INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

YEAR 1998

11 March 1998

List of cases:
No. 2

THE M/V "SAIGA" (No. 2) CASE

(SAINT VINCENT AND THE GRENADINES *v.* GUINEA)

Request for provisional measures

ORDER

Present: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; *Registrar* CHITTY.

THE TRIBUNAL,

Composed as above,

After deliberation,

Having regard to article 287, paragraph 4, and article 290 of the United Nations Convention on the Law of the Sea (hereinafter "the Convention") and articles 21 and 25 of the Statute of the Tribunal (hereinafter "the Statute"),

Having regard to articles 89 and 90 of the Rules of the Tribunal (hereinafter "the Rules"),

Having regard to the Notification submitted by Saint Vincent and the Grenadines to Guinea on 22 December 1997 instituting proceedings in accordance with Annex VII to the Convention in respect of a dispute concerning the M/V Saiga,

Having regard to the Request submitted by Saint Vincent and the Grenadines to the Tribunal on 13 January 1998 for the prescription of provisional measures by the Tribunal in accordance with article 290, paragraph 5, of the Convention,

Having regard to the Exchange of Letters dated 20 February 1998 constituting an agreement between Guinea and Saint Vincent and the Grenadines to submit the dispute between Saint Vincent and the Grenadines and Guinea relating to the M/V Saiga to the International Tribunal for the Law of the Sea,

Having regard to the Order of the Tribunal of 20 February 1998 by which the Request for the prescription of provisional measures is considered as having been duly submitted to the Tribunal under article 290, paragraph 1, of the Convention,

Makes the following Order:

1. *Whereas* Saint Vincent and the Grenadines and Guinea are both States Parties to the Convention;

2. *Whereas*, following an Application by Saint Vincent and the Grenadines for the prompt release of the M/V Saiga and its crew under article 292 of the Convention, the Tribunal delivered a judgment on 4 December 1997;

3. *Whereas*, on 13 January 1998, Saint Vincent and the Grenadines filed with the Registry of the Tribunal a Request for the prescription of provisional measures in respect of a dispute between the Government of Saint Vincent and the Grenadines and the Government of Guinea in connection with the arrest by the Guinean authorities of a vessel, the M/V Saiga, flying the flag of Saint Vincent and the Grenadines;

4. *Whereas* Saint Vincent and the Grenadines, in its Request, invoked article 290, paragraph 5, of the Convention as the basis for the jurisdiction of the Tribunal;

5. *Whereas* a certified copy of the Request was sent the same day by the Registrar of the Tribunal to the Minister for Foreign Affairs of Guinea, Conakry, and also in care of the Ambassador of Guinea to Germany;

6. *Whereas* the Registrar was informed of the appointment of Mr. Bozo Dabinovic, Commissioner for Maritime Affairs of Saint Vincent and the Grenadines, as Agent of Saint Vincent and the Grenadines, and the appointment of Mr. Hartmut von Brevern, Barrister, Hamburg, as Agent of Guinea;

7. *Whereas*, after having ascertained the views of the parties, the President of the Tribunal, by Order of 20 January 1998, fixed 23 February 1998 as the date for the opening of the hearing with respect to the Request, notice of which was communicated to the parties;

8. *Whereas* Guinea filed with the Registry of the Tribunal a Statement in response on 30 January 1998, Saint Vincent and the Grenadines submitted a Reply on 13 February 1998 and Guinea submitted a Rejoinder on 20 February 1998, and copies of those documents were forthwith transmitted by the Registrar to the other party;

9. *Whereas* the Tribunal held its initial deliberations on 18 and 19 February 1998, in accordance with article 68 of the Rules, and noted the points and issues it wished the parties specially to address;

10. *Whereas*, in accordance with article 24, paragraph 3, of the Statute, States Parties to the Convention were notified of the Application by a note verbale from the Registrar dated 20 February 1998, *inter alia,* through their Permanent Representatives to the United Nations in New York;

11. *Whereas*, at a meeting with the representatives of the parties on 20 February 1998, the President of the Tribunal ascertained the views of the parties regarding the procedure for the hearing and, in accordance with article 76 of the Rules, informed them of the points and issues which the Tribunal wished the parties specially to address;

12. *Whereas* the President of the Tribunal was informed on 20 February 1998 in writing by the Agent of Guinea that the Government of Guinea and the Government of Saint Vincent and the Grenadines had agreed to transfer to the International Tribunal for the Law of the Sea the arbitration proceedings instituted by Saint Vincent and the Grenadines by its Notification of 22 December 1997;

