# INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
# TRIBUNAL INTERNATIONAL DU DROIT DE LA MER

## MINUTES OF PUBLIC SITTINGS

MINUTES OF THE PUBLIC SITTINGS
HELD ON 10 AND 11 AUGUST 2015

*The "Enrica Lexie" Incident (Italy* v. *India),*
*Provisional Measures*

## PROCÈS-VERBAL DES AUDIENCES PUBLIQUES

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TENUES LES 10 ET 11 AOÛT 2015

*L'incident de l'« Enrica Lexie » (Italie c. Inde),*
*mesures conservatoires*

For ease of use, in addition to the continuous pagination, this volume also contains, between square brackets at the beginning of each statement, a reference to the pagination of the revised verbatim records.

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En vue de faciliter l'utilisation de l'ouvrage, le présent volume comporte, outre une pagination continue, l'indication, entre crochets, au début de chaque exposé, de la pagination des procès-verbaux révisés.

# Minutes of the Public Sittings held on 10 and 11 August 2015

# Procès-verbal des audiences publiques tenues les 10 et 11 août 2015

**PUBLIC SITTING HELD ON 10 AUGUST 2015, 9.30 A.M.**

**Tribunal**

*Present:* *President* GOLITSYN; *Vice-President* BOUGUETAIA; *Judges* CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, PAIK, KELLY, ATTARD, KULYK, GÓMEZ-ROBLEDO *and* HEIDAR; *Judge* ad hoc FRANCIONI; *Registrar* GAUTIER.

**Italy is represented by:**

H.E. Mr Francesco Azzarello,
Ambassador of Italy to The Netherlands, The Hague, The Netherlands,

*as Agent*

*and*

Mr Stefano Pontecorvo,
Minister Plenipotentiary, Diplomatic Adviser, Ministry of Defence,

Ms Stefania Rosini,
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Mr Mario Antonio Scino,
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Mr Paolo Busco,
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Mr Sudhanshu Swaroop,
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Mr Attila Tanzi,
Professor of International Law, University of Bologna,

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Sir Michael Wood,

Member of the International Law Commission; Member of the Bar of England and Wales; 20 Essex Street, London, United Kingdom,

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Dr Ida Caracciolo,
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Mr Suhail Dutt,
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Mr Ben Juratowitch,
Solicitor Advocate, England and Wales; Solicitor of the Supreme Court of Queensland; Partner, Freshfields Bruckhaus Deringer,

Mr Kevin Lee,
Advocate of the Supreme Court of Singapore, Singapore,

Dr Daniel Müller,
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Mr Diljeet Titus,
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Dr Philippa Webb,
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**India is represented by:**

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*as Deputy Agent;*

*and*

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Additional Solicitor General,

Mr Alain Pellet,
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Mr Narinder Singh,
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Mr P.V. Rama Sastry,
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Legal Officer, Ministry of External Affairs,

*as Advisers.*

**AUDIENCE PUBLIQUE TENUE LE 10 AOÛT 2015, 9 H 30**

**Tribunal**

*Présents :* M. GOLITSYN, *Président* ; M. BOUGUETAIA, *Vice-Président* ; MM. CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, PAIK, MME KELLY, MM. ATTARD, KULYK, GÓMEZ-ROBLEDO *et* HEIDAR *juges* ; FRANCIONI, juge *ad hoc* ; M. GAUTIER, *Greffier*.

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Ambassadeur de l'Italie aux Pays-Bas, La Haye, Pays-Bas,

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*et*

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Ministre plénipotentiaire, Conseiller diplomatique, Ministère de la défense,

Mme Stefania Rosini,
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Sir Michael Wood,
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M. Suhail Dutt,
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M. Diljeet Titus,
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*comme agent adjoint ;*

*et*

M. P.S. Narasimha,
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M. Narinder Singh,
Président de la Commission du droit international,

*comme conseils et avocats ;*

M. Benjamin Samson,
doctorant, Centre de droit international de Nanterre (CEDIN), Université de Paris Ouest Nanterre la Défense, France,

Mme Laura Yvonne Zielinski,
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M. Ishaan George,
conseiller assistant de l'*Additional Solicitor General* de l'Inde,

*comme conseils auxiliaires ;*

M. M.A. Ganapathy,
secrétaire adjoint (sécurité intérieure-I), Ministère de l'intérieur,

Mme K. Nandini Singla,
secrétaire adjoint (Europe occidentale), Ministère des affaires étrangères,

M. P.V. Rama Sastry,
Inspecteur général, Agence nationale d'enquête,

M. S. Senthil Kumar,

juriste, Ministère des affaires étrangères,

*comme conseillers.*

**Opening of the Oral Proceedings**
[ITLOS/PV.15/C24/1/Rev.1, p. 1–3; TIDM/PV.15/A24/1/Rev.1, p. 1–3]

**THE PRESIDENT:** Pursuant to article 26 of its Statute, the Tribunal holds today a hearing in the case concerning the *Enrica Lexie* incident between Italy and India.

At the outset I would like to note that Judge Vicente Marotta Rangel has tendered his resignation as a Member of the Tribunal on 18 May 2015. His place is therefore currently vacant.

On 21 July 2015, Italy submitted to the Tribunal a Request for the prescription of provisional measures pending the constitution of an arbitral tribunal in a dispute with India concerning the *Enrica Lexie* incident. The Request was made pursuant to article 290, paragraph 5, of the United Nations Convention on the Law of the Sea. The case was named *The "Enrica Lexie" Incident* and entered in the List of cases as case no. 24.

I now call on the Registrar to summarize the procedure and to read out the submissions of the Parties.

**THE REGISTRAR:** Thank you, Mr President.

*(Poursuit en français)* Le 21 juillet 2015 une copie de la demande en prescription de mesures conservatoires a été transmise au Gouvernement de l'Inde. Par une ordonnance du 24 juillet 2015, le Président a fixé au 10 août 2015 la date d'ouverture de la procédure orale. Le 6 août 2015, l'Inde a soumis son exposé en réponse à la demande de l'Italie.

Je vais à présent donner lecture des demandes des Parties.

*(Continued in English)* The Applicant requests the Tribunal to prescribe the following provisional measures:

> (a) India shall refrain from taking or enforcing any judicial or administrative measures against Sergeant Massimiliano Latorre and Sergeant Salvatore Girone in connection with the *Enrica Lexie* incident, and from exercising any other form of jurisdiction over that incident; and
>
> (b) India shall take all measures necessary to ensure that restrictions on the liberty, security and movement of the Marines be immediately lifted to enable Sergeant Girone to travel to and remain in Italy and Sergeant Latorre to remain in Italy throughout the duration of the proceedings before the Annex VII tribunal.

The Respondent requests:

> [T]he Republic of India requests the International Tribunal for the Law of the Sea to reject the submissions made by the Republic of Italy in its Request for the prescription of provisional measures and to refuse prescription of any provisional measures in the present case.

Mr President.

**THE PRESIDENT:** Thank you, Mr Registrar.

At today's hearing, both Parties will present the first round of their respective oral arguments. Italy will make its arguments this morning until approximately 1 p.m. with a break of 30 minutes at around 11.15 a.m. India will speak this afternoon from 3 p.m. until approximately 6.30 p.m. with a break of 30 minutes at around 4.30 p.m.

Further to a request by Italy, and as agreed by the Parties, part of the hearing will not be open to the public. This will take place just after the morning break for a period of 30 minutes and I will provide more information when we reach 11.15.

Tomorrow will be the second round of oral arguments with Italy speaking from 10.00 to 11.30 a.m. and India speaking from 4.30 to 6 p.m.

I note the presence at the hearing of Agents, Co-Agents, Counsel and Advocates of the Parties.

I now call on the Agent of Italy, Mr Francesco Azzarello, to introduce the delegation of Italy.

**MR AZZARELLO:** Mr President, Members of the Tribunal, distinguished Agent and members of the delegation of the Republic of India, it is a particular honour to appear today before this Tribunal for the first time to represent the Italian Republic.

It is also a privilege to introduce the members of the Italian delegation. I do not propose to introduce everyone by name but wish to note the presence here of Minister Plenipotentiary Stefano Pontecorvo, the Diplomatic Adviser to the Minister of Defence, First Counsellor Stefania Rosini, the Deputy Head of the Legal Service at the Ministry of Foreign Affairs, and Avvocato Mario Antonio Scino, of the Attorney General's Office. In addition to other members of the Italian delegation, whose names and affiliations have been provided to the Tribunal, our submissions today will be made by the following counsel: Sir Daniel Bethlehem QC, Professor Attila Tanzi, Sir Michael Wood, Avvocato Paolo Busco, and Professor Guglielmo Verdirame.

Mr President, at your invitation, following the introductions of the Indian legal team, I will return to make some opening submissions on behalf of Italy. I thank you, Mr President.

**THE PRESIDENT:** Thank you, Mr Azzarello.

I now call on the Agent of India, Ms Neeru Chadha, to introduce the delegation of India.

**MS CHADHA:** Mr President, Mr Vice-President, and distinguished Members of the Tribunal, it is an honour and privilege for me to appear before this Tribunal as India's Agent.

I will introduce those representing India in these proceedings. The Co-Agent, Ambassador Vijay Gokhale, could not attend the hearing today due to some other exigencies. Dr Vishnu Dutt Sharma, Director in the Legal and Treaties Division is the Deputy Agent.

India's Counsel and Advocates are Mr P.S. Narasimha, the learned Additional Solicitor General of India; Professor Alain Pellet, Emeritus Professor, University Paris Ouest Nanterre La Défense, former Chairperson of the International Law Commission and a member of the Institut de Droit International; Mr Rodman Bundy, Eversheds LLP Singapore, Member of the New York Bar and former Member of the Paris Bar; Mr Narinder Singh, Chairman, International Law Commission.

Mr Benjamin Samson; Ms Laura Zielinski; and Mr Ishaan George assist the Counsel. Mr Ganapathy, Ms Nandini Singla, Mr P. V. Rama Sastry and Mr Senthil Kumar are the Advisers.

I also wish to acknowledge our counterparts representing the Government of Italy and convey our greetings to them.

**THE PRESIDENT:** Thank you, Ms Chadha.

I now request the Agent of Italy, Mr Azzarello, to begin his statement.

**First Round: Italy**

STATEMENT OF MR AZZARELLO
AGENT OF ITALY
[ITLOS/PV.15/C24/1/Rev.1, p. 3–6]

Mr President, Members of the Tribunal, allow me, before introducing our case, to start by underlining that Italy and India have had historically good relations and shared values. It is not uncommon that friends resort to international arbitration – a peaceful mechanism provided for in the United Nations Charter – to resolve a dispute when they have not been able to solve their differences through negotiation.

Against this background, we were surprised at the tone of the Indian Written Observations. It is in many respects an intemperate document. I do not of course refer to the legal argument, which is fair game, and will be met by our response in due course. I do not even refer to factual overstatement, which was perhaps to be expected. I refer rather to wilful inaccuracies and a tone and an approach that perhaps best exemplifies why our two States are now at the impasse at which we find ourselves.

I limit myself to one example in illustration. It is only one example but it is egregious. The two Italian marines who are caught up in this dispute have not been charged with any crime. It is a matter of legal debate why that is the case, and I make no comment on this, but the fact remains that they have not been charged with, let alone convicted of, any crime, and indeed they have protested their innocence throughout.

India, in its Written Statement, skates lightly over this "technicality" with a disdain for due process in criminal proceedings. Its Statement opens with the observation that the subject matter of this dispute

> actually centres upon the murder by two Italian Marines embarked on the *MV Enrica Lexie*, of two Indian unarmed fishermen embarked on the Indian fishing vessel *St. Antony*.[1]

It continues to say that:

> the two Marines used their automatic weapons against *St. Antony* without any warnings; to be noted: one fisherman was shot in the head and the other fatally shot in the stomach.[2]

Similar observations follow throughout the Written Statement.[3] As I say, Mr President, Members of the Tribunal, this cavalier attitude to due process is chilling.

With this said, I will now introduce very briefly our case.

The dispute submitted to an Annex VII arbitral tribunal concerns an incident that occurred on 15 February 2012, approximately 20.5 nautical miles off the coast of India, involving the *MV Enrica Lexie*, an oil tanker flying the Italian flag, and India's subsequent – unlawful – exercise of jurisdiction over the incident, over the vessel, and over two marines of the Italian Navy, Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone. Sergeants Latorre and Girone were on official duty on board the *Enrica Lexie* at the time of the incident.

