual situations are too varied to be submitted to a sole, and probably simplistic, standard.¹⁵

13. This conclusion is confirmed by the discretionary nature of the functions of the Tribunal in proceedings on provisional measures.

Procedural Urgency

14. There is no doubt that, procedurally, these types of proceedings are urgent. Article 25, paragraph 2, of the Tribunal's Statute provides for prescription by the Chamber of Summary Procedure in the event that the Tribunal is not in session or a quorum of Judges cannot be established. Procedural urgency is reinforced by article 90 of the Tribunal's Rules, relating to scheduling.¹⁶ Article 290, paragraph 5, of UNCLOS provides for urgency of "the situation" as a pre-condition to any measures which might be ordered where this Tribunal or another court or tribunal is considering measures concerning parties the substance of whose dispute is before an arbitral tribunal. This provision was designed simply to restrict this Tribunal from unnecessarily asserting superior authority in matters relating to provisional measures over other tribunals with jurisdiction in the case.¹⁷ Therefore, although these requirements could affect the outcome, they are of a procedural nature.¹⁸

THE CIRCUMSTANCES JUSTIFYING MEASURES

15. UNCLOS article 290, paragraph 1, states that measures may be prescribed pending the final decision of the court or tribunal, if they are "appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment...". The first half of this formula is similar to that used in article 41 of the I.C.J. and P.C.I.J. Statutes. Judges of those Courts have variously referred to these situations therein covered as: the "circumstances" in which measures may be taken, the "object" or "purposes" of the authorization of measures, and the "intention" behind the provision authorizing measures. Writers have also paraphrased "circumstances" as "criteria" and "categories."¹⁹ Assuredly, other expressions have been used. However, as this Tribunal

¹⁵ Art. 83, para. 2, of the Rules of Procedure of the Court of Justice of the European Communities requires the "establishment of a *prima facie* case for the interim measures applied for." See Sztucki, p. 6.

¹⁶ Art. 90, para. 1, assigns priority of prescription proceedings over all others, subject to art. 112, para. 1 (simultaneous provisional measures and prompt release proceedings – Tribunal to ensure that both are dealt with without delay) art. 90, para. 1; art. 91, para. 2, requires "the earliest" date for the hearing to be set and authorizes the President to call upon the parties to act in such a way as will enable any order of the Tribunal to have appropriate effects.

¹⁷ See *United Nations Convention on the Law of the Sea 1982 – A Commentary*, Vol. V, 1989 (Myron H. Nordquist, ed.-in-chief, with Shabtai Rosenne and Louis B. Sohn, volume editors), p. 56. The legislative history of art. 290, para. 5, is clear, although the language of the article lacks complete clarity.

¹⁸ See generally Merrills 1994, pp. 111-113.

¹⁹ Circumstances: See e.g. case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), *Provisional Measures, Order of 10 May 1984*, I.C.J. Reports 1984 (hereafter "*Military & Paramilitary Activities Case*"), p.180, para. 27; *Aegean Sea Continental Shelf, Interim Protection, Order of 11 September 1976*, I.C.J. Reports 1976 (hereafter "*Aegean Sea Case*") p. 11, para. 32; Elkind, p. 258. Object: *Land & Maritime Boundary* case, p. 23, para. 42; *Genocide Convention* #2, p. 342, para. 35; *Great Belt* case, p. 16, para. 16; case concerning the *Frontier Dispute [Burkina Faso v. Republic of Mali]*, *Provisional Measures, Order of 10 January 1986*, I.C.J. Reports 1986 (hereafter "*Frontier Dispute Case*"), p. 10, para. 21. Purposes: e.g. H.W.A Thirlway, "The Indication of Provisional Measures by the

commences its task of construing and applying the UNCLOS provision, accuracy will be facilitated by abstention from paraphrases. “Circumstances” is therefore used in this Opinion.

The Circumstance of Preservation of the Respective Rights of the Parties

16. As noted, provisional measures may be prescribed “to preserve the respective rights of the parties.” This differs from the language of the I.C.J. Statute, which refers to measures “which ought to be taken to preserve the rights of either party.” Later on, this difference will be addressed. In the meanwhile, the concepts of preservation and rights will be discussed.

Preservation

17. As will shortly be seen, the jurisprudence and doctrine have advanced several glosses or paraphrases for the circumstances appropriate for the prescription of measures for the preservation of the rights of the parties. It might be argued that the preservation concept has been overtaken by these devices which, one recent writer with relevant experience suggests, came about because “preservation” is a “limited concept”.²⁰ Yet, it is an obviously important aspect of the governing language and, in some 25 years of recent practice, the I.C.J. has consistently referred to the formula of preservation of rights when discussing the power to indicate measures.²¹ Such an approach is consistent with the obvious desideratum of accuracy.