13. *Whereas*, on the same day, by letter to the Registrar, the Agent of Guinea notified the Tribunal of the Exchange of Letters constituting the Agreement;

14. *Whereas* this Agreement reads as follows:

> "Mr. Bozo Dabinovic
> Agent and Maritime Commissioner of
> St. Vincent and the Grenadines
> …
> Hamburg, 20.02.1998
> …

Upon the instruction of the Government of the Republic of Guinea I am writing to inform you that the Government has agreed to submit to the jurisdiction of the International Tribunal for the Law of the Sea in Hamburg the dispute between the two States relating to the MV 'SAIGA'. The Government therefore agrees to the transfer to the International Tribunal for the Law of the Sea of the arbitration proceedings instituted by St. Vincent and the Grenadines by Notification of 22 December 1997. You will find attached hereto written instructions from the Minister of Justice to that effect.

Further to the recent exchange of views between the two Governments, including through the good offices of the President of the International Tribunal for the Law of the Sea, the Government of Guinea agrees that submission of the dispute to the International Tribunal for the Law of the Sea shall include the following conditions:

1. The dispute shall be deemed to have been submitted to the International Tribunal for the Law of the Sea on the 22 December 1997, the date of the Notification by St. Vincent and the Grenadines;

2. The written and oral proceedings before the International Tribunal for the Law of the Sea shall comprise a single phase dealing with all aspects of the merits (including damages and costs) and the objection as to jurisdiction raised in the Government of Guinea's Statement of Response dated 30 January 1998;

3. The written and oral proceedings shall follow the timetable set out in the Annex hereto;

4. The International Tribunal for the Law of the Sea shall address all claims for damages and costs referred to in paragraph 24 of the Notification of 22 December 1997 and shall be entitled to make an award on the legal and other costs incurred by the successful party in the proceedings before the International Tribunal;

5. The Request for the Prescription of Provisional Measures submitted to the International Tribunal for the Law of the Sea by St. Vincent and the Grenadines on 13 January 1998, the Statement of Response of the Government of Guinea dated 30 January 1998, and all subsequent documentation submitted by the parties in connection with the Request shall be considered by the Tribunal as having been submitted under Article 290, paragraph 1, of the Convention on the Law of the Sea and Article 89, paragraph 1, of the Rules of the Tribunal.

The agreement of the Government of St. Vincent and the Grenadines to the submission of the dispute to the International Tribunal on these conditions may be indicated by your written response to this letter. The two letters shall constitute a legally binding Agreement ('Agreement by Exchange of Letters') between the two States to submit the dispute to the International Tribunal for the Law of the Sea, and shall become effective immediately. The Republic of Guinea shall submit the Agreement by Exchange of Letters to the President of the International Tribunal for the Law of the Sea immediately after its conclusion. Upon confirmation by the President that he has received the Agreement and that the International Tribunal is prepared to hear the dispute the arbitration proceedings instituted by the Notification

dated 22 December 1997 shall be considered to have been transferred to the jurisdiction of the International Tribunal for the Law of the Sea.

I look forward to receiving your early response.
Yours sincerely,

(*Signed*)
Hartmut von Brevern
Agent of the Republic of Guinea
…"

"Mr. Hartmut von Brevern,
…
Hamburg,
…
20th February 1998
…
I am in receipt of your letter of 20th February 1998 addressed to Mr. Bozo Dabinovic, Agent and Maritime Commissioner of St. Vincent and the Grenadines, in relation to the Arbitration proceedings concerning the M/V 'SAIGA' as well as the request for provisional measures.

On behalf of the Government of St. Vincent and the Grenadines I have the honour to confirm that my Government agrees to the submission of the dispute to the International Tribunal for the Law of the Sea subject to the conditions set out in your letter of 20th February 1998. A copy of this letter is attached hereto.