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[1] Written Observations of India, at para. 1.6.
[2] Written Observations of India, at para. 1.7.
[3] See, for example, Written Observations of India, at paras. 1.14 and 3.77.

The marines' official duty was to protect the vessel from the risk of piracy attacks during its voyage from Sri Lanka to Djibouti, which required it to pass through IMO-designated high-risk international waters.

The incident was characterized by a series of violations of international law by the Indian authorities. Italy contends that India has breached at least 12 separate provisions of UNCLOS. These are serious violations of some of the most crucial provisions of UNCLOS, including, *inter alia*, freedom of navigation, the duty to fulfil in good faith obligations under the Convention, the exclusive jurisdiction of the flag State and the duty to cooperate in the repression of piracy.

India, acting by ruse and by coercion, including with coastguard ships and aircraft, intercepted the *Enrica Lexie* in international waters and caused it to change its course and put into port in Kochi, on the Kerala coast.

While in Kochi, Indian armed personnel, including coast guard, police and commandos, boarded the vessel, undertook a coerced investigation of the ship and interrogations of its crew. The ship's crew, including the marines, were compelled to disembark, and Sergeants Latorre and Girone were arrested.

Sergeants Latorre and Girone have been subject to the custody of the Indian courts ever since, without any charge having formally been issued. They are under Indian Supreme Court bail constraints to this day, three and a half years later.

Sergeant Latorre, after suffering a brain stroke, assessed to be due to the stress of these events, was granted a relaxation of the condition of bail to return to Italy for medical treatment. He is not yet recovered.

Sergeant Girone remains detained in India. The Indian press has described him, quoting official sources, as the guarantee that Sergeant Latorre will be sent back to India in due course.

At the time of the incident, Italy promptly asserted its jurisdiction and the immunity of its State officials. The exercise of jurisdiction on the part of India over the two marines constitutes a continuing grave prejudice to Italy's rights.

Mr President, Members of the Tribunal, a correct and fair framework of legality needs to be restored, from its foundations.

Italy has tried in these three and a half years, in good faith, to promote, at different levels and directions, a friendly solution to the dispute. While engaging with Indian officials, Italy has acted constructively, listening to all proposals. Informal and formal contacts and concrete offers by Italy have been activated and made. Regrettably, all this has been to no avail.

Mr President, Members of the Tribunal, frustration, stress, deteriorated and deteriorating medical conditions affecting directly and indirectly the people involved threaten grave prejudice to Italy's rights and mean that there is a need to address urgently this situation. With humbleness, therefore, Italy was compelled to initiate proceedings before an Annex VII tribunal on 26 June this year and now seeks provisional measures from this Tribunal, the guardian of the principles, spirit and norms of the UN Convention on the Law of the Sea.

Mr President, Members of the Tribunal, Italy has been compelled to take this step because of the serious damage and irreparable harm to Italy's rights and interests if immediate steps are not taken by India to remedy the situation that it alone has caused.

In light of these developments, pursuant to article 290, paragraph 5, of the Convention, Italy respectfully requests the International Tribunal for the Law of the Sea to prescribe the following provisional measures:

- that India shall refrain from taking or enforcing any judicial or administrative measures against Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone in connection with the *Enrica Lexie* Incident, and from exercising any other form of jurisdiction over that incident;

- that India shall take all measures necessary to ensure that restrictions on the liberty, security and movement of the marines be immediately lifted to enable Sergeant Girone to travel to and remain in Italy and Chief Master Sergeant Latorre to remain in Italy throughout the duration of the proceedings before the Annex VII tribunal.

Mr President, honourable Members of the Tribunal, this Request is made on the ground that Italy will suffer serious and irreversible prejudice to its rights if, notwithstanding the submission of the dispute to arbitration under Annex VII of UNCLOS, India is able to continue exercising its jurisdiction over the *Enrica Lexie* incident and the Italian marines, all the while subjecting the Italian marines to restrictions on their liberty and movement.

Mr President, Members of the Tribunal, the structure of Italy's oral submissions today will be as follows: I will shortly ask you to invite Sir Daniel Bethlehem to the podium. He will set out the facts of the *Enrica Lexie* incident in more detail and will address the subsequent dispute and the necessity for provisional measures. He will be followed by Professor Attila Tanzi, who will address certain issues of jurisdiction relevant to this Request. Sir Michael Wood will speak next. He will address the requirements for provisional measures and the rights at issue in this case.

After the morning break, Avvocato Paolo Busco will address the Tribunal in closed session on certain sensitive and confidential issues that have been addressed to the Tribunal and to India in writing. He will be followed by Professor Guglielmo Verdirame. He will begin in closed session with some brief observations but thereafter continue in open session to address why the conditions required for the prescription of provisional measures are satisfied in this case.

Finally, Sir Daniel will return briefly to the podium with some concluding observations.

Thank you Mr President, honourable Members. May I now ask you, Mr President, to call Sir Daniel Bethlehem to the podium.

**THE PRESIDENT:** Thank you, Mr Azzarello. I now give the floor to Sir Daniel Bethlehem.

STATEMENT OF SIR DANIEL BETHLEHEM
COUNSEL OF ITALY
[ITLOS/PV.15/C24/1/Rev.1, p. 6–17]

Mr President, Members of the Tribunal, it is an honour for me to appear before you representing the Italian Republic in these proceedings.

These proceedings concern Italy's Request for provisional measures. They do not address the merits of Italy's claim nor any issue of jurisdiction that India may raise in due course. You will need to satisfy yourselves that *prima facie* the Annex VII tribunal to be constituted would have jurisdiction. We consider this issue to be straightforward. Professor Tanzi, who will follow me, will address this aspect.

Although these proceedings are not concerned with the merits of the claim in issue between the Parties, it is important that you have a sense of what this case is about and why it is that Italy comes to you now to request the Tribunal to prescribe provisional measures. This is the subject of my submissions. I will address, in summary form, the facts of the dispute, India's coercion and Italy's assertion and exercise of jurisdiction. I will then set out some salient developments following the judgment of the Indian Supreme Court in this case in January 2013 and also deal with more recent developments and issues of urgency that have brought us before you today.

As a preliminary matter, though, before I turn to the facts of the dispute, I am compelled to say something more about India's treatment of these issues in its Written Statement.

You have already heard from Italy's Agent about the cavalier attitude that India has taken to due process in criminal proceedings by its characterization of the Italian marines as murderers. It is not simply that the marines have not yet been charged with any crime and have not yet been judged. It is that they contest every key aspect of the conduct that India alleges against them and maintain their innocence. The incident did indeed appear to be a pirate attack. It is not established that they caused the deaths of the two Indian fishermen. There is considerable evidential dispute. The correct procedures on the *Enrica Lexie* were followed in response to the suspected attack.

But the matter goes beyond the way in which India described the marines. India objects to the description of the facts of the incident given by Italy in its Notification instituting proceedings. Regrettably, in a number of important respects, the Indian statement has a barely recognizable relationship with reality. It is not just oversight or omission. It is wilful inaccuracy. I will come to one or two examples of this during the course of my presentation. This of course goes to the merits of the underlying dispute, which is not before you. India addresses these matters simply for reasons of prejudice.

With that said, Mr President, Members of the Tribunal, let me outline the basic facts of the dispute to provide some context to what will follow.

The incident that sparked this dispute took place on 15 February 2012 about 20.5 nautical miles off the Indian coast of Kerala in an Indian Government-designated high-risk area for piracy. It involved the Italian-flagged oil tanker, the *MV Enrica Lexie*, and a suspected pirate attack. In the incident, it is alleged that two Indian fishermen on board the fishing boat *St. Antony* were killed by gunfire from the *Enrica Lexie*, the shots having been fired, it is alleged, by Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone. Sergeants Latorre and Girone were two of a detachment of six Italian marines who were assigned to the *Enrica Lexie* on official duties to protect the vessel from the threat of piracy in high-risk waters.

The map now on the screen, which is at tab 3 of your Judges' Folder, shows the position of the *Enrica Lexie* at the time of the incident and the 12-nautical-mile limit of India's territorial sea. The ship's position depicted on the map is taken from the automatically generated Ship

Security Alarm System of the *Enrica Lexie*, which was activated when the apparent pirate attack was perceived, and is reflected on the Message that was automatically generated at that point. This Alarm System Message is at tab 4 of your Judges' Folder.[1] The coordinates indicated on the Message were automatically generated when the alarm button was pressed. There is no dispute that, as a matter of fact, the incident took place well beyond India's territorial sea.

Mr President, Members of the Tribunal, two parallel developments that followed the incident are material to this dispute. The first is that when they became aware of the incident, the Indian authorities in Kerala employed coercion to cause the *Enrica Lexie* to alter course from its journey between Sri Lanka and Djibouti, compelling her to enter Indian territorial waters and put into the port of Kochi on the Kerala coast. The Indian authorities also undertook coerced investigations on the vessel and interrogations of its crew, and arrested and detained Sergeants Latorre and Girone on 19 February 2012. All of this is incontrovertibly established by Indian documents.

The second development is that, immediately Italy was informed of the deaths of the two fishermen on board the *St. Antony*, it asserted its jurisdiction over the *Enrica Lexie*, over the incident, and over the *Enrica Lexie* crew, including the Italian marines, and the Office of the Prosecutor at the Military Tribunal in Rome initiated an investigation into the incident. I will return to this aspect shortly.

I turn, first, to the issue of the coercion of the Indian authorities to cause the *Enrica Lexie* to alter its course, to put into port at Kochi, to interrogate the crew, and ultimately to arrest and detain Sergeants Latorre and Girone on 19 February 2012. There are three Indian documents to which I would like to draw your attention to illustrate the point.

The first document is at tab 5 of your Judges' Folder.[2] It is a Report of India's National Maritime Search and Rescue Board dated 4 June 2012. If you turn to page 11, under the heading "Piracy", you will see a report of what is described as a "[f]iring incident by the *MV Enrica Lexie*". Following the opening paragraph, which describes the alleged incident, the Report goes on in the following terms, and I read from the second paragraph:

> On receipt of information, ICGS *[Indian Coast Guard Ship]* Samar on patrol off Vizhinjam coast was diverted and ICGS Lakshmibai was sailed from Kochi at 1935 h on 15 Feb 12 (with 04 police personnel embarked) to the most probable area for search and interdiction of the suspected merchant vessel.
>
> Further, Coast Guard Dornier ex-747 Sqn (CG) was launched for sea-air coordinated search. MRCC (MB) *[The Maritime Rescue Coordination Centre Mumbai]* was concurrently directed to analyze the AIS *[Automatic Identification System]* and LRIT *[Long-Range Identification and Tracking]* plot and correlate with available inputs to identify and track the suspected merchant vessel.

After stating that suspicion attached to the *Enrica Lexie*, and that the *Enrica Lexie* was "directed to alter course and proceed to Kochi anchorage", the Report continues:

> UKMTO *[the UK Maritime Trade Operations centre in Dubai which operates an emergency incident response centre]* confirmed of having received a message from MT Enrica Lexie. At 1950 h on 15 Feb 12, CG

[1] Ship Security Alarm System Message sent out by the *Enrica Lexie* on 15 February 2012, Annex 3 to Annex A.
[2] National Maritime Search and Rescue Board, Report, 4 June 2012, Annex 6 to Annex A, at pp. 11-13.

> Dornier located MT Enrica Lexie and vectored ICG ships for interception. CG Dornier also directed the vessel to proceed to Kochi anchorage for investigation. ICGS Lakshmibai intercepted MT Enrica Lexie at about 2045 h on 15 Feb 12 and escorted the vessel till Kochi anchorage.

Before we leave this document, I would like to ask you to turn to the last page, page 15. You will see there a Ministry of Shipping Notice No. 7 of 2012, which is headed "Navigation off the Indian Coast – Transgressing of Fishing Nets Mistaking Fishing Boats with Pirate Skiffs". I do not propose to take you to this in any detail but would invite you in your own time to have a look at paragraphs 3 and 4 of this Ministry of Shipping Notice.

I draw this to your attention to provide some balance to India's Written Statement, which attempts to cast doubt on any appreciation that the incident involved was apprehended to be a pirate attack.