18. In this case, it was therefore appropriate that, having given prior notice of its intention, in its final oral statement the Applicant amended the chapeau of its submissions to request that the description of the first group of provisional measures should be changed from requesting an order of compliance with this Tribunal’s Judgment of 4 December 1997 to quoting the language about circumstances of article 290, paragraph 1, of the Convention.

Rights

19. In these proceedings, much has been made of “the rights [*contested between*] the parties to the dispute,” e.g. whether the Applicant had cognizable rights to have:

- the ship and crew released;
- the suspension of judgments of the Respondent’s domestic courts;
- the Respondent cease and desist from enforcing such judgments against vessels of Applicant’s nationality;
- freedom of navigation;
- the Respondent refrain from allegedly illegal hot pursuit.

International Court of Justice,” in Rudolf Bernhardt (ed.), *Interim Measures Indicated by International Courts* (1994), pp. 1-36, at pp. 5-16. Criteria: e.g. Merrills 1995, pp. 106-125; D.W. Greig, “The Balancing of Interests and the Granting of Interim Protection by the International Court,” 11 *The Australian Year Book of International Law* (1991), pp. 108-140, at p. 123. Intention: e.g. Diss. Op. by Judge *ad hoc* Thierry in case concerning the *Arbitral Award of 31 July 1989 [Guinea Bissau v. Senegal]*, *Provisional Measures, Order of 2 March 1990*, *I.C.J. Reports 1990*, p. 82.

²⁰ Thirlway 1994, at pp. 7-8, suggesting that “infringement” might be more realistic and that it is probably also realistic to talk about the possible imminent disappearance of the right or that the subject matter of the right was going to vanish totally.

²¹ As will be seen, to the formula the Court has added amplificatory language.

A major contested issue is whether, under UNCLOS, vessels of Applicant's nationality have the right to provide bunkering services in Respondent's Exclusive Economic Zone (EEZ). This implies also the issue of Respondent's right under the Convention to enforce its prohibition of such services. The main question appears to be whether, for provisional measures to be prescribed, the respective rights being preserved must be definitively vested in the party in question. Must there be a particular dispositive title of international law favouring that party?²²

20. In this connection, the purposes of article 290 measures should be recalled: such measures, which are valid only pending the final decision, are designed to preserve the *status quo pendente lite* and to maintain international peace and good order. Neither the Rules of the Tribunal nor those of the I.C.J. require that the rights be specified in the Application, as did the pre-1972 Rules of the I.C.J.²³ It will be recalled that there must be a finding on a *prima facie* basis of the probable jurisdiction of this Tribunal on the underlying merits.²⁴ Logically, then, the rights need not be definitively vested but might comprise a claim by the party in question which the Judges, in their discretion, conclude has juridical substance or significance.²⁵ As in this case, parties will sometimes request measures to protect rights not directly located in the Convention but arising under customary international law. In such cases, the frequent difficulty of identifying the precise content and even existence of customary rules might further influence a tolerant approach of decision-makers to this requirement.²⁶

21. It is possible broadly and roughly to catalogue the cases in which a wide variety of rights have been recognized in provisional measures cases as concerning:

- armed conflicts, threats to peace, injuries to property and persons;²⁷

²² Writing in 1933, Dumwald, not appearing to reach as far as implied in the text, said: "The nature or content of the right is immaterial, except that it must be actionable in law and its violation irreparable in money." Dumwald, p. 165.

²³ See Sztucki, p. 92, noting that only reasons, consequences and measures must be specified in the Application for measures, indicating "the lack of excessive formalism in entertaining requests for interim measures." This is presumably relevant to the point under discussion.

²⁴ Provisional measures are *ex hypothesi* indicated before it is known what the respective rights of the parties are. H.W.A. Thirlway, *Non-Appearance Before the International Court of Justice* (1985), p. 84. Note the Separate Opinion of Judges Amoun, Foster and Arechaga in the *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, *Interim Protection, Order of 17 August 1972*, *I.C.J. Reports 1972* (hereinafter "*Fisheries – F.R.G. Case*"), p. 36 and *Fisheries Jurisdiction (United Kingdom v. Iceland)*, *Interim Protection, Order of 17 August 1972*, *I.C.J. Reports 1972* (hereafter "*Fisheries – U.K. Case*"), p. 18. Therein they note that the Judges' Order "cannot have the slightest implication as to the validity or otherwise of the rights protected by the Order or of the rights claimed by a coastal State."