I remain Sir,

Yours sincerely,

(*Signed*)
Carl L. Joseph
Attorney General.
…"

15. *Whereas* the Order of the Tribunal of 20 February 1998 states, *inter alia,* that:

"the Tribunal is satisfied that Saint Vincent and the Grenadines and Guinea have agreed to submit the dispute to it,

… the Notification submitted by Saint Vincent and the Grenadines on 22 December 1997 instituting proceedings against Guinea in respect of the M/V 'Saiga' shall be deemed to have been duly submitted to the Tribunal on that date;

> … the Request for the prescription of provisional measures, the Response, Reply, Rejoinder, all communications and all other documentation relating to the Request for the prescription of provisional measures be considered as having been duly submitted to the Tribunal under article 290, paragraph 1, of the Convention and article 89, paragraph 1, of the Rules of the Tribunal …;
>
> …
>
> the case be recorded in the List of cases as the M/V 'SAIGA' (No. 2) case";

16. *Whereas* notice of the Order was communicated to the parties and a copy thereof was subsequently transmitted by the Registrar to them;

17. *Whereas*, pursuant to article 67, paragraph 2, of the Rules, copies of the Request, the Statement in response, the Reply, the Rejoinder and the documents annexed thereto were made accessible to the public on the date of the opening of the oral proceedings;

18. *Whereas* oral statements were presented at three public sittings held on 23 and 24 February 1998 by the following:

On behalf of Saint Vincent and the Grenadines	:	Mr. Carl Joseph, Attorney General and Minister of Justice of Saint Vincent and the Grenadines, Mr. Nicholas Howe, Mr. Philippe Sands, Mr. Yérim Thiam, Counsel and Advocates;
On behalf of Guinea	:	Mr. Hartmut von Brevern, Agent;

19. *Whereas*, at two public sittings held on 23 February 1998, the parties also addressed the points and issues raised with the Agents of the parties by the President of the Tribunal at the meeting referred to in paragraph 11;

20. *Whereas*, in the Notification of 22 December 1997, Saint Vincent and the Grenadines recounted a sequence of events, beginning on 28 October 1997 and involving the arrest and continued detention of the M/V Saiga and its crew by Guinean authorities; and whereas, on the basis of the facts and reasons there alleged, the Tribunal is requested to adjudge and declare that:

> "(1) the actions of Guinea (*inter alia* the attack on the m/v 'SAIGA' and her crew in the exclusive economic zone of Sierra Leone, its subsequent arrest, its detention and the removal of the cargo of gasoil, its filing of charges against St Vincent & the Grenadines and its subsequently issuing of a judgment against them) violate the right of St Vincent and the Grenadines and vessels flying its flag to enjoy freedom of navigation and/or other internationally lawful uses of the sea related to the freedom of navigation, as set forth *inter alia* in Articles 56 (2) and 58 and related provisions of the Convention;
>
> (2) subject to the limited exceptions as to enforcement provided by Article 33 (1)(a) of the Convention, the customs and contraband laws of Guinea, namely *inter alia* Articles 1 and 8 of Law 94/007/CTRN of 15 March 1994, Articles 316 and

317 of the Code des Douanes, and Articles 361 and 363 of the Penal Code, may in no circumstances be applied or enforced in the exclusive economic zone of Guinea;

(3) Guinea did not lawfully exercise the right of hot pursuit under Article 111 in respect of the m/v 'SAIGA' and is liable to compensate the m/v 'SAIGA' pursuant to Article 111(8) of the Convention;

(4) Guinea has violated Articles 292(4) and 296 of the Convention in not releasing the m/v 'SAIGA' and her crew immediately upon the posting of the guarantee of US$400,000 on 10 December 1997 or the subsequent clarification from Credit Suisse on 11 December;

(5) the citing of St Vincent and the Grenadines as the flag state of the m/v 'SAIGA' in the criminal courts and proceedings instituted by Guinea violates the rights of St Vincent and the Grenadines under the 1982 Convention;

(6) Guinea immediately release the m/v 'SAIGA' and her master and crew;

(7) Guinea immediately return the equivalent in United States Dollars of the discharged gasoil and return the Bank Guarantee;

(8) Guinea is liable for damages as a result of the aforesaid violations with interest thereon; and

(9) Guinea shall pay the costs of the Arbitral proceedings and the costs incurred by St Vincent and the Grenadines";

21. *Whereas* the provisional measures requested by Saint Vincent and the Grenadines in the Request dated 13 January 1998, as subsequently revised in paragraph 52 of its Reply dated 13 February 1998, are as follows:

"(1) that Guinea forthwith brings into effect the measures necessary to comply with the Judgement of the International Tribunal for the Law of the Sea of 4 December 1997, in particular that Guinea shall immediately:

(a) release the m/v Saiga and her crew;

(b) suspend the application and effect of the judgement of 17 December 1997 of the Tribunal de Premiere Instance of Conakry and/or the judgement of 3 February 1998 of the Cour d'Appel of Conakry;