Mr President, Members of the Tribunal, the second document that establishes India's coercion is at tab 6 of your Judges' Folder.[3] It is the statement given in the Kerala proceedings by the pilot of the Indian coast guard Dornier aircraft that intercepted the *Enrica Lexie* and required it to divert its course. The handwritten statement of the pilot is behind the typed version that Italy has produced. Mr President, Members of the Tribunal, in the interests of time, let me highlight just two portions of the statement for you. The first portion is towards the bottom of the typed part of the page, which is numbered 77 at the bottom, and you will see there, four lines up from the bottom, the statement:

> We located the vessel ENRICA LEXIE in the Position 09°51.6"N and 075°37.5"E. We encircled the vessel and contacted it over VHF in channel 16 and 10.

If you turn over the page, you will see about halfway down the paragraph there, at the point at which square brackets start, and I note that the square brackets are in the original handwritten manuscript, it says as follows:

> [We directed them – that is the Enrica Lexis – to amend the course and proceed to Kochi harbour and informed to be in channel 16 and 10. We contacted them continuously over VHF. The ship altered the course towards Kochi and we shadowed it to Kochi anchorage until 22.30 hrs].[4] At 21.25 hrs. we came into communication with ICGS Lakshmibai which was also engaged in the searching operation. Lakshmibai contacted the vessel over VHF at 21.30 hrs. Lakshmibai intercepted the vessel and escorted to Kochi anchorage at 22.35 hrs.]

Mr President, Members of the Tribunal, there is now on the screen – and at tab 7 of your Judges' Folder – a map showing the position of the *Enrica Lexie* at the point that it was intercepted and was diverted by the Indian coast guard Dornier aircraft, the coordinates being taken from the pilot's witness statement. This is some 36 nautical miles off the Indian coast.

The last of the documents to which I would like to take you is the Boarding Officer's Report which describes the boarding of the *Enrica Lexie* by armed Indian police and coast guard personnel on 16–17 February 2015. This is at tab 8 of your Judges' Folder.[5] It is a detailed

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[3] Statement by Commandant Alok Negi, Coast Guard Air Enclave Kochi, 19 February 2012, Annex 7 to Annex A.

[4] The [square brackets] are found in the original manuscript version of this statement.

[5] Boarding Officer's Report MV Enrica Lexie, 16-17 February 2012, Annex 9 to Annex A.

document, which I do not propose to take you through in full. I would, however, like you to look at parts of it.

I note in passing that paragraphs 4 and 5 of the Report echo the evidence of the Dornier pilot. May I ask you, please, to cast your eyes over paragraphs 6 to 12 of the Report, which contain the following details, which I summarize:

- An armed contingent of at least 36 personnel boarded the *Enrica Lexie* in the early morning of 16 February 2012.
- The Master and crew of the vessel were polite but initially refused to divulge any information claiming that the issue was *sub-judice* to Italian laws and no details could be shared with Indian agencies.
- However, and this is the language of the Indian Report at paragraph 10, "continued interrogation by the boarding team resulted in the Master handing over information and documentation".
- Again using the language of the Report, at paragraph 11,

> continuous pressure was maintained on the crew and Master.
>
> The vessel was eventually ordered to put into port, at which point, in the early hours of 17 February 2012, the Master and crew, including the marines, were compelled to disembark.

As is clear from this Report, following its interception and compelled alteration of course to Kochi, there followed an unrelenting period of about 16 hours during which the *Enrica Lexie* and its crew of 30 were subject to coerced detention by 36 or more armed Indian personnel, and what the Boarding Officer's Report describes as "continued interrogation" and "continuous pressure".

Mr President, Members of the Tribunal, there is more to be said about these events but this will suffice for present purposes to illustrate that this was not a light-touch exercise of jurisdiction by India. The *Enrica Lexie* was intercepted in international waters by an Indian coast guard aircraft and armed Indian coast guard boats. It was ordered to put into port at Kochi. Armed Indian personnel interrogated the crew and the marines, applying continuous pressure to force them to hand over information and materials, which India has subsequently sought to introduce into its domestic court proceedings. This was an exercise of coercive power over an Italian-flagged vessel, and over Italian marines on official duties, in respect of an incident that took place beyond India's territorial jurisdiction.

Mr President, Members of the Tribunal, I turn now to the issue of Italy's prompt assertion of jurisdiction and the opening of a criminal investigation by the Office of the Prosecutor at the Military Tribunal in Rome.

Immediately Italy was informed of the deaths of the two fishermen on board the *St. Antony*, it asserted its jurisdiction over the *Enrica Lexie*, the incident and the crew of the *Enrica Lexie*, including the two marines, and the Office of the Prosecutor at the Military Tribunal in Rome initiated an investigation into the incident. I illustrate this point by reference to a number of documents.

The first document that illustrates this is the Boarding Officer's Report to which I took you a moment ago. You will recall that, in that Report, the Boarding Officer recorded that the crew had indicated that the issue was *sub-judice* to Italian laws (paragraph 9 of the Boarding Officer's Report). I do not propose to take you back to this document but only recall that already on 16 February 2012, less than 24 hours after the incident, the Master and crew of the *Enrica Lexie* had been in contact with the Italian authorities and had been informed that the incident was subject to Italian prosecutorial investigation.

The next document is Italy's note verbale to India of 16 February 2012, which you will find at tab 9 of your Judges' Folder, which was transmitted, again, within 24 hours of the incident.[6] In the interests of time, I need not take you to the document directly but draw your attention to its third paragraph, which states that "... the Italian Navy detachment is exclusively answerable to the Italian judicial Authorities."

This note verbale of 16 February 2012 was followed up by a further note verbale the next day, 17 February 2012, in which Italy again asserted that "the Italian judicial Authorities are the sole competent judicial Authorities for the case in question".[7]

The next document to which I would like to take you is a communication from the Military Prosecutor in Rome dated 17 February 2012. It is at tab 10 of your Judges' Folder.[8] It requires that certain specified information is provided to the Office of the Prosecutor "with the maximum urgency" by way of preliminary investigation.

The opening of a full criminal investigation into the incident by the Office of the Prosecutor of the Military Tribunal in Rome is addressed directly in a communication from the Office of the Prosecutor to the Head of the Cabinet at the Italian Ministry of Defence a few days later, on 24 February 2012. This document is at tab 11 of your Judges' Folder.[9] It is brief and reads as follows:

> In reference to your request for information of today, I'm inform you that this office has opened a criminal proceeding under the number 9463/2012 (RGNR = General Registrar for the entry of Criminal notices) against LATORRE Massimiliano and GIRONE Salvatore – belonging to the Regiment San Marco and to the Military Protection Detachment embarked on board of the Italy Tanker "Enrica Lexie" – for the crime of murder, in reference to the events occurred in international waters in the Indian Ocean the 15th of February.

Mr President, Members of the Tribunal, Italy asserted jurisdiction over the *Enrica Lexie*, an Italian-flagged vessel, and over the Italian marines, within 24 hours of the incident of 15 February 2012. Italy drew this assertion and exercise of jurisdiction to the immediate attention of the Indian Government and to the Indian police and investigating authorities. The Office of the Prosecutor of the Military Tribunal in Rome opened an inquiry into the incident immediately and a full criminal investigation for the crime of murder within days.

Mr President, Members of the Tribunal, in its Written Statement, India says that the Italian authorities have not conducted any kind of serious investigation into the facts. The reality is very different, as we will set out in our Memorial. Following the opening of its investigation, the Italian Military Prosecutor sent numerous letters rogatory to India, seeking Indian cooperation and evidence to assist in the investigation. Those letters rogatory went unanswered. The criminal investigation in Italy is still open. An independent naval enquiry was undertaken. Italy has, from the very outset, taken the responsibility of its jurisdiction very seriously indeed.

Mr President, Members of the Tribunal, I return briefly to the chronology of the incident. Italy, together with Sergeants Latorre and Girone, challenged India's assertion of

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[6] Note Verbale 67/438, 16 February 2012, Annex 10 to Annex A.

[7] Note Verbale 69/456, 17 February 2012, Annex 12 to Annex A.

[8] Communication from the Office of the Prosecutor at the Military Tribunal of Rome to the Commanding Officer of the Military Protection Detachment of the *Enrica Lexie*, 17 February 2012, Annex 11 to Annex A.

[9] Communication from Office of the Prosecutor of the Military Tribunal of Rome to the Head of Cabinet at the Ministry of Defence, 24 February 2012, Annex 13 to Annex A.

jurisdiction over the incident, over the *Enrica Lexie* and over the marines, in a petition before the Kerala High Court. The petition was addressed in a judgment of the Kerala High Court of 29 May 2012.[10] In this judgment, the Kerala High Court rejected the petition, finding that India had jurisdiction over the incident, the vessel and the marines, and that a criminal trial of Sergeants Latorre and Girone should proceed.

The Kerala High Court judgment was appealed to the Indian Supreme Court. The Supreme Court handed down its judgment on 18 January 2013.[11] In that judgment, while leaving open the relevance and application of article 100 of UNCLOS on the suppression of piracy, the Indian Supreme Court held that the State of Kerala had no jurisdiction to investigate the incident. The Indian Supreme Court also held, however, the Union of India did have jurisdiction to investigate and try the marines, concluding that the incident came within India's territorial jurisdiction.[12] The Supreme Court went on to direct the Indian Government to set up a Special Court – an exceptional court – to try the marines. The reason for this was that there is in India no federal criminal court empowered to address such issues. While the Supreme Court indicated that issues of jurisdiction could, in its words, be "re-agitated" before the Special Court, it was not evident what this included, it being clear that the Supreme Court had spoken on questions of jurisdiction going to such matters as the exclusive jurisdiction of the flag State of a vessel exercising high seas freedom of navigation rights. The Indian Supreme Court also failed to address the status of the marines, as Italian State officials exercising official functions.

Mr President, Members of the Tribunal, there are two aspects of the developments since the judgment of the Indian Supreme Court that I would like to draw to your attention briefly as they go to the heart of why we are before you at this point. These are developments on the legal front, in the Indian court proceedings, and developments on the diplomatic front, concerning engagements between Italy and India in an attempt to resolve the dispute by way of a negotiated settlement. These issues are closely intertwined. Before I turn to these aspects, however, there is something that must be said about certain comments in India's Written Statement.

At various places in its Written Statement, India, in terms, calls into question Italy's good faith and says that Italy cannot be trusted to keep its word. We will come to *India's* word in this dispute in the merits proceedings. For the moment, I would like to address briefly the two matters that India cites to call into question Italy's good faith: first, Italy's alleged failure to make the remaining four marines available for interview and, second, the apparent decision not to return Sergeants Latorre and Girone to India after leave had been given to travel to Italy.

On the first of these issues, the availability of the other four marines for interview, with the greatest respect to our colleagues on the other side of the room, India ought to know its own law better than it states it to the Tribunal. As a matter of Indian law, the making available of witnesses for interview by video-conferencing satisfies the requirement to appear. This is what took place. There are those sitting not a million miles away from the Additional Solicitor General in Delhi who would well be able to speak to these issues. Italy fully satisfied the commitments that it had undertaken.

On the issue of the apparent Italian Government decision not to return Sergeants Latorre and Girone to India after a leave of absence in Italy, the reality is that the marines did in fact return to India by the deadline stipulated. This is recorded explicitly in the Indian Supreme Court Order of 2 April 2013 that India annexed to its Written Statement.[13] There was no breach of any undertaking. What there was in this episode were measures taken by the Indian

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[10] Judgment of the High Court of Kerala, 29 May 2012, annex 17 to annex A.

[11] Republic of Italy & Ors v. Union of India & Ors, Supreme Court of India Judgment of 18 January 2013, annex 19 to annex A.

[12] Republic of Italy & Ors v. Union of India & Ors, Supreme Court of India Judgment of 18 January 2013, annex 19 to annex A, at p.83, para. 101.

[13] Written Observations of India, annex 20, at para. 2.

Government to restrict the movement of the Italian Ambassador in Delhi in blatant violation of the Vienna Convention on Diplomatic Relations. This dispute was a hair's breadth away from becoming a dispute before the International Court of Justice addressing India's violation of the sacred canons of international law of diplomacy that rank alongside those concerning the law of the sea and freedom of navigation. Again, Italy fully satisfied the commitments that it had undertaken.

Mr President, Members of the Tribunal, with that aside, let me turn briefly to the litigation–diplomatic engagement narrative.