²⁵ This approach is strongly supported by the *Nuclear Tests Cases*, where the I.C.J. recognized what was referred to in the Orders as a "legal interest" thought to be controversial in international law and relations. *I.C.J. Reports 1973*, pp. 139-140, para. 24 and para. 23. See Sztucki, pp. 92-99 and 101 and Merrills 1977, p. 162. Note also *U.S. Staff Case*, where the I.C.J., in a few words, makes the barest mention of rights, ("continuance of the situation ... exposes the human beings to privation, hardship, anguish and even danger to life and health and thus to a serious possibility of irreparable harm ..."), immediately thereafter discussing injury. *I.C.J. Reports 1979*, p. 20, para. 42. In the *Military & Paramilitary Case*, on the other hand, the rights are set forth at some length (p. 182, para. 23): rights to "life, liberty and security [of Nicaraguan citizens]; ... be free ... from the use or threat of force [against Nicaragua] ...; to conduct its affairs ... [by Nicaragua]; of self-determination [by Nicaragua], but the link with interim protection is "rather disappointing." Thirlway 1994, p. 9. This criticism might be misplaced.

²⁶ See generally Dumwald, pp. 175-176.

²⁷ Cases in which orders were made include: *Land & Maritime Boundary Case*; *Frontier Dispute Case*; *Military & Paramilitary Case*; *U.S. Staff Case*; *Nuclear Tests Cases*. An instructive case in which no order was made is the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from*

- human rights violations;²⁸
- commercial and consular/diplomatic rights of aliens;²⁹
- environmental protection and maritime freedoms.³⁰

Perhaps the existing jurisprudence reflects that rights or claims of a generally high order have received cognition. However, UNCLOS has established a very comprehensive system for the settlement of disputes.³¹ As previously noted, the Convention also deals with a large and varied number of substantive topics. Primary potential beneficiaries include non-States, often in a commercial context.³² It is evident that, for these purposes, arguably non-traditional asserted rights will have to be protected by article 290. These should receive appropriate consideration by this Tribunal. At any rate, in the current dispute the rights in issue fall within the catalogue set forth above or clearly involve specific entitlements and claims under UNCLOS, plus, in one situation, general notions of human rights.

22. Let it be assumed that in a particular dispute this Tribunal is disposed to prescribe measures. As in the present proceedings, the question might arise as to whether a coastal State party can successfully contend that it is “not obliged to accept the submission” of the dispute to the compulsory procedures of Part XV of the Convention, because a particular species of its sovereign rights cannot be so challenged by virtue of article 297, paragraph 3(a).³³ In the present dispute, the Tribunal has disagreed with this contention of the Respondent, holding instead that article 297, paragraph 1³⁴, cited by the Applicant, appears *prima facie* to afford a basis for jurisdiction. Clearly, article 297, paragraph 3(a), although it must generally be dealt with *ad limine* during the merits phase, is of a substantive character not suitable for disposition in this type of incidental proceeding. To address the question of sovereign rights in the context of putative rights seeking provisional protection in a swift proceeding would seriously erode article 290.³⁵

the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992 (hereafter “Lockerbie Case”).

²⁸ Cases in which orders were made include: *Genocide Convention #1 case*; *Genocide Convention #2 case*; *U.S. Staff Case*; probably the *Nuclear Tests Cases*; *Denunciation of the Treaty of 2 November 1865 between China and Belgium*, Orders of 8 January, 15 February and 18 June 1927, P.C.I.J., Series A, No. 8, (hereafter “Sino-Belgian Case”).

²⁹ Cases in which orders were made include: *U.S. Staff Case*; *Fisheries Cases*; *Anglo-Iranian Oil Co. Case*; *Electricity Company of Sofia and Bulgaria*, Order of 5 December 1939, P.C.I.J. Series A/B, No. 79 (hereafter “Electricity Co. of Sofia Case”). Instructive cases in which no order was made include: *Great Belt Case*; *Interhandel*, *Interim Protection*, Order of 24 October 1957, I.C.J. Reports 1957 (hereafter “Interhandel Case”).

³⁰ Case in which orders were made: *Nuclear Tests Cases*. Instructive cases in which no order was made include: *Great Belt Case*; *Aegean Sea Case*. See Elkind, p. 223. UNCLOS art. 290, para. 1, dealing with prevention of serious harm to the marine environment, now clearly reinforces this trend.

³¹ Contained in Parts XI, Section 5, and XV and Annexes V-VIII.

³² These include ship and crew detention; ship nationality; exercise of jurisdiction over ships by non-flag States; marine research; enforcement of domestic pollution laws against individual vessels; deep seabed mining - technical, contractual and commercial issues.