(c) cease and desist from enforcing, directly or indirectly, the judgement of 17 December 1997 and/or the judgement of 3 February 1998 against any person or governmental authority;

(d) subject to the limited exception as to enforcement set forth in Article 33(1)(a) of the 1982 Convention on the Law of the Sea, cease and desist from applying, enforcing or otherwise giving effect to its laws on or related to customs and contraband within the exclusive economic zone of

Guinea or at any place beyond that zone (including in particular Articles 1 and 8 of law 94/007/CTRN of 15 March 1994, Articles 316 and 317 of the Codes des Douanes, and Articles 361 and 363 of the Penal Code) against vessels registered in St Vincent and the Grenadines and engaged in bunkering activities in the waters around Guinea outside its 12-mile territorial waters;

(2) that Guinea and its governmental authorities shall cease and desist from interfering with the rights of vessels registered in St Vincent and the Grenadines, including those engaged in bunkering activities, to enjoy freedom of navigation and/or other internationally lawful uses of the sea related to freedom of navigation as set forth inter alia in Articles 56(2) and 58 and related provisions of the 1982 Convention;

(3) that Guinea and its governmental authorities shall cease and desist from undertaking hot pursuit of vessels registered in St Vincent and the Grenadines, including those engaged in bunkering activities, except in accordance with the conditions set forth in Article 111 of the 1982 Convention, including in particular the requirement that 'such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted"';

22. *Whereas* submissions and arguments presented by Guinea in its Statement in response of 30 January 1998 include the following:

"…
The Government of Guinea asks the Tribunal to reject the request of St. Vincent and The Grenadines for the prescription of provisional measures as some of the conditions laid down in Article 290 para. 5 of the Convention have not been satisfied.

The Government of Guinea is of the opinion that neither an Arbitral Tribunal nor the International Tribunal for the Law of the Sea have jurisdiction to decide the dispute as presented to the Arbitral Tribunal by request of St. Vincent and The Grenadines of 22 December 1997. Furthermore the Government of Guinea is of the opinion that the urgency of the situation does not require the prescription of provisional measures.
...

The request of the Applicant concerns a dispute which is regulated in Article 297 para. 3 lit. a) of the Convention concerning the interpretation or application of the provisions of the convention with regard to fisheries. ... As the Tribunal has explained in its judgement of 4 December 1997, Guinea through the laws mentioned before has defined its rights in the EEZ along the lines of Article 56 of the Convention. The Guinean laws constitute sovereign rights for the purpose of exploring and exploiting, conserving and managing the national resources of its EEZ which is identical to sovereign rights of Guinea with respect to the living resources in the EEZ.

It is however the very purpose of Article 297 para. 3 to strengthen the position of the coastal State as far as its sovereign rights with respect to the living resources in the EEZ are concerned by leaving it to the coastal State's discretion whether to accept compulsory procedures entailing binding decisions according section 2 of part XV of the Convention.

The Government of Guinea however, in the present case does not accept any other settlement procedure than the Guinean Courts. Therefore the Tribunal cannot consider that prima facie the arbitral tribunal to which the request of St. Vincent and The Grenadines of 22 December 1997 is addressed, would have jurisdiction.

Also another condition to be fulfilled before Article 290 para. 5 of the Convention could be applied is not met, i.e. there is no urgent need for provisional measures. ...

The Applicant states that

> 'as a result of the Guinean actions many vessels are incurring increased financial costs, whether because they are re-routing or because they are employing armed protection' ... .

It is not understandable why vessels should re-route or whether they should employ armed protection. There is no prohibition of Guinea for foreign vessels to take the route through the EEZ of Guinea. There is no danger to foreign vessels to be attacked by Guinean vessels. If the Applicant however has tankers in mind that would like to supply gasoil offshore to fishing vessels in the EEZ of Guinea the provisional measures requested would not be justified, as the question whether such activity would be in conformity with the Convention is not subject to a regulation by provisional measures but has to be the subject of the final decision of the arbitral tribunal.

Furthermore it is not correct as Applicants state ... that all vessels flying the flag of St. Vincent and The Grenadines are subject to protential seizure in the waters including the EEZ of Guinea.

…

Furthermore the Applicants do not give any reasons for their statement, that the arbitral proceedings are 'unlikely to lead to a final and binding judgement in the near future'...

