

Joint Dissenting Opinion

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and Judge Patrick Robinson

1. The present joint dissenting opinion addresses the findings in paragraph 1094(B)(4)(a) and (b) of the Award that Italy has not violated Articles 56 and 58, paragraph 3, of the Convention.

I. DISSENT TO THE FINDING IN PARAGRAPH 1094(B)(4)(A) OF THE AWARD THAT ITALY HAS NOT VIOLATED INDIA’S SOVEREIGN RIGHTS UNDER ARTICLE 56 OF THE CONVENTION

2. In paragraph 1094(B)(5) of the Award, the Majority finds that “by interfering with the navigation of the “St. Antony” Italy has acted in breach of Article 87, paragraph 1, subparagraph (a), and Article 90 of the Convention”. An examination of why that finding is correct illustrates why the finding in paragraph 1094(B)(4)(a) is wrong. The finding in paragraph 1094(B)(5) is correct inasmuch as it is based on the firing by the Marines of shots that interfered, both during the course of and after the incident, with the right of Indian fishermen to engage in fishing within the Indian exclusive economic zone over which India enjoys sovereign rights under Article 56, paragraph 1, of the Convention. The intention of the Marines, insofar as it is claimed and admitted that they acted under an apprehension of a perceived threat of piracy, is immaterial for treating the conduct of the Marines as an internationally wrongful act attributable to Italy as the State of which they are officials. Given that the factual matrix is the same in respect of all three provisions, that is, Article 56, paragraph 1, Article 87, paragraph 1, and Article 90 of the Convention, it is odd that the Arbitral Tribunal failed in paragraph 1094(B)(4)(a) to draw the same conclusions with respect to Article 56, paragraph 1, and Article 58, paragraph 3, as it did in the case of Article 87, paragraph 1, and Article 90 of the Convention.

3. In relation to its claim that Italy breached Article 87, paragraph 1, subparagraph (a), of the Convention, India submitted that its freedom and right of navigation in its exclusive economic zone was violated by Italy “when the Marines fired shots at the ‘St. Antony’ and caused it to change course and veer away to avoid further gunfire”.¹ Italy submitted that the measures, adopted by the Marines to avoid a collision or perceived risk of hostile boarding, did not constitute an interference with the freedom of navigation of the “St. Antony”² and in no way involved any

¹ Paragraph 987 of the Award.

² Paragraph 1015 of the Award.

attempt by Italy to interfere with India's freedom of navigation.³ In effect, Italy argued that the Marines had no intention to interfere with India's freedom of navigation, and that the measures they adopted were a response to what they perceived as a potential collision and an attack by pirates.

4. The Arbitral Tribunal was not persuaded by Italy's submission. It simply identified the possible breaches of the right to freedom of navigation, including "physical or material interference with navigation of a foreign vessel",⁴ determined that the shooting by the Marines "caused the 'St. Antony' to change direction and ultimately head back to shore",⁵ and concluded that this was an interference with the navigation of the "St. Antony", in breach of Article 87, paragraph 1, subparagraph (a), and Article 90 of the Convention. Notably, in identifying the breaches of the primary obligation to respect India's right to freedom of navigation, the Arbitral Tribunal did not include "an intention to harm" as an element of the breach.
5. The Arbitral Tribunal was entirely correct to disregard Italy's submission that the Marines did not intend to interfere with the "St. Antony"'s navigation, because a State's international responsibility for wrongful conduct is engaged independently of whether it intended to cause harm. This is how the ILC addresses the question in paragraph 10 of the Commentary on Article 3 of its Draft Articles on State Responsibility:

A related question is whether fault constitutes a necessary element of the internationally wrongful act of a State. This is certainly not the case if by "fault" one understands the existence, for example, of an intention to harm. In the absence of any specific requirement of a mental element in terms of the primary obligation, it is only the act of a State that matters, independently of any intention.⁶

6. It is surprising that, in considering India's submission that Italy violated its sovereign rights under Article 56 of the Convention, the Majority did not follow the same impeccable reasoning that led to its finding that Italy had violated India's right to freedom of navigation under Article 87, paragraph 1, subparagraph (a), of the Convention. The factual matrix is the same in respect of India's claim of Italy's breach of Article 87, paragraph 1, subparagraph (a), and its claim of a breach of Article 56 of the Convention: the firing of shots by the Marines from the "Enrica Lexie" to the "St. Antony" and the death of the two Indian fishermen.