³³ Dealing with sovereign rights with respect to the living resources in the EEZ or their exercise.

³⁴ Generally providing for disputes concerning interpretation or application of the Convention with regard to the exercise by a coastal State of its sovereign rights or jurisdiction is subject to the Convention’s general compulsory procedures (including submission to this Tribunal) for dispute settlement entailing binding decisions.

³⁵ It would have the same impact on article 292, on prompt release, and such related provisions as arts. 73, 220, para. 7, and 226, para. 1(b). In this case, it will also be noted that Respondent, while invoking art. 297, para. 3(a), failed to proceed against the defendant in its own courts under legislation dealing with its sovereign entitlements relating to EEZ living resources, instead proceeding under its customs, marine and related legislation.

Balancing Both Parties' Rights

23. In the measures indicated by the I.C.J. for those cases that this Opinion has categorized as concerning armed conflict and threats to peace, a studious solicitude towards both parties can be discerned. To some extent, this might have stemmed from the evident need to display even-handedness in volatile situations. Probably the sensitivity of the Court in those cases differs only in degree from that which judicial bodies generally display in provisional measures cases, which all involve the exercise of discretion. Of course, in a preliminary procedure like this, where the judicial body has an incomplete grasp of all the facts, it needs to demonstrate the utmost circumspection. It must therefore be asked whether, as in certain domestic jurisdictions, there is any general requirement to balance the rights of the parties.³⁶ Although apparently this issue has not been definitively decided on principle, such a requirement would be consistent with the language of article 290, paragraph 1, authorizing measures appropriate “to preserve the respective rights of the parties.” By contrast, it will be recalled that article 41 of the I.C.J. Statute refers to the “respective rights of *either* ³⁷ party”. At any rate, in this case the Tribunal has generally sought to balance the rights and interests of both parties.

Third Parties

24. In its written pleadings, the Applicant cites several situations where vessels of non-parties are alleged to have had EEZ encounters with the Respondent's customs authorities. Those pleadings might also imply that the relief that Applicant seeks in these proceedings might redound to the benefit of non-parties. It is clear that situations involving third parties have no direct bearing on this case. Neither do benefits redound to them.³⁸ However, incidents involving non-parties may provide evidence of system or similar facts and conduct, raising the inference that the actions in issue might have occurred. Nevertheless, this issue plays no part in the Tribunal's Order in this case.

Substantive Urgency

25. Under article 290, is there an affirmative substantive requirement that each circumstance or that the relief requested must be proved to be urgent? In the Applicant's original written pleadings it endeavoured to demonstrate that the Application satisfied the requirement of urgency in article 290, paragraph 5, dealing with provisional proceedings related to arbitration before another tribunal. Applicant adopted these pleadings for its new case, with some modifications, when the case was converted to an article 290, paragraph 1, case. In its oral pleadings, it based its arguments on the assumption that urgency has to be proved. It asserted that the standard of urgency was the one advanced in the *Great Belt Case*, “whether the proceedings on the merits ... would, in the normal course, be completed before” the act

³⁶ Dumwald suggests that “The more serious the hardship to defendant, the stricter the scrutiny of plaintiff's wants.” (p. 163). The balancing requirement is often referred to in the common law domestic context as the “balance of convenience”. See 24 *Halsbury's Laws of England* (4th ed., reissue, 1991), para. 856, citing *American Cyanamid Co v Ethicon Ltd.* [1975] AC 396 at p. 408, 1 All ER 504 at 510, HL, per Lord Diplock; I.C.F. Spry, *The Principles of Equitable Remedies* (4th ed, 1990), pp. 454, 462, 465; 42 *American Jurisprudence* (2d ed., 1969-1997), paras. 56-57.

³⁷ Emphasis added.

³⁸ Provisional measures proceedings are not, in any way, a form of *actio popularis*.

complained of would occur.³⁹ Comparatively, in some domestic jurisdictions, the urgency of the situation to which the desired measures are to respond is treated as of importance.⁴⁰ Yet, across the board, there is no such general requirement. Although a number of I.C.J. Orders and individual opinions refer to urgency, it is sometimes unclear whether they are referring to or are influenced by procedural urgency. A few writers seem to advance urgency as a substantive criterion, but it is possible that they unwittingly import the notion of procedural urgency. To resolve this dilemma, it is useful to recall the discretionary and equitable nature of the institution of provisional measures. This suggests that urgency should always be borne in mind as an aspect of any possible “circumstance.” But equally or alternatively should there be borne in mind such aspects, if they exist, as (1) the wrong has already occurred or cannot be compensated or monetarily repaired (e.g. the continued detentions after 4 December 1997 in this case), (2) the certainty that the feared consequence will occur unless the Tribunal intervenes,⁴¹ (3) the seriousness of the threat, (4) the right being preserved has unique or particularly special value and (5) the magnitude of the underlying global public order value, e.g. such possibly *jus cogens* values as global peace and security or environmental protection.⁴²