Furthermore there is absolutely no reason for Guinea to give an 'assurance that it would not seek to take action against vessels flying the flag of St. Vincent and The Grenadines within its exclusive economic Zone or beyond'. Why should Guinea give to all vessels flying the flag of St. Vincent and The Grenadines such 'carte blanche', the more so, as it is difficult to understand what the Applicants mean by referring to an 'action'.

Finally it would be more than unusual to expect a declaration from a Government that it would not 'otherwise' seek to enforce a first instance judgement.

...

Alternatively in case the Tribunal does not share the view as expressed before ...

The Applicant requests that MV 'SAIGA' and her crew be released. The Tribunal in its judgement of 4 December 1997 has decided that the release of MV 'SAIGA' and its crew from detention shall be upon the posting of a reasonable security. However, the bank guarantee of Crédit Suisse of 10 December 1997 offered to the Respondents was not 'reasonable' ...

All the other measures requested are neither provisional ones nor has the Tribunal any competence to issue orders to the requested effect";

23. *Whereas*, in the final submissions presented by the representative of Saint Vincent and the Grenadines at the public sitting held on 24 February 1998 and filed with the Registry, Saint Vincent and the Grenadines requested the prescription by the Tribunal of the following provisional measures:

"That Guinea ...

(1) release the m/v Saiga and her crew;

(2) suspend the application and effect of the judgement of 17 December 1997 of the Tribunal de Première Instance of Conakry and/or the judgement of 3 February 1998 of the Cour d'Appel of Conakry;

(3) cease and desist from enforcing, directly or indirectly, the judgement of 17 December 1997 and/or 3 February 1998 against any person or governmental authority;

(4) subject to the limited exception as to enforcement set forth in Article 33(1)(a) of the 1982 Convention on the Law of the Sea, cease and desist from applying, enforcing or otherwise giving effect to its laws on or related to customs and contraband within the exclusive economic zone of Guinea or at any place beyond that zone (including in particular Articles 1 and 8 of law 94/007/CTRN of 15 March 1994, Articles 316 and 317 of the Codes des Douanes, and Articles 361 and 363 of the Penal Code) against vessels registered in St. Vincent and the Grenadines and engaged in bunkering activities in the waters around Guinea outside its 12-mile territorial waters;

(5) cease and desist from interfering with the rights of vessels registered in St. Vincent and the Grenadines, including those engaged in bunkering activities, to enjoy freedom of navigation and/or other internationally lawful uses of the sea related to freedom of navigation as set forth inter alia in Articles 56(2) and 58 and related provisions of the 1982 Convention;

(6) cease and desist from undertaking hot pursuit of vessels registered in St. Vincent and the Grenadines, including those engaged in bunkering activities, except in accordance with the conditions set forth in Article 111 of the 1982 Convention, including in particular the requirement that '[s]uch pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing

State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted'";

24. *Whereas*, in the final submissions presented by the Agent of Guinea at the public sitting held on 24 February 1998 and filed with the Registry, Guinea presented the following submissions:

"1. The request of Saint Vincent and the Grenadines for the prescription of provisional measures as per number 52 of the reply of Saint Vincent and the Grenadines of 13 February 1998 or in a possible later revised draft should be rejected in total.

2. Furthermore the International Tribunal is asked to adjudge and declare that Saint Vincent and the Grenadines shall pay the costs for the proceedings which have been held consequently the request of Saint Vincent and the Grenadines for the prescription of provisional measures";

25. *Considering* that article 290, paragraph 1, of the Convention reads as follows:

> "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";

26. *Considering* that the Tribunal, in its Order of 20 February 1998, decided that the dispute had been duly submitted to it;

27. *Considering* that the parties disagree as to whether the Tribunal has jurisdiction since, according to the Applicant, the Tribunal has jurisdiction under article 297, paragraph 1, of the Convention, and, according to the Respondent, the Request of the Applicant concerns a dispute covered by article 297, paragraph 3(a), of the Convention and is not subject to the jurisdiction of the Tribunal;

28. *Considering* that, in the Exchange of Letters of 20 February 1998, the parties agreed to submit the dispute to the Tribunal and also agreed that the written and oral proceedings before the Tribunal "shall comprise a single phase dealing with all aspects of the merits (including damages and costs) and the objection to jurisdiction raised in the Government of Guinea's Statement in response dated 30 January 1998";

29. *Considering* 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;

30. *Considering* that in the present case article 297, paragraph 1, of the Convention, invoked by the Applicant, appears *prima facie* to afford a basis for the jurisdiction of the Tribunal;

31. *Considering* that, according to article 75, paragraph 2, of the Rules, each party shall at the conclusion of its last statement read its final submissions;

