

## SEPARATE OPINION OF JUDGE JESUS

1. I voted in favor of the Order, though I do not entirely share its legal reasoning and some of the conclusions reached with regard to certain issues relating to jurisdiction, the posting of a bond and the scope of application of the Order regarding the release of personnel. I will address them in this order:

### On the issue of jurisdiction

2. In its letter dated 22 October 2013 addressed to the Tribunal, the Russian Federation informed the Tribunal that through a note verbale

the Russian Side has...notified the Kingdom of the Netherlands...that it does not accept the arbitration procedure under Annex VII to the Convention initiated by the Netherlands in regard to the case concerning the vessel *Arctic Sunrise* and that it does not intend to participate in the proceedings of the International Tribunal for the Law of the Sea in respect of the request of the Kingdom of the Netherlands for the prescription of provisional measures under Article 290, paragraph 5, of the Convention.

3. In the same letter, the Russian Federation explained that its

actions...in respect of the vessel *Arctic Sunrise* and its crew have been and continue to be carried out as the exercise of its jurisdiction, including criminal jurisdiction, in order to enforce laws and regulations of the Russian Federation as a coastal State in accordance with the relevant provisions of the United Nations Convention on the Law of the Sea

and drew the attention of the Tribunal to the fact that

Upon the ratification of the Convention on 26th February 1997 the Russian Federation made a statement, according to which, *inter alia* it does not accept procedures provided for in Section 2 of Part XV of the Convention, entailing binding decisions with respect to disputes...concerning law-enforcement activities in regard to the exercise of sovereign rights of jurisdiction.

4. In view of this position of the Russian Federation not to accept the jurisdiction of the Annex VII arbitral tribunal to deal with the dispute (a position which may have led to its non-appearance in the provisional measures proceedings before the Tribunal), I am of the opinion that the Order of the Tribunal, in response to this important issue of jurisdiction raised, could have given a clearer and more direct explanation as to why the Tribunal, contrary to the position of the Russian Federation, found that the Annex VII arbitral tribunal *prima facie* would have jurisdiction to deal with the dispute submitted to it by the Netherlands.

5. Though I unreservedly agree with the findings of the Tribunal that the arbitral tribunal *prima facie* would have jurisdiction to entertain the case on the merits and that the Tribunal therefore has the authority to entertain the request for provisional measures under article 290, paragraph 5, I am of the view that the Tribunal should have developed its legal reasoning in paragraph 45 of the Order to address clearly and specifically the important, and only, argument made in this regard by the Russian Federation in its above-mentioned letter. I therefore felt that I should detail my position on this issue as follows:

- (a) The jurisdiction of the Tribunal to deal with a request for provisional measures, under article 290, paragraph 5 of the Convention, is dependent on whether the Tribunal, under the factual and legal circumstances of the case, finds that the arbitral tribunal instituted under Annex VII of the Convention would *prima facie* have jurisdiction to entertain the merits of the case. This is the guidance provided by that paragraph, which states:

Pending the constitution of an arbitral tribunal to which a dispute is being submitted . . . , the International Tribunal for the Law of the Sea . . . may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires.

- (b) Therefore, the Tribunal, in establishing the *prima facie* jurisdiction of the Annex VII arbitral tribunal in this case, should have expounded reasoning to counter the Russian Federation’s argument

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Convention, entailing binding decisions with respect to disputes . . . concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction”.

- (c) Bearing in mind that this Russian Federation position lies at the heart of the issue of the arbitral tribunal’s jurisdiction in this case and taking into account as well that the Russian Federation’s declaration upon ratification of the Convention, on 26 February 1977, meant to exclude disputes concerning “law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction” from the compulsory jurisdiction set out in Section 2 of Part XV, the Tribunal should have expanded its legal reasoning in this respect, to make it clear that:
- (i) Under the Convention, States parties to a dispute submitted to a court or tribunal referred to in article 287 of the Convention are subject to binding decisions, as set out in Section 2 of Part XV, unless the dispute falls into one of the categories of disputes referred to in article 298 of the Convention, in respect of which States may opt out;
  - (ii) While exceptions to the compulsory jurisdiction established in Section 2 of Part XV of the Convention concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction are allowed under article 298, paragraph 1(b), of the Convention, such exceptions nonetheless can only be made in respect of two categories of disputes, as clearly specified in that subparagraph *in fine*. These two categories of disputes are those relating to marine scientific research and to fisheries, as indicated in article 297, paragraphs 2 and 3, of the Convention. It is evident from the factual background of this case that the detention by the Russian authorities of the vessel *Arctic Sunrise* and the personnel on board has nothing to do either with marine scientific research or with fisheries;
  - (iii) From the above, it stands to reason that the declaration of the Russian Federation made upon ratification of the Convention on 26 February 1977 cannot be construed as having excluded from the compulsory procedures entailing binding decisions under Section 2 of Part XV of the Convention the dispute that arose out of the incident having taken place in the exclusive economic zone (“EEZ”) of the Russian Federation on 19 September 2013 and having led to the detention of the *Arctic Sunrise* and the personnel on board;

- (iv) Nor can this declaration this declaration by the Russian Federation be interpreted as excluding or modifying the legal effect of the provisions of the Convention in their application to it, as this is not allowed by article 310 of the Convention.
- (d) For these reasons and having in mind that no other obstacles to jurisdiction were raised by the Russian Federation or otherwise appear to arise, I am of the view that the jurisdiction of the Annex VII arbitral tribunal will be well established and, as a result, the Tribunal has the authority to entertain the Netherlands’ request for provisional measures.