26. On the basis of the information presently available, then, there seems to be no *a priori* universal requirement of substantive urgency.⁴³ Yet that idea has received some tepid encouragement under the twin influences of the requirements of procedural urgency⁴⁴ and the notion that irreparability, with its connotations of gravity, has largely replaced the textual requirement of preservation of rights. I believe that this idea is inaccurate and am happy that the Tribunal’s Order gives no credence to it.

Various Paraphrases of the Preservation Circumstance

³⁹ *Great Belt Case*, p. 18, para. 27. For an earlier discussion, see Sztucki, pp. 115-116, suggesting that the *Interhandel Case* was decided on that basis. See *Interhandel Case*, p. 112. There, the judicial proceeding in question was actually before a domestic body and not an international provisional measures proceeding. Thirlway (pp. 25-27) treats urgency as a “condition” for I.C.J. provisional measures, the other two conditions being the existence of jurisdiction and the existence of *prima facie* jurisdiction. It has been pointed out that in the jurisprudence of the I.C.J., considerable attention has been given to urgency since the *Trial of Pakistani Prisoners of War [Pakistan v. India]*, *Interim Protection, Order of 13 July 1973*, *I.C.J. Reports 1993*, p. 328, where the case was dismissed on those grounds after Applicant requested postponement. Thirlway 1994, pp. 16-27. See also *Land & Maritime Boundary Case*, p. 22, para. 35, which merely states that “provisional measures are only justified if there is urgency ...”. Note the analysis in Merrills 1995, pp. 111-113.

⁴⁰ 42 *American Jurisprudence*, para. 26. However, urgency is not a universal rule in various American jurisdictions.

⁴¹ See Sztucki, pp. 104-108. As Greig argues, there is no need to consider urgency where rights have already been infringed, as in some aspects of this case, only where they are threatened, as has been alleged with other aspects of this case. Greig, p. 136. Note his argument that it “is far from certain that it follows ineluctably from article 74 of the [I.C.J.’s] Rules of Procedure (the counterpart of art. 90 of this Tribunal’s Rules), that urgency is an essential and defined quality”. He concludes that it has a direct bearing on the need to protect interests and can enhance irreparability. Greig, p. 137.

⁴² E.g. the value sought to be protected by the second leg of art. 290, para. 1 – threat of serious harm to the marine environment.

⁴³ See Sztucki, pp. 112-119, esp. 113.

I repeat that it is self-evident that urgency might often be dictated by the circumstances. And the operational context of a system of provisional measures might have a significant dimension of urgency. E.g., art. 63, para. 2, of the American Convention on Human Rights, in the more suitable context of human rights, provides that the Inter-American Court of Human Rights may take provisional measures “in cases of extreme gravity and urgency ...”. See 9 *International Legal Materials* (1970), p. 118.

⁴⁴ In his analysis of his suggested (apparently substantive) urgency requirement, Thirlway discusses mainly procedural requirements, such as court scheduling.

27. This Opinion will now address the subject of the various glosses on or paraphrases that have been used for the generic institution of preservation of rights. This discussion will be brief, in view of the fact that, in the proceedings and the Tribunal's Order, this norm has been essentially unchallenged. Furthermore, in the first place, it would be premature for this Tribunal so relatively early in its life and that of UNCLOS to sanction the use of paraphrases in substitution for the language of the Convention. Secondly, it should again be emphasized that provisional measures are discretionary and equitable, which the open-ended nature of the present formula facilitates. The focus should therefore be on devising measures which are appropriate for the situation, not relying on mantras.