32. *Considering* that the Applicant modified its submissions at the public sitting on 24 February 1998 and that the Respondent objected to the modification;

33. *Considering* that a modification of the submissions of a party is permissible provided that it does not prejudice the right of the other party to respond;

34. *Considering* that in the present case the right of Guinea to respond has not been prejudiced because it had been given sufficient notice of the modification;

35. *Considering* that the Applicant in its final submissions requested the Tribunal to prescribe as a provisional measure the release of the M/V Saiga and its crew;

36. *Considering* that, after the Tribunal began its deliberations on the present Order, it was informed by letter dated 4 March 1998 sent on behalf of the Agent of the Applicant that "the M/V Saiga has been released from detention in Conakry and safely berthed in Dakar … this morning";

37. *Considering* that the Registrar, upon instructions of the Tribunal, informed the parties on 5 March 1998 that, in accordance with article 77, paragraph 1, of the Rules, the Tribunal was ready to receive, not later than 9 March 1998, observations which they might wish to provide regarding this release;

38. *Considering* that the information received from the parties confirmed that the M/V Saiga, its Master and crew had been released in execution of the Tribunal's Judgment of 4 December 1997;

39. *Considering* that it is appropriate to take note of the information provided by the parties;

40. *Considering* that, following the release of the vessel and its crew, the prescription of a provisional measure for their release would serve no purpose;

41. *Considering* that the rights of the Applicant would not be fully preserved if, pending the final decision, the vessel, its Master and the other members of the crew, its owners or operators were to be subjected to any judicial or administrative measures in connection with the incidents leading to the arrest and detention of the vessel and to the subsequent prosecution and conviction of the Master;

42. *Considering* that, in determining their conduct and attitude regarding activities pending the final decision, both parties should make every effort to avoid incidents similar to those which led to the arrest and detention of the M/V Saiga and its crew and which might aggravate or extend the dispute;

43. *Considering* that, in order to prevent aggravation or extension of the dispute, the parties should endeavour to find an arrangement to be applied pending the final decision, without prejudice to their contentions on jurisdiction or merits;

44. *Considering* that any action or abstention by either party to avoid aggravation or extension of the dispute should not in any way be construed as a waiver of any of its claims or an admission of the claims of the other party to the dispute;

45. *Considering* that the timetable which has been set by the Tribunal, upon the proposal of the parties, for a single phase of written and oral proceedings on jurisdiction and merits reduces to the minimum the period pending the final decision;

46. *Considering* that the present Order in no way prejudges any questions relating to the jurisdiction of the Tribunal or to the merits of the case, and leaves unaffected the right of both parties to submit arguments in respect of such questions;

47. *Considering* that, in accordance with article 89, paragraph 5, of the Rules, the Tribunal may prescribe measures different in whole or in part from those requested;

48. *Considering* the binding force of the measures prescribed and the requirement under article 290, paragraph 6, of the Convention that compliance with such measures be prompt;

49. *Considering* that, pursuant to article 95, paragraph 1, of the Rules, each party is required to submit to the Tribunal a report and information on compliance with any provisional measures prescribed;

50. *Considering* that it may be necessary for the Tribunal to request further information from the parties on the implementation of provisional measures and that it is appropriate that the President be authorized to request such information in accordance with article 95, paragraph 2, of the Rules;

51. *Considering* that it is appropriate to deal with the request of the Respondent concerning costs in the present proceedings in its final decision;

52. For these reasons,

THE TRIBUNAL,

1. Unanimously,

Prescribes the following provisional measure under article 290, paragraph 1, of the Convention:

> Guinea shall refrain from taking or enforcing any judicial or administrative measure against the M/V Saiga, its Master and the other members of the crew, its owners or operators, in connection with the incidents leading to the arrest and detention of the vessel on 28 October 1997 and to the subsequent prosecution and conviction of the Master.

2. Unanimously,

Recommends that Saint Vincent and the Grenadines and Guinea 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.

3. Unanimously,

Decides that Saint Vincent and the Grenadines and Guinea shall each submit the initial report referred to in article 95, paragraph 1, of the Rules as soon as possible and not later than 30 April 1998, and authorizes the President to request such further reports and information as he may consider appropriate after that date.

4. Unanimously,

Reserves for consideration in its final decision the submission made by Guinea for costs in the present proceedings.