On the diplomatic front, throughout the period following the Indian Supreme Court judgment in January 2013, there was contact between the successive Italian and Indian Governments. Italy made strenuous diplomatic attempts to engage the Indian Government to resolve the dispute. Those attempts came to nothing, however, and the initiatives were heavily complicated by uncertainty in the Indian domestic proceedings. The Indian Supreme Court's judgment requiring, exceptionally, the establishment of a Special Court to try the marines was questionable as a matter of Indian constitutional law. The judgment had also left various matters unaddressed. Italy was therefore advised that the dispute could be resolved if the marines petitioned again to the Indian Supreme Court, as a revisiting of the issues would highlight India's lack of jurisdiction.

Given the lack of movement in India, and the proposal that the marines should petition again to the Indian Supreme Court, the marines did just that in March 2014 by a writ petition under article 32 of the Indian Constitution. By this petition, the marines challenged India's jurisdiction, and the jurisdiction of the Indian courts, and asserted their immunity. This article 32 writ petition is of considerable importance as the Indian Supreme Court is due to hear a deferment application in respect of this petition on 26 August, in just over two weeks' time. This deferment application was brought by the marines expressly with reference to the commencement of the Annex VII arbitration proceedings. I will say more about this in a moment.

Mr President, Members of the Tribunal, following the assumption to office in early 2014 of Prime Minister Renzi's Government in Rome and Prime Minister Modi's Government in Delhi, renewed efforts were made at the highest level to resolve the dispute in a negotiated manner that would be sensitive to the interests of all those engaged. In mid-2014, the Italian Government sought to engage the Indian Government about negotiations on a possible diplomatic solution, on the basis of detailed proposals that Italy had developed and that it stated expressly in correspondence to India would be sensitive to the Indian Supreme Court's engagement on the matter. Italy was carefully minded of the involvement of the Indian Supreme Court on the matter, even though it disputed India's jurisdiction, and Italy sought to formulate proposals for a settlement that would have been taken to the Indian Supreme Court by both Governments as a reflection of their agreement not just on issues of law but also with regard to the interests of all those engaged by the incident. Italy has throughout sought to assert and vindicate its rights under international law in a manner that was respectful of India.

This Italian initiative to engage the Indian Government on a possible settlement took place both on a visible track, in correspondence to the Indian Ministry of External Affairs, and, separately, behind the scenes, between the most senior representatives of Prime Minister Renzi and Prime Minister Modi.

It was only in late May of this year that it became clear beyond doubt that a negotiated settlement would not be possible. At this point, the Indian Government indicated to Italy that it had no latitude to pursue a negotiated settlement given the engagement of the Indian Supreme Court. This impasse is a matter of regret as Italy was and remains convinced that a negotiated settlement was possible.

It is this political impasse, evident for the first time in late May of this year, that led Italy to commence Annex VII proceedings on 26 June. This political impasse also coincided with acute and increasingly urgent concerns, of both a humanitarian and a legal nature, that have brought us before you today.

Mr President, Members of the Tribunal, the humanitarian considerations will be addressed in the oral submissions of my colleagues Mr Busco and Professor Verdirame. I will say no more of these aspects other than to emphasize that they are not static considerations. Any delay in having regard to them risks potentially irreversible harm.

I turn then, almost finally, to the pressing legal considerations that have brought us here today.

While there was still a possibility of a political settlement, it was in the interests of both the Italian and the Indian Governments to afford space to their discussions. The delays in the Indian court proceedings provided some negotiating space.

There is no longer any prospect of a negotiated settlement. Quite apart from the critical humanitarian considerations that have compelled us here today, the failure of the political track has brought the dispute to a turning point. India's assertion of jurisdiction over the *Enrica Lexie* incident and over the Italian marines now threatens to crystallize into a more egregious and manifest violation of Italy's rights. There is now, but for the international proceedings that Italy has commenced, the prospect of imminent Indian criminal proceedings against Italian State officials in respect of a maritime incident over which Italy has exclusive jurisdiction. The threat of irreversible prejudice to Italy's rights has thus now crystallized sharply.

In the notification commencing Annex VII proceedings, Italy requested provisional measures from India. Following the notification, the marines brought two applications before the Indian Supreme Court, on 4 July 2015, expressly rooted in the commencement of the Annex VII proceedings. The first application was by Sergeant Latorre for leave to extend his stay in Italy – which the Supreme Court had granted following Sergeant Latorre's stroke on 31 August 2014. In that application, Sergeant Latorre applied for leave to remain in Italy during the pendency of the Annex VII proceedings. The urgent reason dictating the application was that Sergeant Latorre's leave to remain in Italy was set to expire 11 days later, and Italy wanted to avoid unnecessary mental anguish to Sergeant Latorre, whose health remains a source of real concern, and also an unnecessary escalation of the dispute with India over the issue of Sergeant Latorre's wellbeing.

In the second application, Sergeants Latorre and Girone applied for a deferment of the article 32 writ petition, on which I addressed you earlier, this being the petition that the marines brought in March 2014 to challenge India's jurisdiction. This deferment application was also put expressly in terms of the period of the pendency of the Annex VII proceedings.

Mr President, Members of the Tribunal, the purpose of these applications before the Indian Supreme Court was not simply to achieve the narrow ends requested in the applications. It was also to afford the Indian Government an opportunity to register its support for the Italian request that the Indian domestic proceedings should be stayed pending the adjudication by the Annex VII tribunal of the rights in dispute between Italy and India. It was to afford India an opportunity to give effect to the provisional measures requested by Italy in its notification. It was also to afford an opportunity for India and the Indian Supreme Court to put in place appropriate arrangements that would adjourn further issues about the marines being continued to be subject to Indian jurisdiction until such time as the international law issues of jurisdiction and immunity had been authoritatively determined.

I should add that the article 32 writ petition deferment application was also intended as a constructive device that would put on hold the Indian domestic proceedings to keep open the possibility of a judicial dialogue between the Annex VII tribunal and the Indian Supreme Court in due course.

Mr President, Members of the Tribunal, the Indian Government refused to support the application by Sergeant Latorre in the terms requested for leave to remain in Italy during the pendency of the Annex VII proceedings. It was prepared only to support a six-month extension of his leave to remain in Italy on humanitarian grounds, expressly rejecting any reference to the Annex VII proceedings. The consequence of the court's order is that Sergeant Latorre remains under the jurisdiction and control of the Indian Supreme Court. India makes much of the fact that he has been granted leave to remain in Italy until mid-January 2016. What it fails to acknowledge, however, is that, unless this Tribunal grants the provisional measures requested by Italy, Sergeant Latorre will have to re-apply to the Indian Supreme Court in a few months' time for leave to remain in Italy and to do so in circumstances in which the Indian Government has already made clear that it would not support any application for leave that was rooted in the pendency of the Annex VII arbitration proceedings. India therefore remains intent on exercising its jurisdiction over Sergeant Latorre even during the pendency of the international proceedings that will address India's entitlement to exercise jurisdiction.

As regards the article 32 writ petition deferment application, the Indian Supreme Court adjourned that hearing until 26 August to allow the Indian Government to submit an affidavit presenting India's views. That affidavit is due to be submitted today, by 1.00 p.m. Hamburg time. We look forward to seeing what the Indian Government has to say. Whatever it says, the issue will fall to be determined by the Indian Supreme Court on 26 August.

These provisional measures proceedings come on the cusp of potentially very severe complications in the dispute between Italy and India. These proceedings afford the Tribunal an opportunity to move this dispute onto a calmer and more stable trajectory that would allow for a determination of the rights of the Parties and would remove any risk of irreversible prejudice to either State's rights and interests.

Mr President, Members of the Court, there is one further issue that I must address. At the point at which Sergeant Latorre applied to extend his leave to remain in Italy, and the marines applied for a deferment of the article 32 writ petition proceedings, careful consideration was given to whether an application by Sergeant Girone should also be made for leave to travel to Italy on the grounds of the commencement of the Annex VII proceedings and for humanitarian reasons. The decision was taken not to make such an application. The reason for this was that such an application had previously been made in December 2014. It was, however, at the time, forcefully opposed by the Government of India in the proceedings before the Supreme Court, and the Chief Justice of India expressed himself to be opposed to the application. Italy had every reason to believe that the position of the Indian Government and of the Indian Supreme Court had not changed.

This is another issue on which the Indian Written Statement is economical with the reality. The application by Sergeant Girone in December 2014 was withdrawn, before the judgment of the Court was issued, when it became clear in the hearing that the Indian Government, through its representatives in court, opposed it heavily and that, in the face of such opposition, the court would reject it. This episode set us on the path on which we now find ourselves. And, I add, in the face of the false umbrage that India expresses in its Written Statement about Italy's use of the word "hostage" to describe Sergeant Girone, this is the language that Indian officials have used to Italy. We have it on record and we would be content in due course to cross-examine Indian officials on the subject.

Mr President, Members of the Tribunal, Italy commenced Annex VII proceedings as soon as it became evident that there was no prospect of a political settlement. Italy left no stone unturned in its attempt to engage the Indian Government on a settlement proposal that would have been sensitive to the interests of all those engaged. These efforts were to no avail.

This impasse in the political dialogue has crystallized the dispute over India's exercise of jurisdiction in a manner that now threatens to aggravate the situation. It has also coincided

with increasingly acute humanitarian considerations in respect of the two marines. These are the reasons why we are now before you requesting provisional measures.

Mr President, that concludes this first part of my submissions this morning. May I invite you to call upon Professor Tanzi.

**THE PRESIDENT:** Thank you, Sir Daniel.

I now call upon Professor Tanzi.

STATEMENT OF MR TANZI
COUNSEL OF ITALY
[ITLOS/PV.15/C24/1/Rev.1, p. 17–20]

Mr President, Members of the Tribunal, it is a great privilege for me to be appearing for the first time before you and, especially, to do so on behalf of my country.

Mr President, in order for this Tribunal to entertain its jurisdiction over the present Request for provisional measures, firstly, there must be a title of jurisdiction permitting the Italian application; secondly, the Tribunal is to be satisfied *prima facie* that the Annex VII tribunal vested with the merits of the case has jurisdiction over the claims submitted to it. Contrary to the allegations advanced by the Indian Government in their Written Observations, Mr President, those requirements have been plainly satisfied by Italy.

As to the title for jurisdiction of the present proceedings, suffice to recall that both disputing Parties have consented to the Annex VII jurisdiction of the tribunal currently under constitution. Italy and India are both Parties to UNCLOS and mutually bound by it since 29 July 1995. However, India, differently from Italy, has made no declaration accepting any of the means of dispute settlement listed in article 287, paragraph 1. Consequently, lacking agreement between the Parties on such other means of dispute settlement, they have consented under article 287, paragraph 5, to submit to an Annex VII arbitration procedure any dispute concerning the interpretation or application of the Convention. Furthermore, in conformity with article 290, paragraphs 1 and 5, Italy duly submitted the present dispute to Annex VII arbitration on 26 June this year. The constitution of the Annex VII tribunal is currently pending.

Mr President, turning now to the second requirement, according to article 290, paragraphs 1 and 5, this Tribunal needs to consider – *prima facie* – whether the Annex VII tribunal under constitution has jurisdiction over the merits of the case.

As it has been authoritatively stressed, the assessment of *prima facie* jurisdiction is a question "not whether there is conclusive proof of jurisdiction, but rather whether jurisdiction is not so "obviously excluded".[1]

Mr President, Members of the Tribunal, Italy considers that the law and the facts of the present case manifestly show that the Annex VII tribunal under constitution will have more than simply *prima facie* jurisdiction over the merits of this dispute.

This Tribunal, in *"Arctic Sunrise"* – drawing on its six precedents most consistent on the point in issue[2] – concluded in the sense of the existence of *prima facie* jurisdiction (paragraph 71) after stressing that "the Tribunal is not called upon to establish *definitively* the existence of the rights claimed by the Netherlands" (paragraph 69, emphasis added).

It also felt the need to determine that "the provisions of the Convention invoked by the Netherlands appear to afford a basis on which the jurisdiction of the arbitral tribunal might be founded" (paragraph 70).

Such statements, Mr President, confirm the consistent case law of this Tribunal to the effect that it is to be content that the submissions on the merits of the case by the requesting

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[1] P. Tomka and G. Hernandez, "Provisional Measures in the International Tribunal for the Law of the sea", in E.P. Hestermeyer *et al.* (Eds.), *Coexistence, Cooperation and Solidarity. Liber Amicorum Rudiger Wolfrum*, Leiden-Boston, 2012, p. 1763 ff., at p. 1777.