³ Paragraph 1017 of the Award.

⁴ Paragraph 1038 of the Award.

⁵ Paragraph 1041 of the Award.

⁶ Draft Articles on Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission, 2001, Vol. II, Part Two, p. 36, para. 10.

7. Moreover, Italy's submissions are also the same, namely, that Italy acted on the basis of an apprehension that the "Enrica Lexie" was facing the threat to a safety of its navigation, in the form of a risk of collision and pirate boarding; Italy argues that it did not act to impede India's right to explore and exploit its natural resources in its exclusive economic zone. The Arbitral Tribunal found that "the Marines and the 'Enrica Lexie' crew believed that the vessel was under a pirate attack and took actions...to protect the 'Enrica Lexie' against a perceived pirate attack".⁷ However, Italy's international responsibility is engaged for the acts of the Marines that clearly infringed India's sovereign rights by firing at the "St. Antony" and the killing of two Indian fishermen. Its responsibility is engaged, as the ILC stated, "independently of any intention", that is, independently of whether the Marines had "an intention to harm" India's sovereign rights to exploit its living resources in the exclusive economic zone. There is nothing in the formulation in Article 56 of the coastal State's sovereign rights to exploit its living resources in its exclusive economic zone to absolve Italy of its responsibility in this regard. Hence, the Majority's reasoning that "the Marines did not target the 'St. Antony' as a fishing vessel, but on the suspicion that it was a pirate vessel intending to board the 'Enrica Lexie'"⁸ cannot serve as basis, under the law of State responsibility, to conclude that Italy did not violate India's sovereign rights under Article 56 of the Convention. What is relevant is that, whether the "St. Antony" was targeted or not, the Marines fired shots that resulted in the death of the two Indian fishermen, consequently contravening the enjoyment by India of its sovereign rights in the exclusive economic zone.
8. While the mental state (an intention to harm) of the Marines may be a factor affecting the quantum of damages for the breach, it does not affect the fundamental question of Italy's responsibility for its breach of Article 56 of the Convention.
9. Paragraph 10 of the ILC Commentary, cited above, does not state anything that is new in the law of State responsibility. In the case of the *Jessie*,⁹ the tribunal held that although the United States naval authorities acted *bona fide*, they made an error of judgment and that the United States Government, like any other government, was responsible for the errors in judgment of its officials. Similarly, in this case, Italy bears responsibility for acts of the Marines that led to the shooting at the "St. Antony" and the killing of the two fishermen, thereby interfering with India's enjoyment of its sovereign rights in respect of the living resources in its exclusive economic zone. Clearly, the position of the Majority in concluding that there was no breach of Article 56 because the Marines' conduct had "the discrete purpose of protecting the 'Enrica Lexie' against a perceived

⁷ Paragraph 952 of the Award.

⁸ Paragraph 955 of the Award.

⁹ *Owners of the Jessie, the Thomas F. Bayard and the Pescawha (Great Britain) v. United States*, Award of 2 December 1921, RIAA Vol. VI, p. 57 at p. 59.

pirate attack”¹⁰ is at variance with this well-established principle governing State responsibility, and the reason for the same is not obvious