Irreparability

28. The most commonly used paraphrase is that of irreparability. In the I.C.J.'s most recent jurisprudence, the phraseology is that the power to indicate measures has as its object or is intended to prevent irreparable prejudice, injury, damage or harm.⁴⁵ Often enough, it is stated that the measures should address not past consequences but the risk of future consequences. In general, this paraphrase, first used in the *Sino-Belgian Case*, has often seemed to work, certainly in the types of cases that go before the I.C.J., cases quite unlike the first case, on ship detention, to come before this Tribunal. Irreparability is not designed to provide ready relief. A notable case in which it was interpreted in a restrictive sense is the *Aegean Sea Case*, although the facts suggest that some, if not all, of the Applicant's rights were in need of preservation.⁴⁶ Irreparability arguably does not adequately cover such situations as that of the U.S. hostages in the *U.S. Staff Case* or the detentions in the instant case. One writer, discussing environmental damage, suggests that a preferable label would be "unendurable," not "irreparable."⁴⁷ In fact, the establishment in article 290, paragraph 1, of the institution of prevention of "serious" harm to the marine environment, alongside the institution of preservation of the respective rights, strongly reinforces the view that the rather grave standard of irreparability is inapt for universal use, at least in many of the situations under UNCLOS.⁴⁸ It is not a standard that should appropriately be the exclusive synonym for the treaty language in a Convention that envisages such very varied potential heads of jurisdiction *ratione materiae* and topics of concern. Therefore, in the future, if the Tribunal chooses to use this paraphrase, its subsidiarity or supplementarity should be very clearly indicated. This might help to improve the climate conducive to the acceptability of creative judicial action to preserve the *status quo pendente lite* or maintain international peace and good order.

⁴⁵ Understandably, art. 63, para. 2, of the American Convention on Human Rights (authorizing the Inter-American Court of Human Rights to adopt provisional measures) refers exclusively to irreparable damage.

The concept of irreparability is generally accepted in the doctrine. However, the wrong done or anticipated is described variously. See Merrills 1995, p. 106 (irreparable damage), Elkind, p. 258 (irreparable injury), Greig, p. 123 (irreparable harm). A leading law dictionary defines each of "injury," "damage" and "harm" mainly by citing one or both of the other words as a synonym. However, "prejudice" is defined as a "forejudgment; bias; partiality; preconceived opinion." Only the expression "without prejudice" includes the notion of non-waiver or non-loss of rights or privileges. *Black's Law Dictionary*, pp. 389, 718, 785-86, 1179.

Writers often imply that this is not a category which is separate from prejudice of rights. However, Greig lists irreparable harm and prejudice of rights as separate categories, not as paraphrase and principal category.

⁴⁶ The Court seems to have focused on the reparability of prejudice to the Applicant's real or corporeal rights. At the same time, it declined to acknowledge the existence or irreparability of rights of national policy-determination or –formulation. Direct application of the preservation genus, along with a sensitive rendering of the concept of rights, might have induced a different result by the Court.

⁴⁷ Elkind, p. 223.

⁴⁸ Sztucki notes the "gravity" of irreparability. See Sztucki, p. 14.

Nugatory Final Judgments

29. In a description of the various circumstances allowed in the I.C.J.'s practice, one Judge, having mentioned "prevention of irreparable prejudice or injury," mentions, possibly as a primary circumstance, "action in such a manner as to render the final judgment nugatory..."⁴⁹ There are not many specific illustrations of this heading in the jurisprudence. Perhaps it simply identifies sub-species of patterns of fact justifying preservation of the *status quo pendente lite*.⁵⁰ However, as far as concerns article 290, it would be best to analyse any such of pattern of facts directly under the broad main heading of preservation or rights.

The Prevention of Destruction of the Subject-Matter

30. This is another, possibly primary, circumstance which has been suggested.⁵¹ Cases⁵² where the Court sought to foreclose destruction of evidence which was material to the eventual decision could fall under this heading but there is little to distinguish it from irreparability. Again, this suggested modality should be treated as an aspect of preservation of rights or, exceptionally, under the irreparability sub-heading, if that were ever taken-up by the Tribunal.

Aggravation or Extension of the Dispute

31. The "[prevention] of aggravation of the dispute" is also included in the list mentioned in the two preceding sub-sections. Such a circumstance, which generally reads "non-aggravation or non-extension ...", has been included in all Orders of the I.C.J. indicating provisional measures since the *Electricity Co. of Sofia Case*.⁵³ This is logical, since the measures prescribed or indicated might otherwise themselves become a source of tension between the parties. Furthermore, in some of the cases in which measures were not indicated, several Judges in their Separate Opinions voiced their disagreement more or less on the ground that the Court did not at least apply this category of protection.⁵⁴

32. Two issues arise. Firstly, under this heading does the adjudicatory body have the power to order non-aggravation/non-extension measures independently of the request of the parties as for example in this case, where neither party has requested such measures? Although there was previously some doubt about this in relation to the Court,⁵⁵ the question

⁴⁹ See Separate Opinion of Judge Weeramantry in *Genocide Convention # 2 case*, p. 379.

⁵⁰ Elkind suggests the category of the intolerableness of the continuance of the situation i.e. that complaining party cannot reasonably be expected to endure the *status quo* pending settlement. Elkind, p. 230.