[2] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Provisional Measures, Order of 11 March 1998, ITLOS Reports 1998*, p. 24; *Southern Bluefin Tuna (New Zealand* v. *Japan; Australia* v. *Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 280; *MOX Plant (Ireland* v. *United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 95; *Land Reclamation in and around the Straits of Johor (Malaysia* v. *Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p. 10; *M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain), Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010*, p. 58; *"ARA Libertad" (Argentina* v. *Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012*, p. 332.

party fall within the scope of the jurisdiction of the Tribunal which is to pass judgment on them. Sir Michael Wood will illustrate after me the rights invoked by Italy in its Notification and Request. However, permit me to anticipate that each and all of such rights fall squarely within the scope of the law applicable to the merits of the present case. Indeed, all the Italian submissions are deeply rooted in UNCLOS, namely in Parts II (Territorial Sea and Contiguous Zone), V (Exclusive Economic Zone) and VII (High Seas), notably with reference to articles 2, paragraph 3, 27, 33, 56, 58, 87, 89, 92, 94, 97, 100 and 300 of the Convention.[3]

Mr President, the unilateral assertion of one's own claims would certainly not be sufficient, as such, to fulfil the basic jurisdictional requirement of the existence of a "dispute" between the Parties. In *Georgia v. Russian Federation,* building on established international case law - its own, amongst others -, precedents, the International Court of Justice stressed that the existence of a dispute "is a matter for 'objective determination' by the Court"[4]. In doing so, it recalled the famous *dictum* in *Mavrommatis* whereby "[a] dispute is a disagreement on a point of law or fact".[5]

The general jurisdictional requirement of the existence of a dispute is enshrined in UNCLOS, in article 288, and it underpins the whole of Part XV of the Convention (Settlement of Disputes).

As to the means for assessing the existence of a dispute, it is noteworthy that the ICJ, in the same *Georgia* v. *Russian Federation* case, also felt the need to stress that "the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for".[6] The Court went on to state: "[w]hile the existence of a dispute and the undertaking of negotiations are distinct as a matter of principle, the negotiations may help demonstrate the existence of the dispute and delineate its subject-matter".[7]

Indeed, Mr President, the Italian protests and claims and requests for consultations over the *Enrica Lexie* incident, repeatedly addressed to India ever since its occurrence, represent a reaction to India's persistent assertion of jurisdiction over the incident and over the two Italian marines which is clearly one of firm and repeated objection to its legality.

The combination of such juxtaposed conducts and attitudes unquestionably reveals a "disagreement" between Italy and India which amounts to a dispute over the interpretation and application of the Convention and the international rules invoked by Italy in the present proceedings. The assertion advanced by the Indian Government in their Written Observations that "the subject-matter of the dispute does not fall within the ambit of the Convention"[8] only corroborates the evidence of the existence of such a dispute.

As evidenced in the notes verbales annexed to its Notification and Request,[9] and as it has been further illustrated this morning by Sir Daniel, Italy has not limited itself to lodging complaints, but has conducted itself constructively with a view to reaching an amiable solution to the controversy. It is clear, Mr President, that through such conduct Italy has fulfilled the requirement whereby, before resorting to an international adjudicative body, the applicant is to

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[3] See Notification, para. 29.

[4] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70, at p. 84, para. 30.

[5] *The Mavrommatis Palestine Concessions, Judgment, 1924, P.C.I.J., Series A, No. 2*, p. 6, at p. 11.

[6] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70, at p. 84, para. 30.

[7] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70, at p. 84, para. 30.

[8] Written Observations of India, para. 3.5.

[9] NV 69/456 of 17 February 2012; NV 73/472 of 20 February 2012; NV 95/553 of 29 February 2012; NV 89/635 of 11 March 2013; NV 273/1570 of 9 July 2013; NV 447/2517 of 5 November 2013; NV 56/259 of 7 February 2014; NV 67/319 of 15 February 2014; NV 71/338 of 19 February 2014; NV 93/446 of 10 March 2014; and NV 123/714 of 18 April 2014, annex 20 to annex A.

prove that it has pursued in a meaningful manner a negotiated settlement of the dispute to no avail. Such a general rule is specified in article 283 UNCLOS on the "Obligation to exchange views".

The assessment that good-faith attempts at amiable settlement are definitely to no avail requires caution on the part of the claimant. However, as stated by the International Court of Justice in the *North Sea Continental Shelf* case, building on established case law, the jurisdictional requirement in point is deemed to have been fulfilled "when either of [the Parties] insists upon its own position without contemplating any modification of it".[10]

This, Mr President, is precisely the situation which has emerged from the facts eloquently described this morning by Sir Daniel. Those are the facts which, cumulatively taken, have made Italy draw, in May this year, the conclusion that a negotiated settlement could no longer be achieved. Such circumstances are precisely of the kind envisaged by this Tribunal when stating in *MOX Plant* that "a State Party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted".[11]

Mr President, that concludes my presentation on jurisdiction. Mr President, may I invite you to call Sir Michael Wood to the podium.

**MR PRESIDENT:** Thank you, Mr Tanzi.

I now give the floor to Sir Michael Wood.

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[10] *North Sea Continental Shelf (Federal Republic of Germany* v. *Denmark; Federal Republic of Germany* v. *The Netherlands), Judgment, I.C.J. Reports 1969*, p. 3, at p. 47, para. 85.

[11] *MOX Plant (Ireland* v. *United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 95, at p. 107, para. 60.

STATEMENT OF SIR MICHAEL WOOD
COUNSEL OF ITALY
[ITLOS/PV.15/C24/1/Rev.1, p. 20–26]

Mr President, Members of the Tribunal, it is an honour to appear before you, and to do so on behalf of the Italian Republic.

I shall first recall, briefly, the requirements for provisional measures, as set out in UNCLOS and in your case law. Then I shall describe the rights claimed by Italy and the link between those rights and the provisional measures sought.[1] Thereafter, Professor Verdirame will deal with the urgency requirement, after you have heard from Avvocato Busco.

The requirements for the prescription of provisional measures under article 290, paragraph 5, of UNCLOS are well-established. It can be seen from India's Written Observations that, despite the rhetoric, there is a fair measure of agreement between the Parties on what these requirements are. In particular, we agree that the purpose of provisional measures is "to preserve the respective rights of the parties to the dispute …, pending the final decision".[2]

In this connection, a court or tribunal prescribing provisional measures will wish to be careful not to impose what the Special Chamber in the *Ghana/Côte d'Ivoire* case referred to as an "undue burden" – an "*undue*" burden, since in the nature of provisional measures there will inevitably be some burden – on the State against which they are prescribed. As Professor Verdirame will show later this morning, that would most certainly not be the case with the measures sought by Italy. What we propose would indeed preserve the respective rights of both Parties, pending the award of the arbitral tribunal, and that is notwithstanding India's wholly unconvincing attempt to suggest that they would prejudge the final award.

In reviewing the requirements for provisional measures, I shall focus on the differences between the Parties as they emerge from India's Written Observations.

The first requirement is straightforward. It is that two weeks must have elapsed between the date of the request for provisional measures and the reference to this Tribunal. That requirement has plainly been met. The request was made in Italy's Notification and Statement of Claim, which was transmitted to India on 26 June.

The second requirement is that the Law of the Sea Tribunal may only prescribe provisional measures under article 290, paragraph 5, if it considers that *prima facie* the arbitral tribunal to be constituted would have jurisdiction. Professor Tanzi has shown that this is the case.

I would, however, like to make three points in light of India's Written Observations. First, the *prima facie* test embodies a "rather low" threshold, to borrow Judge Paik's expression in the *M/V "Louisa"* case.[3]

Second, what has to be determined is that there is *prima facie* jurisdiction over the case, that is over at least some of the matters raised in the Statement of Claim; it is not necessary for the Tribunal to reach this conclusion over each and every one of the claims made.[4] India focuses on one or two of Italy's arguments, and conveniently overlooks the wide range of matters covered by the Statement of Claim.

Third, India's argument seems to confuse the *prima facie* jurisdiction requirement with the separate requirement that the rights claimed be at least plausible. When considering *prima*

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[1] *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015*, para. 63.
[2] UNCLOS, article 290, para. 1.
[3] *M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain), Provisional Measures, Separate Opinion of Judge Paik, ITLOS Reports 2008-2010*, p. 72, at p. 73, para. 7.
[4] See *"ARA Libertad" (Argentina* v. *Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012*, p. 332, at pp. 343-344, paras. 61-67.

*facie* jurisdiction, India asserts that "the subject-matter of the dispute does not fall within the ambit of the Convention".[5] India seems to be arguing that there is no dispute between the Parties "concerning the interpretation or application of [the] Convention".[6]

In this context, it focuses on Italy's claims under article 97 and in respect of the immunity of its State officials.[7] This argument, with respect, is misconceived. As Professor Tanzi has just pointed out, it is clear from India's Written Observations that there is a dispute concerning the interpretation and application of the provisions of the Convention; India sets out its position on the interpretation and application of article 97,[8] which is in opposition to that of Italy. It even invokes its declaration under article 310 of the Convention. These are clearly matters for the merits. The same is true in respect of all the other provisions of UNCLOS cited by Italy in its Statement of Claim.

Mr President, at its heart the dispute before the arbitral tribunal is about the jurisdictional provisions of UNCLOS, about whether – under the Convention – it is Italy or India that has the right to institute proceedings arising out of the incident of 15 February 2012; it is about freedom of navigation; and it is about whether, by asserting jurisdiction over the two Italian State officials, the marines, in respect of acts performed in an official capacity, India is violating the immunity from foreign criminal jurisdiction which they enjoy under international law. It is not appropriate at this provisional measures stage to enter into these questions of interpretation and application of UNCLOS, which clearly belong to the merits, tempting though it is to do so, in light of India's unfounded positions.

The third requirement for provisional measures, which flows from the case-law, is that the rights claimed in the main proceedings must be at least plausible. Here too the threshold is a low one. I shall return to the plausibility of the rights claimed by Italy in a moment but, for the avoidance of doubt, let me say that, while for the purposes of provisional measures the threshold is low, Italy believes that the rights it asserts in these proceedings are far more than plausible; they are clear.

Fourth, there must be a link between the rights claimed and the provisional measures sought. Article 290, paragraph 5, has to be read together with article 290, paragraph 1,[9] and the measures must be considered "appropriate under the circumstances to preserve the respective rights of the parties to the dispute".[10] I shall return to this requirement.

And fifth, the urgency of the situation must be such that provisional measures ought to be prescribed by this Tribunal before the arbitral tribunal is constituted and is itself in a position to act on a provisional measures request.[11] As the Tribunal made clear in *Land Reclamation*, the key date is when the arbitral tribunal is itself in a position to act. As of today, we do not know when the Annex VII tribunal will be constituted, or when it will be in a position to act, but that will inevitably be some time after it is formed; it will have to convene, and put in place rules of procedure and other administrative arrangements, such as a registry; and of course it would need to conduct the necessary written and oral proceedings before it could make an order, so we are looking at months, not weeks. That is precisely why the framers of the Convention had the foresight to provide for the procedure before the Hamburg Tribunal. That is why your Tribunal has been ready to prescribe provisional measures even when the constitution of the Annex VII tribunal was expected to be much sooner than it is in the present case.

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[5] Written Observations of India, para. 3.5.
[6] UNCLOS, article 288(1).
[7] Written Observations of India, paras. 1.8. 1.11, 3.5.
[8] Written Observations of India, paras. 1.8, 3.5.
[9] *"Arctic Sunrise" (Kingdom of the Netherlands* v. *Russian Federation), Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013*, p. 230, at pp. 247-248, paras. 80-82.
[10] UNCLOS, article 290(1).
[11] See *Land Reclamation in and around the Straits of Johor (Malaysia* v. *Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p.10, at p. 22, paras. 67-68.

I turn now to another point about urgency. It is rather misleading to say, as India does in its Written Observations, that

> the [Law of the Sea] Tribunal is not called upon to prescribe provisional measures that will remain in place until the substance of the dispute is finally decided by the Annex VII arbitral tribunal; only until the Annex VII Tribunal is in a position to address the matter if requested to do so.[12]

Mr President, that is not what article 290 says, nor does India's assertion reflect the practice of this Tribunal. When the Law of the Sea Tribunal acts under paragraph 5 of article 290, the measures it prescribes may in principle last through to the arbitral tribunal's final award on the merits.