Done in English and in French, the English text being authoritative, in the Free and Hanseatic City of Hamburg, this eleventh day of March, one thousand nine hundred and ninety-eight, in three copies, one of which will be placed in the archives of the Tribunal and the others transmitted to the Government of Saint Vincent and the Grenadines and the Government of Guinea, respectively.

(Signed) Thomas A. MENSAH,
President.

(Signed) Gritakumar E. CHITTY,
Registrar.

Judges VUKAS and WARIOBA append declarations to the Order of the Tribunal.

Judge LAING appends a separate opinion to the Order of the Tribunal.

(Initialled) T.A.M.
(Initialled) G.E.C.

Declaration of Judge Vukas

1. As stated in the above Order, I voted in favour of all the subparagraphs of its operative part contained in paragraph 52. Without any further explanation this would mean that I fully share the position of the Tribunal concerning the structure, the contents and the scope of the entire operative part. This not being so, I attach this declaration to the Order; its purpose is to explain my vote on subparagraphs 2 and 3 of paragraph 52.

2. I voted in favour of subparagraph 2, as I do share the opinion concerning the importance of achieving at this stage of the relations between the parties, and at the beginning of the procedure of the Tribunal on the merits of the case, the main goal set in this operative provision: abstention of the parties from any action which might aggravate or extend the dispute. An arrangement to be applied between the parties pending the final decision of the Tribunal could be a useful additional step in the same direction.

3. In my opinion, the duty to abstain from any action "taken by their respective authorities or vessels flying their flag which might aggravate or extend the dispute submitted to the Tribunal" had to be prescribed by the Tribunal as a provisional measure. However, in the course of the deliberations it was decided that the only provisional measure prescribed by the Tribunal would be the one formulated in subparagraph 1, and that the contents of subparagraph 2 would be drafted and adopted in the form of a recommendation. The reasons why I disagree as to formulating subparagraph 2 as a recommendation are the following:

Firstly, taking into account the nature of the case, the restraint of the parties in respect of actions which might aggravate or extend the dispute is of utmost importance. The tragic events which occurred on 28 October 1997 and afterwards resulted in human suffering and material loss. Therefore, the Tribunal should have used the most effective measures in order to convince the parties to abstain from any similar or other action which might aggravate or extend the dispute pending the final decision of the Tribunal. Under the applicable rules, such means are "prescribed provisional measures".

Secondly, another reason against the "recommendation" form of subparagraph 2 is based on the applicable rules on provisional measures prescribed by the Tribunal. And there is no doubt that this Order is made by the Tribunal on the Request submitted by Saint Vincent and the Grenadines only for the prescription of provisional measures. Under all the rules on provisional measures in the United Nations Convention on the Law of the Sea (article 290), the Statute of the International Tribunal for the Law of the Sea (article 25) and the Rules of the Tribunal (articles 89-95), the Tribunal is not entitled to take any other decision, make any suggestion or recommendation, express any wish, etc.; its only task and competence is to "prescribe provisional measures" which it considers appropriate under the circumstances of the dispute.

4. Parties to the dispute have to comply with the prescribed measures; the compliance with such measures is their legal obligation and they bear international responsibility for not complying with the prescribed provisional measures. Parties to a dispute have to inform the Tribunal as soon as possible as to their compliance with the prescribed provisional measures (article 95 of the Rules).

On the other hand, the legal nature of the measures recommended in subparagraph 2, nowhere mentioned in the applicable rules, remains unclear. As the Tribunal did not want to

qualify them as “provisional measures”, it is questionable whether it at all considered them as “appropriate under the circumstances to preserve the respective rights of the parties to the dispute ... pending the final decision” (article 290, paragraph 1, of the Law of the Sea Convention). The reason for including such measures without characterising them as provisional measures remains obscure.

5. In subparagraph 3, the Tribunal decides that the parties have to submit reports, but it does not specify whether this obligation concerns only subparagraph 1 or also subparagraph 2. This vagueness does not come as a surprise, because the Tribunal is aware of the fact that it is entitled to request reports only in respect of the compliance with provisional measures (subparagraph 1), and that there is no rule which would oblige the parties to report on the compliance with recommendations (subparagraph 2). Taking this into account, it is not correct that the Tribunal invokes article 95, paragraph 1, of its Rules, as this provision deals only with reports on the compliance with provisional measures.

Notwithstanding this vagueness and incorrectness of subparagraph 3, I voted in favour because of its implied element which requires reporting concerning the provisional measures (subparagraph 1). Namely, I consider reporting an indispensable component for the efficiency of prescribed provisional measures.