⁵¹ See Separate Opinion by Judge Weeramantry in *Genocide Convention #2 case*, p. 379.

⁵² Such as the *Land & Maritime Frontier case*, p. 18, para. 19.

⁵³ Sztucki, p. 74; Merrills 1995, pp. 123-124.

⁵⁴ See, e.g. Dissenting Opinion of Judge *ad hoc* Thierry in *Arbitral Award Case*, p. 84, and the *Lockerbie Case*, pp. 180-181; Dissenting Opinion of Judge Ajibola in *id.*, pp. 193-198.

⁵⁵ Sztucki, p. 74, referring in particular to the I.C.J.'s abstention, on the ground of absence of necessity, from deciding this point in the *Aegean Sea Case*, pp. 11-13, paras. 34-42 (attention to the problem being simultaneously given by the political organs of the United Nations) and criticisms thereof by Judges Lachs, pp. 20-21 and Elias, pp. 27-28.

seems to have been definitively and positively decided in recent cases.⁵⁶ There is no doubt that the Tribunal has this authority, which has been acknowledged in this case. However, today the Tribunal has departed from the Court's tradition and has not prescribed measures but "Recommends" the parties

"[to] endeavour to find an arrangement to be applied pending the final decision, and to this end the two States should ensure that no action is taken by their respective authorities or vessels flying their flag which might aggravate or extend the dispute submitted to the Tribunal ...".

Furthermore, in the recitals, the Tribunal recommends that the parties "should make every effort to avoid" certain situations which might aggravate or extend the dispute and "should endeavour to find an arrangement to" conduce to the same end. The Tribunal's caution is understandable, since measures are now mandatory. It would not be advisable to make orders for prescription which the parties will ignore. However, I repeat that the non-aggravation/non-extension clause is a logical component of measures. They should not be prescribed without this clause. I assume that in the future, the Tribunal will more readily prescribe measures of this nature, since⁵⁷ such measures are generally thought to be relatively harmless. This is consistent with the notion that the purposes of provisional measures are not only to preserve the *status quo pendente lite*, but also to maintain peace and good order, in a world without a global police force.⁵⁸ Even if the effect is largely hortatory, the influence of judicial decrees should not today be underrated.

33. The second question is the status of this heading of circumstance. It has been suggested that it is an ancillary category.⁵⁹ However, it has also been said to be of equal status to irreparability.⁶⁰ The better analytical approach is that non-aggravation or non-extension should be regarded as subsumed under the generic main category of preservation of the respective rights of the parties pending the final decision. In view of the above-mentioned purposes of provisional measures proceedings and of measures prescribed, it is concluded that non-aggression or non-extension may be used as an important sub-heading of the generic heading with an elevated status. The Tribunal has apparently taken that approach in this case. In subsequent cases, it is hoped that it will be more categorical.

34. I must here express my hope that the Tribunal's restraint in the non-aggravation and non-extension measures that it has indicated will itself have the effect of conducing to the maintenance of peace and good order. It would be my hope, too, that these measures will induce the parties to establish an interim regime for the short period of time remaining before the Tribunal's decision on the merits. Such a regime should ideally be consistent with the

⁵⁶ See *Land & Maritime Frontier*, p. 22, para. 41; *Frontier Dispute Case*, p. 9, para. 18.

⁵⁷ It will be recalled that art. 290, para. 1, provides that the "court or tribunal may prescribe any provisional measures which it considers appropriate ..." (emphasis added). This implies that, as long as a party has requested provisional measures, the Tribunal has power to order appropriate measures. Article 89, para. 5, of the Rules of the Tribunal, like Art. 75, para. 2, of the I.C.J. Rules, provides for the Tribunal (on its own) to prescribe measures different in whole or in part from those requested. The significance of the Tribunal's discretionary power in this area will be recalled.

⁵⁸ It is conceded that in cases involving private parties or largely commercial or technical matters (unlike the present case), questions might be asked about the desirability of routinely prescribing non-aggravation or non-extension measures.

⁵⁹ Additional to the alleged main categories of irreparable prejudice and urgency. Sztucki, pp. 123 and 127-129.

⁶⁰ See Merrills 1995, pp. 106-125 (a "criterion"), Elkind, p. 230 (a "category" which applies "generally"), Greig, p. 123 (a "criterion").

restoration or preservation of the *status quo* existing just before this dispute arose. As I have several times stated, such preservation is at the heart of the system of article 290. I venture to express the expectation that, pending the early hearing on the merits and this Tribunal's prompt disposition of that phase of the case, the parties will heed the Tribunal's exhortations, in particular about consulting about finding "an arrangement" which might include limited use of Guinea's EEZ by the *Saiga* and perhaps other ships registered in Saint Vincent and the Grenadines.