Sir Daniel Bethlehem and Professor Tanzi have already covered the basic facts, as well as the first and second requirements that I have just described. I shall now deal with the third and fourth requirements. Professor Verdirame will later address you on the fifth one, urgency, and the prejudice that will be caused to Italy's rights if the measures are not prescribed.

I now turn to look in a little more detail at the issue of plausibility of the rights claimed, and the test adopted in your case-law, most recently in the Order of the Special Chamber in *Ghana/Côte d'Ivoire*:

> a court called upon to rule on a request for provisional measures does not need, at this stage of the proceedings, to settle the parties' claims in respect of the rights and obligations in dispute and is not called upon to determine definitively whether the rights which they each wish to see protected exist.[13]

The Chamber continued:

> the Special Chamber need not therefore concern itself with the competing claims of the Parties, and that it need only satisfy itself that the rights which Côte d'Ivoire claims on the merits and seeks to protect are at least plausible.[14]

The rights claimed by Italy are set out in our Notification and Statement of Claim at paragraph 29, which is also at tab 20 in the folders.

Before turning to paragraph 29, I first want to make the point that the rights claimed by Italy are rights of Italy, rights which have been directly infringed by India. At issue in this case are Italy's right to freedom of navigation, Italy's right to jurisdiction over the incident, Italy's right that its State officials, its military personnel, be treated in accordance with international law. This is not a case of diplomatic protection, as India would seemingly have you believe.

Paragraph 29 at tab 20 begins by indicating the provisions of UNCLOS that, in our submission, India has and is violating, and Professor Tanzi has already recalled these. It is Part II, Part V and Part VII (on the high seas). We have referred to a whole series of articles which Professor Tanzi read out.

Paragraph 29 sets out at subparagraphs (a) to (h), in a non-exhaustive fashion, the ways in which India has breached these provisions. This is reflected in the relief sought, which is set

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[12] Written Observations of India, para. 3.17.

[13] *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015*, para. 57.

[14] *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015*, para. 58.

out at paragraphs 33 and 34 of the Notification. I note in passing that these violations of UNCLOS are not minor or technical. They go to the heart of the modern international law of the sea. They concern core principles such as freedom of navigation and the exclusive jurisdiction of the flag State.

As you will see from paragraph 29, many of the breaches have a continuing character. As article 14 of the 2001 Articles on State Responsibility says:

> The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.[15]

It will be recalled that one of the examples of a continuing wrongful act, given by the International Law Commission in its commentary to this provision, is "unlawful detention of a foreign official".[16]

Some of the violations described in our Statement of Claim are indeed completed, even though their effects may continue.[17] These include interfering with freedom of navigation by forcing the *Enrica Lexie* to enter Indian territorial waters, ordering her to proceed to Kochi port, and arresting and detaining the vessel and crew.[18]

The continuing breaches include the ongoing measures taken against the two marines, in violation of various provisions of UNCLOS, including articles 27, 56(2), 92 and 97. You will find these at subparagraphs (a) and (e).[19] They also include the failure to cooperate in the repression of piracy, as required by article 100. That is at subparagraph (f).[20] In addition, by flagrantly ignoring the immunity to which Italy is entitled in respect of its State officials, its military personnel, India has violated and continues to violate articles 2(3), 56(2) and 58(2) of UNCLOS and customary international law. That you will find at subparagraph (g).[21]

It is, of course, particularly in relation to these continuing breaches that we seek provisional measures.

There is ample material in our Notification, which will of course be developed in the Memorial, to show that the rights claimed by Italy are plausible. Indeed, they are far more than plausible. We have summarized this material in paragraph 35 of the Request for provisional measures. At this stage, I need only recall some basic facts. The incident took place approximately 20.5 nautical miles from India's baselines, well beyond India's territorial sea. The two marines were on board an Italian-flagged vessel and were acting in exercise of their official duties as laid down by Italian law. Italy exercised its jurisdiction over the case without hesitation or delay, and so informed the Indian authorities before the marines were arrested by India. Notwithstanding this, India, after intercepting the *Enrica Lexie* in international waters and bringing her into India's waters and port, has exercised, and continues to exercise, jurisdiction over the incident and over the marines, in flagrant violation of numerous provisions of UNCLOS. Based on these facts, the rights asserted by Italy are not merely plausible; they are, in our submission, manifest.

Mr President, Members of the Tribunal, I now turn to the link between the rights claimed by Italy and the provisional measures we seek. Here too the position is straightforward.

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[15] *Yearbook of the International Law Commission,* 2001, Vol II(2), p. 59.
[16] Commentary (3) to article 14, *Yearbook of the International Law Commission,* 2001, Vol II(2), p. 60.
[17] Commentary (5) to article 14, *Yearbook of the International Law Commission,* 2001, Vol II(2), p. 60.
[18] Notification, para. 29(a), (b), (c) and (d).
[19] Notification, paras. 29(a) and (e); 33(a), (c) and (d); and 34.
[20] Notification, para. 29(f); 33(b); 34.
[21] Notification, para. 29(g); 33(d); 34.

The measures sought in our Request are set out at paragraph 57. They were read out this morning by the Registrar and by the Agent of Italy and I do not need to repeat them now.

The link between the measures sought and the rights claimed by Italy is obvious from a comparison of what is in the Request and the relief sought in the Notification.

The request that India refrain from taking or enforcing measures against the marines is directly linked to the claims in the Notification that India must cease to exercise jurisdiction over the marines,[22] and that India's exercise of jurisdiction is in violation of their immunity.[23] I do not think I need repeat that the prejudice caused to the marines, officials of the Italian State, is a direct infringement of the rights of Italy. It is likewise directly linked to our claims that Italy has exclusive jurisdiction over the marines,[24] and that India must cease to exercise any measure of jurisdiction over the marines, including any measure of restraint.[25] It is likewise directly linked to our claim that India is violating its obligation to cooperate in the repression of piracy.[26]

Mr President, Members of the Tribunal, before concluding, I ought to address briefly India's reference in its Written Observations to article 295 of UNCLOS, on exhaustion of local remedies.[27] I make three quick points. First, the invocation of the exhaustion of local remedies rule is not a matter for a provisional measures hearing. It would require a detailed examination of the facts relating to the merits, and would be an issue for the merits, as is clear from your decision in *M/V Louisa*.[28] For example, if the rule were found to apply, which we would strongly dispute, we would say that local remedies have been exhausted. There is no requirement to exhaust remedies that have no prospect of success, remedies that would not be effective. But for you to reach that conclusion would require close examination of the legal proceedings that have taken place in India and of such avenues as might theoretically still be available. That is clearly not appropriate or possible at the provisional measures stage.

Second, and in any event, the local remedies rule does not apply here. Article 295 provides that local remedies are to be exhausted "where this is required by international law", that is, in the context of diplomatic protection. But, as I have already said, in the present case Italy is asserting direct injury to its own rights.

Third, and closely related, the local remedies rule would only be relevant where a State espouses the claim of a private citizen. It does not apply where the individual injured was a State official engaged in official business.

Mr President, that concludes what I have to say this morning. I would request that, after the break, you invite Mr Paolo Busco to the podium. As previously agreed, we hope that part of the hearing will be in camera.

I thank you, Mr President.

**THE PRESIDENT:** Thank you, Sir Michael.

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[22] Notification, para. 33(a).
[23] Notification, para. 33(b).
[24] Notification, para. 33(c).
[25] Notification, para. 33(d).
[26] Notification, para. 33(e).
[27] Written Observations of India, para. 3.5.
[28] *M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain), Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010*, p. 58, at pp. 68-69, paras 66-69.

**THE PRESIDENT:** We have now reached the time when the Tribunal will withdraw for a break of 30 minutes.

Before withdrawing, however, I wish to inform the public that, in accordance with article 26 of the Tribunal's Statute and article 74 of its Rules, Italy has requested that part of the hearing be held in camera in order to present arguments dealing with some confidential information.

Thus, further to the agreement reached between the Parties, an in camera sitting will be held. This will take place directly after the break. Only the Tribunal, the Parties' representatives and teams and the Registry staff will be able to attend this part of the sitting. The general public is requested to remain outside of the courtroom until the public sitting resumes. This part of the sitting will not be broadcast on the internet.

The estimated duration of the sitting in camera will be 30 minutes. After that the hearing will continue in public and the public will be invited to return to the courtroom.

It is now 11.05. The hearing will resume in camera at 11.35. The public will be admitted again to the hearing after 30 minutes of the hearing in camera.

*(Short adjournment)*

*(In camera proceedings)*

*(Members of the public were re-admitted)*

We now resume the public part of today's sitting.

I give the floor to Mr Guglielmo Verdirame, to continue the oral arguments of Italy.

STATEMENT OF MR VERDIRAME
COUNSEL OF ITALY
[ITLOS/PV.15/C24/1/Rev.1, p. 33–43]

Mr President, Members of the Tribunal, Sir Michael Wood addressed you earlier on the plausibility of Italy's rights and on the appropriateness of Italy's requested measures in the light of those rights. I shall now elaborate on appropriateness by focusing on the consequences if the measures are not granted, in particular on the prejudice that Italy's rights would suffer, and on the question whether the requested measures would place an undue burden on India. I shall show throughout that the prescription of the measures requested by Italy is justified by reasons of urgency.[1]

In the Notification, Italy requested India to refrain from exercising any jurisdiction over the *Enrica Lexie* incident while the dispute under UNCLOS is pending. I shall refer to this request as Italy's First Request. In the Notification, Italy also requested India to take all measures necessary to ensure that restrictions on the liberty, security and movement of the marines are immediately lifted.[2] I shall refer to this request as Italy's Second Request. I shall examine each request by reference to both consequences and urgency.

As regards Italy's First Request, Mr President, it is important to keep the nature of the dispute at the front of our considerations. This is at heart a dispute between two States on the interpretation and application of rules governing the exercise of jurisdiction under the UN Convention on the Law of the Sea.

Whether India can exercise jurisdiction over the *Enrica Lexie* incident under UNCLOS is in dispute; whether India can detain the marines or subject them to bail conditions in connection to the Enrica Lexie incident is in dispute; whether India is within its rights in deciding if and when Sergeant Latorre should return to India and if and when Sergeant Girone should be released and returned to Italy is in dispute; and, of course, whether India can put the marines on trial is disputed between the Parties.

It is for the Annex VII tribunal to determine if India can lawfully exercise *any* of these rights. The rights of the Parties can only be established once the Tribunal delivers its award. Pending that determination, any exercise of jurisdiction by India will prejudice the very rights which Italy is seeking to vindicate through the Annex VII proceedings.

As the International Court of Justice observed, in the context of provisional measures the key concern is "to preserve by such measures the rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent".[3]

Italy's key concern is precisely that: to preserve the rights which the Annex VII tribunal has not yet adjudged. Italy cannot preserve those rights if India continues to exercise jurisdiction.

It is also important to recall here that the rights of jurisdiction which Italy is seeking to preserve are not abstractions. As Sir Daniel has shown, and contrary to India's assertions in the Written Observations, Italy attempted to exercise jurisdiction promptly after the incident.

In its Written Observations, India has left no doubt as to its determination to put the marines on trial. As observed by Italy's Agent, India has seemed to have already decided the outcome of that trial.

If a trial does take place, the effective implementation of an award by the Annex VII tribunal in favour of Italy would suffer fatal prejudice. Italy's attempt to exercise its jurisdiction at that point – by resuming the investigation that it launched promptly after the incident or by

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[1] Request, para. 37.
[2] Request, para. 5; Notification, paras. 31-32.
[3] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v *Nigeria), Provisional Measures, Order of 15 March 1996, ICJ Reports 1996*, p. 13, at p. 22, para. 35.

prosecuting and trying the marines – would be met with formidable and almost certainly insurmountable difficulties.

For all intents and purposes, therefore, the criminal trial, which India now insists should commence as soon as possible, would be a *fait accompli,* depriving the Annex VII tribunal of any effect if it decides in Italy's favour. The trial of the marines and any steps towards it thus clearly constitute actions which, in terms of *"Arctic Sunrise"*, are capable of prejudicing "the carrying out of any decision on the merits which the arbitral tribunal may render".[4]

India seeks to argue that it would stand to suffer greater prejudice than Italy if the Request were granted, and describes Italy's request as a request for prejudgment.

On the question of the balancing of competing risks on each side, the Special Chamber in the recent Order on Provisional Measures in *Ghana/Côte d'Ivoire* proceeded on the basis that the provisional measures should not place an "undue burden" on the country against which they are ordered. In the present case, India cannot plausibly claim that it would be placed under any such "undue burden".