**On the issue of the bond**

6. The Tribunal in its collective wisdom decided to order the release of the vessel *Arctic Sunrise* and its personnel on board as an interim measure, pending the constitution of the Annex VII arbitral tribunal. Release was made conditional on the posting of a bond.

7. Although I joined the Tribunal in its decision to order the release of the vessel and personnel, I have reservations as to the bond-posting procedure, for the following reasons:

- (a) Although the Tribunal has dealt with several requests for provisional measures under article 290, paragraph 5, this is the first case in which it has been requested in the framework of provisional measures proceedings to order the release of the vessel and persons on board from detention for alleged violations of a coastal State’s maritime regulations applicable to its EEZ. Therefore, as this case may be taken as setting a precedent, it is imperative that careful consideration be given in the Order to the legal issues arising in this respect.
- (b) The majority in its decision, based on the language of article 290, paragraph 1, stating that the Tribunal “may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute”, decided to order the release of the vessel *Arctic Sunrise* and its personnel on the condition that a bond be posted. This amounts to a back-door prompt release remedy that the Convention

designed to be applied only to cases involving illegal fisheries in the EEZ and the specific situations referred to in article 226, paragraph 1, in conjunction with article 220, paragraphs 3 and 8, of the Convention.

- (c) My reservations with regard to the reasoning in the majority decision lie on the very concept of requesting interim protection to obtain the release of vessel and crew upon the posting of a bond. I see no difficulty in using provisional measures proceedings to obtain the release of vessel and crew. My reservations arise when this release occurs upon the posting of a bond. I shall explain:
- (i) As a general proposition, the criminal investigation and possible prosecution, in accordance with the procedural and substantive laws of a State, of persons suspected of having violated the State’s laws is a normal function of the State and an emanation of its sovereignty, due regard, of course, being paid in this respect to the guarantees of the detainee under applicable international rules and standards.
  - (ii) States should therefore be allowed a reasonable period of time, without undue interference from outside, to undertake the normal investigative and criminal proceedings aimed at establishing matters of fact and law which may or may not lead to the prosecution of detained persons. The early release of detainees may compromise the very purpose of the investigation and criminal proceedings.
  - (iii) Releasing detainees prior to the outcome of the investigation which could lead to their prosecution may be justified where it is expressly allowed through procedures established in the applicable law, domestic or international, as one would expect these procedures to have taken into account mechanisms to prevent the investigation or prosecution from being rendered void.
  - (iv) In the framework of the law of the sea, the possibility of releasing detained foreign vessels and crew prior to the outcome of internal criminal investigations or prosecutions is expressly provided for only in the case of prompt release of vessel and crew under the urgent proceeding of article 292 of the Convention, a special procedure that is applicable in two situations alone:

1. In case of alleged violations of the coastal State’s fishing legislation (article 73, paragraph 1, of the Convention); and
2. In the specific cases referred to in article 226, paragraph 1(b), in conjunction with article 220, paragraphs 3 and 8, of the Convention, involving the violation of applicable rules for the prevention, reduction and control of pollution from vessels.

8. The Tribunal has been requested on several occasions, through the prompt release procedure under article 292 of the Convention, to order the release, upon the posting of a reasonable bond, of vessels and crews that had been detained for alleged violations of the coastal State’s fishing legislation applicable to the EEZ.<sup>1</sup> Indeed, in the framework of cases brought to the Tribunal under the article 292 prompt release procedure, the Tribunal in several instances issued orders for release of fishing vessels and crews, always upon the posting with the detaining State of a reasonable bond or other financial guaranty in an amount fixed by the Tribunal.

9. In the case of the article 292 prompt release procedure an early release of vessel and crew does not hinder the criminal investigation and prosecution to be carried out by the domestic authorities, since under article 73, paragraph 3,

Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary, by the States concerned, or any other form of corporal punishment.

This is, of course, on the assumption that the amount of the bond is fixed taking into account all impossible monetary penalties and other amounts, as has been done in the prompt release cases entertained by the Tribunal.

10. Similar reasoning applies to the specific cases referred to in article 226, paragraph 1(b), in conjunction with article 220, paragraphs 3 and 8, of the Convention, involving the violation of applicable rules for the prevention, reduction and control of pollution from vessels. Indeed, in this case, to which the prompt release procedure under article 292 of the Convention also applies, only

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<sup>1</sup> See article 73 of the Convention.

Monetary penalties . . . may be imposed with respect to violations of national laws and regulations or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment, committed by foreign vessels beyond the territorial sea.<sup>2</sup>

11. Conversely, a bond imposed as a condition for the release of vessel and crew in the framework of provisional measures, as in the present case, may not “preserve the rights” of the detaining State in cases in which the imposed or imposable penalties may involve imprisonment terms which, under the applicable domestic law, are not convertible into monetary penalties.