10. It may be that the conduct of the Marines, directed at what the Majority describes as “a perceived pirate attack”, would not be in breach of Article 100 that imposes a duty on all States to “cooperate to the fullest possible extent in the repression of piracy”. But conduct that does not breach Article 100 may yet breach Article 56, because the Articles impose different requirements on State Parties. Compliance with Article 100 may not necessarily constitute compliance with Article 56 of the Convention.
11. By way of further justification, the Majority found that the Marines’ conduct was a “singular and isolated incident, which had a merely incidental effect on the ability of a fishing vessel, the ‘St. Antony’, to continue pursuing its fishing activities”.¹¹ This is a very questionable finding. In the first place, in its reference to “a fishing vessel”, it would appear to be embracing the elitist view that Article 56 is more concerned with fisheries than fishermen.¹² Secondly, the effect of the conduct of the Marines on the ability of the “St. Antony” to carry out its fishing activities is anything but “incidental”; it is a very direct effect. Third, for the purposes of the engagement of the international responsibility of Italy, it is irrelevant that the Marines’ conduct was what the Majority describes as “a singular and isolated incident”. Neither the right under Article 56, nor its corresponding obligation has a numerical threshold. What is relevant is that that conduct interfered with India’s enjoyment through the fishermen of its sovereign rights in extracting the living resources in its exclusive economic zone. Moreover, it appears that the Majority concluded that the shooting by the Marines at the “St. Antony” and the killing of the two Indian fishermen plying their trade in India’s exclusive economic zone does not rise to the level of interference with “sovereign rights for the purposes of exploring and exploiting, conserving and managing” the natural resources of the exclusive economic zone. Yet, it is hard to envisage any act that could constitute a greater interference with a coastal State’s enjoyment of its sovereign rights in the exclusive economic zone than the killing of two of that State’s fishermen while they were pursuing their livelihood of fishing in that coastal State’s exclusive economic zone.
12. The Majority, in an attempt to justify its finding, invokes India’s duty under Article 56, paragraph 2, to have “due regard to the rights and duties of other States and the applicability of Article 110 of the Convention”.¹³ Article 110 is irrelevant. That Article addresses the

¹⁰ Paragraph 955 of the Award.

¹¹ Paragraph 953 of the Award.

¹² Paragraph 939 of the Award.

¹³ Paragraph 954 of the Award.

circumstances in which a warship may exercise the right of visit in relation to a foreign ship on the High Seas. One of the circumstances identified is when the foreign ship is engaged in piracy. However, the Article is inapplicable because the “Enrica Lexie” is neither a warship nor a “duly authorized ship” within the meaning of Article 110, paragraph 5, of the Convention.

13. Second, the Majority did not cite Article 56, paragraph 2, of the Convention in full. The duty to have due regard does not exist in a vacuum. It arises when the coastal State is “exercising its rights and performing its duties under the Convention in the exclusive economic zone”. The obligation of India to have due regard to the rights of Italy does not arise because India was not exercising any right or performing any obligation in respect of the incident that took place in its exclusive economic zone. By the time the Indian authorities came on the scene, the Marines had already fired the shots from the “Enrica Lexie” that resulted in the killing of the two Indian fishermen on the “St. Antony”. Therefore, the due regard obligation is inapplicable to India. Moreover, the Arbitral Tribunal unanimously determined that India did not breach the obligation under Article 100 of the Convention to “cooperate to the fullest possible extent in the repression of piracy on the High Seas”.
14. Therefore, we regret our inability to share the conclusion of the Majority, finding that Italy had not violated India’s sovereign rights under Article 56 of the Convention, which is wrong.

II. DISSENT TO THE FINDING IN PARAGRAPH 1094(B)(4)(B) OF THE AWARD THAT ITALY HAS NOT VIOLATED ARTICLE 58, PARAGRAPH 3, OF THE CONVENTION

15. India argues that Italy has breached the due regard obligation in Article 58, paragraph 3, of the Convention. Italy’s response is quite straightforward. It argues that the action taken by the Marines was in response to a perceived threat of a collision and pirate attack and hence a threat to the “Enrica Lexie”’s safe navigation. The Majority found that the duty under Article 100 of the Convention to repress piracy is a duty incumbent on all States. It also found that “if protection from and repression of piracy comprise a right and a duty of India and Italy alike, including within India’s [EEZ], the conduct of the Marines on board the ‘Enrica Lexie’ in responding to a perceived piracy threat cannot have ‘unreasonably interfere[d] with’, and thus have failed to show ‘due regard’ to, India’s rights as the coastal State”.¹⁴
16. The best definition of the due regard obligation is the one that is found in the award in the *Chagos Marine Protected Area Arbitration*, which is cited in paragraph 976 of the Award. That tribunal