If India perseveres in the exercise of jurisdiction, even proceeding to a criminal trial while the dispute is still pending, all risk of irreparable prejudice would be on Italy's side. India contends that its rights will not be preserved unless it can continue to exercise jurisdiction.[5] However, preservation of rights cannot be interpreted to mean that one State will continue to exercise jurisdiction when the issue in dispute is precisely who has jurisdiction. In the particular facts of this case, India cannot claim that it will suffer prejudice or be placed under any undue burden if it is not allowed to proceed to a trial, the outcome of which India has made a point of announcing in its Written Observations. Mr President, Members of the Tribunal, the essence of this Request is to suspend any action in relation to the exercise of jurisdiction. We accordingly invite you to make an order in the terms we specified in the Request,[6] but, if you are so minded to do, in terms addressed to both sides.

Mr President, Members of the Tribunal, I would now like to turn to the reasons that make the First Request urgent.

Italy's case in respect of the First Measure meets the requirement of urgency, judged by reference to each of the critical time frames discussed earlier by Sir Michael: the time when the Annex VII tribunal is in a position to act and the pendency of the proceedings.

In circumstances where irreparable harm is being suffered by Italy through each and every exercise of jurisdiction, urgency is demonstrated by the fact that the exercise of jurisdiction is ongoing. Here we know for a fact that that is so. As Sir Daniel Bethlehem has drawn to your attention, a hearing is scheduled to take place before the Indian Supreme Court on August 26 to address the article 32 Writ Petition deferment application that is rooted in the commencement of the Annex VII proceedings. The Additional Solicitor General for India is required to submit the Indian Government's views on that application today. And, of course, both marines are still under the bail conditions of the Indian Supreme Court. These exercises of jurisdiction are certain and ongoing.

We also know that, based on India's Written Observations, India is determined to pursue the exercise of jurisdiction throughout the next few weeks and months and throughout the pendency of the Annex VII proceedings. While no timetable has been set for the criminal trial, India has left no doubt that it wants to proceed to the trial and would have already done so were it not for what it calls the abuse of process by Italy and the marines in the Indian domestic proceedings. India blames Italy for the delay, on the one hand, but relies on delay on the other to reassure the Tribunal that there is no urgency.

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[4] *"Arctic Sunrise" (Kingdom of the Netherlands* v. *Russian Federation), Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013*, p. 230, at p. 251, para. 98.

[5] Written Observations of India, paras. 3.54, 3.57, 3.82.

[6] Request, para. 5

Mr President, Members of the Tribunal, the jurisdictional dispute between Italy and India is for the Annex VII tribunal to determine. In advance of that, India insists on carrying on with an exercise of jurisdiction that is tainted with violations of due process and with the prejudgment of the guilt of the marines running through India's Written Observations.[7] In these circumstances, the requirement of urgency is amply satisfied by reference both to the period before the Annex VII tribunal will be in a position to act and to the pendency of Annex VII proceedings.

Mr President, Members of the Tribunal, I will now come to Italy's Second Request, which is that India should lift all measures restricting the liberty, security and movement of the marines, and refrain from exercising any such jurisdiction, while the dispute is pending.

It cannot be in contention that India is limiting the rights of liberty and movement of both marines. The hearing before the Supreme Court of India on 13 July 2015 showed unequivocally that India regards the marines as on bail and subject to its jurisdiction. Sergeant Girone is not allowed to leave Delhi and is subjected to a form of detention that is more limiting in many ways than 'house arrest' for he is thousands of miles away from his home and family. Sergeant Latorre is in Italy at present but, unless provisional measures are ordered by the Tribunal, he will remain subject to Indian jurisdiction, to the requirement of having to constantly re-apply to the Indian Supreme Court for extensions of his leave to remain in Italy, and to the risk that the Indian Supreme Court, or indeed the Special Court that has been established to conduct the criminal trial of the marines, would revise the current bail conditions or revoke bail altogether.

The lifting of the bail measures is appropriate and necessary on three separate and discrete grounds. I have already covered one of these in camera and I shall now address the other two.

I can deal with the first one briefly. If the Tribunal agrees that India should not exercise the very rights that form the object of this dispute, all restrictions placed on the marines through the exercise of that jurisdiction should be set aside while proceedings are pending. The Second Request therefore follows, as a necessary consequence, from the first one.

The second ground on which Italy is requesting the lifting of all restrictions on the liberty and movement of the marines is that these restrictions are contrary to international standards of due process applicable under the law of the sea.

To develop this second ground, we must begin by recalling the *Camouco* and *Monte Confurco* decisions. The issue in those cases was whether the Master of the vessel was in a state that could be properly characterised as "detention", having been placed under court supervision and having had his passport taken away from him. The Tribunal held in those two cases that the circumstances did amount to detention and ordered his release.[8] The conditions imposed on Sergeant Girone are far stricter than those in *Monte Confurco* and *Camouco*, and Sergeant Latorre is at risk of being placed under similarly strict conditions unless the Tribunal orders that this particular exercise of Indian jurisdiction be suspended.

As in *Camouco* and *Monte Confurco*, we are faced here with a special category of unlawful detention, namely detention which the law of the sea specifically characterises as unlawful, in this particular case by virtue of the fact that the detention is not premised on a permissible exercise of jurisdiction and violates immunity.

The restrictions on the liberty and movement of the marines further breach the law of the sea because they violate international standards of due process which, as this Tribunal has held on several occasions, must inform the operation of the law of the sea.

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[7] Written Observations of India, paras. 1.6, 1.11, 1.14, 3.77.

[8] *"Camouco" (Panama* v. *France), Prompt Release, Judgment, ITLOS Reports 2000*, p. 10, at pp. 32-33, para. 71; *"Monte Confurco" (Seychelles* v. *France), Prompt Release, Judgment, ITLOS Reports 2000*, p. 86, at p. 112, para. 90.

Mr President, Members of the Tribunal, at tab 24 of the Judges' Folder you will find a passage from the *Juno Trader* case. The Tribunal held in that case:

> The obligation of prompt release of vessels and crews includes elementary considerations of humanity and due process of law.[9]

There was no dissent from this passage. At least three of the judges writing separate opinions endorsed it explicitly, also by reference to human rights.[10]

Due process of law must be engaged even more critically in this case, where there is a clear dispute under UNCLOS concerning the exercise of jurisdiction.

At tab 25 of your folder, you will find another reference to due process in the context of prompt release proceedings. In *Tomimaru*, the Tribunal observed that domestic proceedings "*inconsistent with international standards of due process of law*" could breach article 292 of the Convention.[11]

Due process is not mentioned expressly in article 292 of the Convention, but, in both of these cases, the Tribunal found that it applied to the exercise of domestic jurisdiction.

In *M/V "Louisa"*, which is at tab 26 of your folder, even though the Tribunal found that it lacked jurisdiction, it emphasised as follows:

> The Tribunal holds the view that States are required to fulfil their obligations under international law, in particular human rights law, and that considerations of due process of law must be applied in all circumstances.[12]

The other important case in the Tribunal's jurisprudence is *"Arctic Sunrise"*. In the provisional measures proceedings in that case, the Tribunal ordered the release of individuals placed in detention, also in the light of due process considerations. I will return to this case later, but before doing so I would like to reflect on the crucial aspects of the present situation in terms of due process.

There are at least three dimensions in which international standards of due process are critically engaged here.

First, there is the obligation to formulate charges promptly. Mr President, Members of the Tribunal, this is a basic standard of due process and procedural fairness, encapsulated in articles 9, paragraph 2, and 14, paragraph 3(a), of the International Covenant on Civil and Political Rights, to which both Italy and India are parties.

Two cases of the Human Rights Committee illustrate the importance and the functioning of this standard. At tab 27 of your folder, you will find *Campbell v. Jamaica*. The author of this individual communication had been detained before being formally charged with murder for three months. The Human Rights Committee concludes at the end of that passage that the delay does not meet the requirements of article 9, paragraph 2.[13]

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[9] *"Juno Trader" (Saint Vincent and the Grenadines* v. *Guinea-Bissau), Prompt Release, Judgment, ITLOS Reports 2004*, p. 17, at pp. 38-39, para. 77.

[10] *"Juno Trader" (Saint Vincent and the Grenadines* v. *Guinea-Bissau), Prompt Release*, Separate Opinion of Judge Treves, *ITLOS Reports 2004*, p. 71; ibid., Joint Separate Opinion of Judges Mensah and Wolfrum, *ITLOS Reports 2004*, p. 57, at pp. 57-58, paras. 3-4.

[11] *"Tomimaru" (Japan* v. *Russian Federation), Prompt Release, Judgment, ITLOS Reports 2005-2007*, p. 74, at p. 96, paras. 76 and 79.

[12] *M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain), Judgment, ITLOS Reports 2013*, p. 4, at p. 46, para. 155.

[13] *Campbell* v *Jamaica*, Communication No. 248/1987, in General Assembly, *Official Records, Forty-seventh session, Supplement No. 40* (A/47/40), p. 232, at p. 238, para. 6.3.

Another relevant decision is *Grant v. Jamaica*, at tab 28 of your folder. At the beginning of the passage, the Human Rights Committee

> observes that the State party is not absolved from its obligation under article 9, paragraph 2, of the Covenant to inform someone of the reasons of his arrest and of the charges against him, because of the arresting officer's opinion that the arrested person is aware of them.

The author of this communication had been detained for seven days before being charged with murder and the Committee concludes that there was a violation of the basic standard of due process in article 9, paragraph 2, of the Covenant."[14] It is confirmed in other cases, delay in bringing charges, and I quote from *Kelly v. Jamaica*, "should not exceed a few days".[15]

Mr President, Members of the Tribunal, one thousand two hundred and sixty-nine (1269) days have gone by since the marines were first arrested by the police in the Indian State of Kerala, and the marines have not yet been charged formally in a legally valid way. India cannot rely on the charge sheet issued by the State of Kerala for the purposes of fulfilling its obligation to charge promptly, in circumstances where its own Supreme Court found, two years and eight months ago, that the Kerala Police – and I quote from the Supreme Court judgment – did not have "jurisdiction to investigate into the complaint" and that the State of Kerala had no jurisdiction "to investigate and, thereafter, to try the offence".[16]

The Kerala charge sheet is consequently *ultra vires* and India cannot rely on it as a formal charge in this case.

Mr President, Members of the Tribunal, the due process requirement to inform a person of the charges brought against him or her promptly is not an abstract legal formality. It is a fundamental check on the exercise of State power. It is also a basic safeguard, designed to create some measure of certainty, and thus to minimise anguish and distress of individuals who are innocent. In this regard I refer you to Italy's submissions in camera.

India seeks to conceal this fundamental failure of due process behind convoluted expressions in its Written Observations. It refers to the present situation as one of "non-framing of charges"[17] and it also refers to the "criminal case being ripe for the framing of charges".[18]

Three and a half years and we are still nearly at the point where the criminal case is "ripe for the framing of charges" but still no valid charges.

The facts in this respect are so unequivocal that the Chief Justice of the Indian Supreme Court remarked at a hearing in December 2014: "Even the charge sheet has not been filed".[19]

India is also running the absurd argument that the reason why the marines have not yet been charged is because they and Italy have not been cooperative. Mr President, in some legal systems a person has the right to remain silent upon arrest. But that does not exempt a State from its obligation to formulate charges promptly.

The criminal system in every country deals with individuals who are entirely uncooperative (which anyway was not the case here). That does not mean that the State can place them in indefinite custody without charges. The State must still charge them, and must do so promptly, and it must do so properly.

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[14] *Grant* v *Jamaica*, Communication No. 597/1994, General Assembly, *Official Records*, *Fifty-first session*, *Supplement No. 40* (A/51/40), p. 206, at p. 212, para. 8.1.

[15] *Kelly* v *Jamaica*, Communication No. 253/1987, UN Doc. CCPR/C/41/D/253/1987, at para. 5.8.

[16] Judgment of the Indian Supreme Court, 18 January 2013, annex 19 to annex A, paras. 93, 94, 111.

[17] Written Observations of India, para. 1.17.

[18] Written Observations of India, para. 2.13.

[19] Request, para. 49 and fn. 28.