12. For these reasons, I would have preferred the reasoning of the Tribunal to be based on different grounds. In my view the release of the *Arctic Sunrise* and the personnel on board should have been justified on the grounds of the freedom of navigation which the flag State of the vessel enjoys on the high seas, a freedom which also extends to the EEZ of the Russian Federation, in accordance with article 58, paragraph 2, of the Convention.

13. Under this reasoning the release of personnel would have included even those members of the personnel of the *Arctic Sunrise* who may have entered the safety zone established by the Russian Federation. As the Tribunal unfortunately did not have the benefit of participation by the Russian Federation in the proceedings before it, it was prevented from receiving a full account of the facts of this case, including facts that could have clarified for the Tribunal matters relative to those members of the personnel of the *Arctic Sunrise* who may have entered the safety zone without authorization, in violation of the Russian regulations and safety measures. For this reason, it would have been difficult to make a distinction between those who may have violated the Russian-established safety zone and those who may have been in the Russian EEZ on board of the vessel as it exercised its freedom of navigation.

14. It may be argued that if the Tribunal had followed such an approach, it would have entered into the substance of the case, which should be left to the Annex VII arbitral tribunal as the tribunal hearing the case on the merits.

15. To this argument I would respond by saying that there are some matters of substance that a court or tribunal dealing with a request for provisional measures

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<sup>2</sup> See article 230 of the Convention.

under article 290 of the Convention cannot abstain from addressing. I offer the following arguments in favour of this position:

- (a) Firstly, I would say that the very object of a request for provisional measures is, as stated in article 290, paragraph 1, of the Convention, “to preserve the respective rights of the parties to the dispute”. As I see it, it is simply not possible to prescribe measures to preserve the rights of the parties without touching on or sometimes even giving full consideration to certain matters pertaining to the substance of the case. As stated by the International Court of Justice, “a request for provisional measures must by its very nature relate to the substance of the case” (*United States Diplomatic and Consular Staff in Tehran, United States v. Iran, Request for Provisional Measures, 1979*);
- (b) Secondly, the jurisprudence of the Tribunal itself on provisional measures has at times gone into the substance of the case to justify such measures for the preservation of the rights of the parties. Such is the jurisprudence that resulted, for example, from the “*ARA Libertad*” Case. In that case the Tribunal determined the release of the Argentinian warship without a bond, based on its interpretation of the applicable substantive law, as reflected in paragraphs 94, 95, 98 and 100 of the Order of the Tribunal on the release of that warship. In paragraph 95 of that Order, for example, the incursion into substantive law was clear-cut when the Tribunal stated that “in accordance with general international law, a warship enjoys immunity, including in internal waters”;
- (c) The jurisprudence of the Tribunal in this regard is not an isolated one. The International Court of Justice itself has done the same. An example is the case concerning *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran, Provisional Measures)*, where that Court clearly indicated interim measures based on its interpretation of applicable substantive law;
- (d) A decision to order the release of the *Arctic Sunrise* and its personnel in this case based on the interpretation and application of substantive provisions of the Convention would not have interfered with the consideration by the Annex VII arbitral tribunal of the case on the merits, as the claims by the Netherlands before that tribunal relate more to compensation than to release of the vessel and personnel.



16. Therefore I am of the view that the Tribunal could have instead ordered the release of the vessel and crew on the basis of the arguments developed in paragraphs 7 to 15 of this opinion, without recourse to a bond.

17. It would appear to me that, when dealing with a request for provisional measures, the Tribunal should determine whether the Applicant has good cause for obtaining the provisional measures requested and, if that is its conclusion, then it should take a decision accordingly to preserve the rights of the applicant *pendente lite* and therefore no bond should be required as a condition for the release; or, if the facts and the law applicable to the request do not warrant the imposition of such measures, then the Tribunal should not order them.

**On the issue of the scope of application of the Order regarding the release of personnel**

18. The decision of the Tribunal ordering the Russian Federation to release all the detained persons includes members of the personnel holding Russian citizenship. I understand that the ship-as-a-unit concept developed by the Tribunal in the *M/V “SAIGA” (No. 2) Case* brings all crew members of a vessel under the international judicial protection of the vessel’s flag State, even those of a nationality different from that of the flag State.

19. While I am in full agreement that crew members of a nationality different from that of the ship’s flag State should also enjoy international judicial protection from that State, as promoted by the ship-as-a-unit concept, I do not think that the concept should interfere with the special legal relationship that exists between a State and its citizens in its own territory.

20. To order a State to release its own citizens who are being prosecuted in its domestic courts for alleged violations of that State’s own law may be overstretching the scope of applicability of the ship-as-a-unit concept, which is otherwise a valuable contribution to international law developed by the Tribunal in its early case law, a contribution that complements the institute of diplomatic protection. For these reasons alone, I would have preferred that the order of release apply to all personnel other than the Russian citizens.

(signed) J.L. Jesus