(*Signed*) Budislav Vukas

Declaration of Judge Warioba

I have voted for the provisional measure in paragraph 52, subparagraph 1, with some hesitation because it is unnecessarily wide and goes beyond the circumstances and requirement of the Request of the Applicant. As stated in paragraph 47 of the Order the Tribunal has used its discretion in article 89, paragraph 5, to prescribe the provisional measure. That article states:

> "5. When a request for provisional measures has been made, the Tribunal may prescribe measures different in whole or in part from those requested and indicate the parties which are to take or comply with each measure."

In this case Guinea, the Respondent, is the party which is required to comply with the measure. The Tribunal has rationalised its decision in paragraph 41 of the Order by saying "that the rights of the Applicant would not be fully preserved if … the vessel, its Master and … crew, its owners or operators were to be subjected to any judicial or administrative measures in connection with the incidents leading to the arrest and detention of the vessel and to the subsequent prosecution and conviction of the Master". In its final submissions the Applicant had requested that Guinea:

> "(1) release the m/v Saiga and her crew;
>
> (2) suspend the application and effect of the judgement of 17 December 1997 of the Tribunal de Première Instance of Conakry and/or the judgement of 3 February 1998 of the Cour d'Appel of Conakry;
>
> (3) cease and desist form enforcing, directly or indirectly, the judgement of 17 December 1997 and/or 3 February 1998 against any person or governmental authority;
>
> …"

For understandable reasons the Tribunal has declined to prescribe a provisional measure on the request for the release of the vessel. But it has gone ahead and prescribed a measure on the other two far beyond the request of the Applicant without giving sufficient reasons for doing so.

The Judgments of the courts of Guinea were submitted to the Tribunal in the proceedings. It is clear from these Judgments that the only person prosecuted was the Master of the vessel. He was convicted and sentenced to imprisonment for a term of six months which was immediately suspended. He was also fined some US$ 15 million and the vessel and its load were confiscated. No other person, crew, owner, or operator was subject of the prosecution.

Subsequently the vessel and the Master have been released unconditionally in accordance with the Judgment of the Tribunal (the crew had already been released). In the proceedings the Respondent stated that no further action would be taken against the Master in relation to the fine because he could not pay. The vessel and the crew have already left Guinea and are completely free. These developments make the application or effect of the Judgment of the courts of Guinea moot in the context of the incidents of October 1997.

The provisional measure, however, requires Guinea to:

> "refrain from taking or enforcing any judicial or administrative measure against the M/V Saiga, its Master and the other members of the crew, its owners or operators, in connection with the incidents leading to the arrest and detention of the vessel on 28 October 1997 and to the subsequent prosecution and conviction of the Master."

The measure is very broad in the type of action Guinea is required to refrain from and the category of people who are protected. The vessel and its crew have been released in the implementation of the Judgment of this Tribunal in the prompt release case (M/V "Saiga", Prompt Release) and they are free and away from Guinea. Guinea has complied fully with the decision of this Tribunal. With regard to the owners and operators there is absolutely no evidence on record that at any time action by Guinea, actual, threatened or otherwise, was taken against them. One fails to see what action Guinea is required to refrain from in respect of the owners and operators. It is also not clear what type of reports Guinea is supposed to submit. That, however, does not disturb so much in the prevailing circumstances, especially taking into account paragraph 52, subparagraph 2, of the Order which recommends to the parties to desist from action that could aggravate or extend the dispute. One hopes the Tribunal will use its discretion to request information under article 95, paragraph 2, with circumspection lest it unwittingly contribute to aggravation or extension of the dispute.

What really disturbs is the way the Tribunal has used its discretion under article 89, paragraph 5, to prescribe measures different in whole or in part from those requested. This discretion is properly conferred on the Tribunal and it is not a discretion which should be used simply because it is there. It is not a discretion which should be used at a whim but one which should be exercised when there are compelling reasons borne out by facts. The circumstances of this case lack that criterion. Hence my hesitation.

(*Signed*) Joseph S. Warioba

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

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[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

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[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]

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[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 Applicant[12] 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

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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

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[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 Jurtice," 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]

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[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 1[34], 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]

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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

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[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 urgency[44] 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

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[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 irreparabilty. 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.

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[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] Cases[52] 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

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[49] See Separate Opinion of Judge Weeramantry in *Genocide Convention # 2 c*ase, 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 c*ase, 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, since[57] 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

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[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

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[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-aggression/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.