35. In the future, this Tribunal should routinely invoke the pertinent preservation of rights language of article 290, paragraph 1, followed, if appropriate, by either or both subsidiary formulations of non-aggravation and non-extension and irreparability. However, I reserve my views about whether the latter is a required sub-category.

The Circumstance of Prevention of Serious Harm to the Marine Environment

36. Available information suggests that, prior to UNCLOS, the need for environmental protection was not generally considered as *per se* a circumstance for provisional measures.⁶¹ Under article 290, paragraph 1, of UNCLOS, the prevention of "serious harm to the marine environment" has now been included as a second main circumstance alternative to the preservation of the respective rights of the parties. This is reminiscent of the doctrinal suggestion that there exists a category of circumstances, called "intolerableness," which encompasses the environmental situation.⁶² It has been thought that the notion of intolerableness avoids the harshness and gravity of irreparability, presumably being of the same subsidiary character. However, examination of the scheme of article 290, paragraph 1, reveals that rights' preservation and prevention of serious harm are on the same superior level. The former generally seeks to preserve the *status quo pendente lite*; the latter usually, but possibly not always, does so. Both, presumably, serve the requirements of maintaining peace and good order. Besides these, other labels are merely subsidiary sub-categories of provisional measures. One of these is non-aggravation/non-extension.⁶³ If, after mature deliberation, the Tribunal sanctions irreparability in certain types of cases, it would belong to another sub-category.

CONCLUSIONS

37. In its first provisional measures Order, the Tribunal has taken a careful first step, ordering a provisional measure only in relation to the possible application of judicial or administrative measures relating to the vessel's arrest and detention and the master's subsequent prosecution and conviction. The Tribunal's action, faithful to the terms of article 290, paragraph 1, and the objectives of preserving the *status quo pendente lite* and maintaining peace and good order, in effect seeks to preserve the respective rights of the parties. The particular right which is the subject of prescription is the non-application of laws and State action

⁶¹ One notable exception is Elkind, apparently influenced by the *Nuclear Tests Cases* and making mention of the provision in the draft of what became art. 290, para. 1. See Elkind, pp. 220-224.

⁶² See Elkind, p. 230, who seems to include environmental protection under his second, of three, "categories," viz. "where the continuance of a situation is intolerable and the complaining party cannot reasonably be expected to endure the *status quo* pending judicial settlement of a dispute."

⁶³ Some of these more or less frequently may be manifested in such component paradigms as those suggested by Judge Weeramantry.

thereunder which, although possibly facially valid under domestic law, would, if applied, provisionally seem to be inconsistent with the Convention and international law. This right is well established and consistent with those that have been protected in previous cases, viz. rights relating to property and persons and security from illegitimate enforcement jurisdiction.

38. In all the circumstances, I believe the asserted right of freedom from hot pursuit was one which, in its discretion, the Tribunal properly declined to address.

39. Importantly, the Tribunal has sought to balance the rights claimed by both parties while not giving unauthorized attention to claims or rights of non-parties.

40. The Tribunal has not indulged in paraphrases of the article or glosses based on provisions of different treaties in lieu of the clear terms of article 290, paragraph 1. As already mentioned, the sole measure prescribed, evidently is designed to preserve rights. And the non-aggravation/non-extension measures, which fall short of prescription, have the same design and are not equivocal about the source of authority since the Tribunal's treatment suggests that it considers that the function of that type of clause is a completely subsidiary aspect of the institution of preservation of rights. This trend should continue.⁶⁴

41. Nevertheless, the Tribunal has shown excessive caution in not categorically prescribing non-aggravation/non-extension even if that entailed mandating specific actions that the parties should take. Even without "prescribing," this could have been done in language less tentative than that of a recommendation. Nevertheless, that part of the clause which mentions the aggravation/extension institution also categorically provides for a form of prescription in requiring the two States "to ensure that no action is taken ... which might aggravate or extend the dispute ..."

42. In the Order in this case, no unduly restrictive and unnecessary procedural preconditions to prescription were imposed. Thus, issues related to articles 295 and 297, paragraph 3(a), have been effectively deferred to the merits, while the Tribunal has complied with the mandate of procedural urgency, without imposing a requirement of substantive urgency, yet being attentive to all relevant circumstances.

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For the foregoing reasons, I have voted for the measures which have been prescribed.

(Signed)

Edward A. Laing

⁶⁴ The same approach is suitable for the irreparability formulation, if the Tribunal, after careful deliberation, occasionally decides to rely on that grave tool in some specific cases.