¹⁴ Paragraph 980 of the Award.

found that the due regard obligation requires “such regard for the right of Mauritius as is called for by the circumstances and by the nature of those rights”. The tribunal then went on to find that “the extent of the regard required by the Convention will depend upon the nature of the rights held by Mauritius, their importance, the extent of the anticipated impairment, the nature and importance of the activities contemplated by the United Kingdom, and the availability of alternative approaches”.¹⁵

17. In the instant case, the right for which Italy must have due regard is India’s sovereign rights to exploit the living resources (fisheries) in its exclusive economic zone. Italy has a corresponding obligation to respect that right. The conduct of the Marines in firing shots at the “St. Antony”, resulting in the death of the two Indian fishermen was a breach of that obligation. This obligation exists notwithstanding that the Marines did not intend to harm India’s enjoyment of its right to exploit the living resources in its exclusive economic zone. That is so because a State’s international responsibility for wrongful conduct, as noted above in paragraph 5, above, is engaged independently of whether it intended to cause harm.
18. *Dicta* from the *Chagos Marine Protected Area Arbitration* award indicate that the regard that is required is that which is called for by the circumstances and by the nature of the right. The nature of India’s right is such that Italy is not relieved of its obligation to respect and have due regard for that right on the ground that the Marines perceived that there was a threat of a collision and pirate attack. In this case therefore, Italy’s breach of its obligation to respect India’s rights under Article 56, paragraph 1, subparagraph (a), of the Convention is also a breach of its duty under Article 58, paragraph 3, of the Convention to have due regard for that right.
19. One of the factors identified in the *Chagos Marine Protected Area Arbitration* award for determining the extent of the regard required by the Convention is the “availability of alternative approaches”. It was certainly open to the Marines to take some action other than firing at a miniscule vessel, leading to the death of the two Indian fishermen. For example, the difference in the size and maximum speed of the “Enrica Lexie” (243.8 metres and 14 knots) and the “St. Antony” (13.7 metres and 10 knots) was such that the “Enrica Lexie” could easily have changed course and outrun the very small Indian fishing boat, thereby avoiding any risk of collision or pirate attack. This provides another basis for concluding that the obligation to have due regard to India’s rights was breached by Italy.

¹⁵ Paragraph 976 of the Award, citing PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 519.

20. It remains now to address the observation of the Majority that Article 100 imposes a duty on all States to repress piracy in their exclusive economic zone. The Majority's finding in paragraph 980 of the Award has already been cited in paragraph 1 of this Joint Dissent. It is a finding that is based on reasoning that is wholly tortuous and wrong. If the phrase, "India and Italy alike" is intended to signify an equivalence in the position of the two countries in relation to the suppression of piracy, it is misleading. In the first place, India did not fail by any act or any omission in its duty to repress piracy in its exclusive economic zone. The Arbitral Tribunal unanimously found in paragraph 1094(B)(1)(d) of the Award that India did not violate its duty to repress piracy under Article 100. Second, the Majority's finding that the Marines' response was prompted by their perception of the risk of collision and a pirate attack is misplaced. As noted before, the obligation imposed by the right under Article 56, paragraph 1, subparagraph (a), of the Convention applies independently of any intention. Whether the Marines acted reasonably or not in the circumstances is irrelevant to the engagement of Italy's international responsibility on the basis of their conduct.
21. For all the reasons noted above, we disagree with the Majority and hold that Italy is in breach of its obligation of due regard under Article 58, paragraph 3, of the Convention. The *bona fide* conduct of the Italian officials may be taken into consideration, as a factor, to determine the quantum of damages for the breach, but it does not relieve Italy of its international responsibility for its failure to pay due regard under Article 58, paragraph 3.

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