The second critical due process dimension in this case concerns the manner in which India wants to try the marines. Even from a domestic point of view, the exercise of criminal jurisdiction by India over the *Enrica Lexie* incident and over the marines was so exceptional and so fraught with legal difficulties that there was no way of dealing with it under ordinary legislation. So the Supreme Court directed the Government to set up an *ad hoc* Special Court to try the marines. This is in clear breach of another fundamental standard of due process, encapsulated in article 14, paragraph 1, of the International Covenant on Civil and Political Rights, which provides that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." A tribunal designated *ad hoc* and *ex post facto*, without foundation in Indian legislation, to try two specific individuals manifestly fails to fulfil this requirement.

Again, India seeks to resort to euphemisms to conceal this violation of clearly applicable international standards of due process, describing the Special Court as an "exclusive court".[20] Far from placing the marines in a privileged position, India's decision to try them in an exclusive *ad hoc* court has produced more problems and greater uncertainty. The marines cannot be blamed for seeking to defend themselves as best they can in these unique "exclusive" circumstances, not provided for under Indian law. Without charges, without a court established by law, without a clear legal framework governing the procedure, and against the background, now made explicit in the Indian Written Submission, that the outcome of the trial is a foregone conclusion, in these circumstances the marines are simply doing their best to exercise their fundamental right of defence.

Thirdly, we have seen that the marines' right to defend themselves has been attacked in its most basic dimension: the presumption of innocence. There can be few more blatant breaches of due process than a State declaring, in no uncertain terms, in the solemnity of inter-State proceedings in front of this Tribunal, the guilt of two individuals, before the trial has taken place and before charges have been formally brought. We must not forget that the marines have maintained their innocence throughout.

Each of these three relevant and applicable standards of international due process vitiates the exercise of jurisdiction by India, quite aside from that exercise of jurisdiction not being founded in UNCLOS. It also shows the acute and irreparable prejudice that Italy would suffer if the measures restricting the marines' liberty are not lifted promptly. These acute concerns are relevant to both prejudice and due process.

Mr President, Members of the Tribunal, let me now turn to *Arctic Sunrise*. In the part of the Order dealing with reasons, the Tribunal drew attention to a passage in the Written Statement of the Netherlands which is particularly relevant here.[21] The Netherlands argued in that passage, which is referred to by the Tribunal under its reasons, that

> the crew would continue to be deprived of their right to liberty and security as well as their right to leave the territory and maritime areas under the jurisdiction of the Russian Federation

adding that

> [t]he settlement of such disputes between two states should not infringe upon the enjoyment of individual rights and freedoms of the crew of the vessels concerned.

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[20] Written Observations of India, para. 1.19.

[21] *"Arctic Sunrise" (Kingdom of the Netherlands* v. *Russian Federation), Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013*, p. 230, at p. 249, para. 87.

This passage, to which the Tribunal referred in giving its reasons for the Order, concluded: "every day spent in detention is irreversible".

Italy relies on similar arguments. The present Request also rests on stronger grounds than the successful Dutch request in *Arctic Sunrise*. This is so for at least four reasons.

First, the violations of applicable standards of due process are more severe in this case. The crew members in *Arctic Sunrise* had been charged, and their detention had not gone on for nearly as long as in this case.

Secondly, the marines are agents of the Italian State, who were engaged in official activities clearly and closely connected with the prevention and repression of piracy. That is another important distinguishing factor from *Arctic Sunrise*.

India seeks to rely on immunity to argue that this is a factor that distinguishes both *Arctic Sunrise* in its favour. Mr President, Members of the Tribunal, that argument is clearly misplaced. The opposite is true. The existence of immunities in this case makes the prescription of Italy's Second Measure both more appropriate and more urgent than in *Arctic Sunrise*. As noted by the International Court of Justice in the Advisory Opinion on the Immunity of the Special Rapporteur,[22] immunities must be addressed *in limine litis*, but the Indian Supreme Court was silent on immunities in its January 2013 Judgment. The Second Request would certainly not prejudge the question of immunities, but it would prevent the irreparable prejudice that would inevitably result from a continued breach of immunities.

The third factor that distinguishes this case from *Arctic Sunrise* is that India cannot claim that its exercise of jurisdiction in the Exclusive Economic Zone comes under one of the cases expressly contemplated under articles 56 or 60 of the Convention.

The fourth factor is the medical circumstances discussed in camera. These four factors distinguish *Arctic Sunrise* and strengthen our reliance on that precedent.

To conclude on the issue of prejudice suffered by Italy, the circumstances of this case make the nature of prejudice which Italy would suffer if the Second Measure is not granted more acute and extreme than in *Arctic Sunrise*. Failure to grant this measure would entail a significant departure from that decision and from the jurisprudence of this Tribunal.

Mr President, Members of the Tribunal, I will now turn to the question of undue burden in relation to the Second Request. India alleges that Italy would not comply with an award in India's favour so that India would, on balance, be placed under greater risk if the marines are both in Italy.

Mr President, Members of the Tribunal, this is an allegation that Italy rejects in the most vigorous terms. Italy and India are each committed to the Convention and to the dispute settlement obligations under it. They have a long history of friendly relations between them. The fact is that, notwithstanding the political resonance of this case in Italy, Italy complied with its undertakings before the Indian Supreme Court. In the course of this dispute, it was India which resorted to a glaring breach of international law when it prevented the Italian Ambassador from leaving Indian territory. In these circumstances, it would be entirely inappropriate to proceed on the basis that Italy is in bad faith and would not observe its obligation under the Convention to comply with the award of the Annex VII tribunal, whatever that award says.

Let me now turn to the issue of urgency in relation the Second Request. Urgency here inheres in the nature of the prejudice to Italy's rights. If the Annex VII tribunal finds that India has no jurisdiction, it would follow that the measures restricting the liberty and movement of the marines were unlawful throughout. The marines, and in consequence Italy, would have suffered irreparable damage.

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[22] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 62, at p. 88, para. 63.

Italy is not calling into question the principle that States have a right, or a power, to arrest, detain, prosecute and punish individuals, but that power is not absolute. There are limitations to it under UNCLOS: a State cannot assert a power to prosecute and punish in respect of alleged offences over which it has no jurisdiction under the Convention. A State has, similarly, no such power *vis-à-vis* individuals who are entitled to immunity from its jurisdiction. In exercising this power, States must respect due process throughout; as this Tribunal said, "in all circumstances".

Where a dispute over the exercise of jurisdiction has arisen and has been submitted for final binding determination, and where violations of due process are ongoing, the status quo in relation to the marines is one where their rights and Italy's rights are suffering irreparable damage on a daily basis. Every additional day in which a person is deprived of these rights must be regarded as one day too many. This was a principle referred to in the Order in *Arctic Sunrise*.[23] Again, I note, Mr President and Members of the Tribunal, that in the light of the duration and of the circumstances of the detention here, and of the other factors to which we have drawn your attention in camera, the considerations of urgency are more urgent and pressing than in *Arctic Sunrise*.

Part of the irreparable damage has of course already occurred but this is no justification for inflicting more of it in the coming weeks and months and during the pendency of the proceedings, particularly since, as Sir Daniel explained, urgency has crystallized quite sharply over the last few weeks, as a result of the developments which Sir Daniel took you through earlier.

Mr President, Members of the Tribunal, India is not only determined to prejudge the outcome of the Annex VII proceedings by pursuing the exercise of jurisdiction all the way to the completion of the trial before the Special Court; as is clear from their Written Observations, India is also prejudging the marines' guilt before charging them, and by doing so, it has aggravated the prejudice, and brought all the risks connected to the ongoing exercise of criminal jurisdiction into even sharper relief. The requirement of urgency in respect of Italy's Second Request is clearly met.

Before concluding, I would like to address a final point which may be relevant to the analysis of urgency in relation to both measures. It is well known that this dispute is not new. India makes much of this point in its Written Statement, but India is conflating two analytically distinct issues: the duration of the dispute and the assessment of urgency. This is clear from the jurisprudence under UNCLOS, as shown in the recent order of the Special Chamber of this Tribunal in *Ghana/Côte d'Ivoire*.

It is not uncommon for disputes over the exercise of jurisdiction and immunity of State officials to be brought to an international forum after some domestic proceedings. This is not because of any requirement of exhaustion of local remedies – which clearly does not apply here – but because these disputes will often begin with an exercise of jurisdiction by domestic authorities and they will be challenged before domestic courts.

There is therefore nothing unusual about engagement with the domestic process in disputes over jurisdiction; nor is there anything unusual in a case of this kind for political and diplomatic negotiations to take place. It would be adding insult to injury if the passage of time, due to the nature of the dispute as well as to Italy's best efforts to secure a negotiated solution, were somehow to be held against Italy.

The duration of the dispute, on the contrary, is a factor which, particularly in the context of violations of international due process and the other special circumstances of this case, strengthens the case for urgency.

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[23] *"Arctic Sunrise" (Kingdom of the Netherlands* v. *Russian Federation), Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013*, p. 230, at p. 249, para. 87.

Mr President, Members of the Tribunal, in conclusion, Italy's First Request is justified by the irreparable prejudice which Italy will suffer if the rights which form the object of this dispute were continued to be exercised by India. It is further justified by the fact that continued exercise of criminal jurisdiction by India could jeopardize the future implementation of an award of the Annex VII tribunal. Italy's Second Request is justified on at least three bases: as a consequence of the First Request; by the applicable international standards of due process; and by the circumstances which have been assessed in camera. Both of Italy's requests are justified by reasons of urgency and in neither case would India be placed under an "undue burden".

Mr. President, Members of the Tribunal, I have now concluded. I would ask you to invite Sir Daniel Bethlehem to the podium.

**THE PRESIDENT:** Thank you, Mr Verdirame.

I now give the floor to Sir Daniel Bethlehem.

STATEMENT OF SIR DANIEL BETHLEHEM
COUNSEL OF ITALY
[ITLOS/PV.15/C24/1/Rev.1, p. 44–45]

Mr President, Members of the Tribunal, I return to the podium to make some very brief closing observations to Italy's first-round argument and, in so doing, to underline a number of points on which, in our submission, this case turns. I would like to pick up where Professor Verdirame left off, with irreversible prejudice, urgency and undue burden. I do not repeat his submissions.

On irreversible prejudice, I note only that the risks to Italy's rights, including as regards humanitarian considerations relevant to its officials, are manifest. India, in contrast, can show no irreversible prejudice to its rights in issue in these proceedings. If, however, contrary to Italy's submission, the Tribunal does perceive there to be some risk to India's rights, this could be easily addressed by an order from the Tribunal that is directed in equal terms to both Parties not to take any step of criminal investigation or trial during the pendency of the Annex VII proceedings that could prejudice the rights of the other Party. This would cater perfectly well for any concern that could possibly be apprehended as regards India's rights. Professor Verdirame has addressed you on this in more detail.

As regards the risk of irreversible prejudice to Italy's rights in issue in the international proceedings, however, a freezing order in respect of the criminal proceedings is not enough. Italy's rights engaged by the prejudice that is posed to its State officials cannot be adequately addressed, or even addressed at all, by an order that simply maintains the status quo. The status quo is one in which Italy's rights are being prejudiced daily, on an ongoing basis; and the risk of irreparable harm will be readily apparent from the information that has been provided to you.

Urgency, as you have heard, is both humanitarian and legal. It is humanitarian both because of the individual circumstances of the two marines, and because prolonged pre-charge deprivation of liberty is a grave matter of continuing concern. This is not a prompt-release case, in which the issue of deprivation of liberty was explicitly envisaged and addressed in UNCLOS. The circumstances in issue here however are even more egregious. The marines are officials of the State who were on official duties. They are not simply the crew of a vessel flying the flag of the applicant State. The marines have been subject, unlawfully, to India's exercise of jurisdiction not for days, or for weeks, or even for months, as may arise in a prompt-release cases, but for three-and-a-half years. The humanitarian circumstances in issue in this case also distinguish it from prompt-release cases.

Urgency is legal as, with the failure of efforts to reach a negotiated solution, the dispute has reached a turning point. India's assertion of jurisdiction over the *Enrica Lexie* Incident and over the Italian marines has now crystallized sharply into a violation of Italy's rights that requires urgent attention. If provisional measures are not prescribed, there is a high risk of the aggravation of the dispute as India pushes forward to try the marines. The threat of irreversible prejudice to Italy's rights has thus now crystallized sharply. As both Sir Michael Wood and Professor Verdirame have addressed, urgency is not be assessed by the length of time since the dispute has arisen but by an appreciation that every continuing day that is lost is a day that can never be recovered.

This brings me to undue burden. Professor Verdirame has dealt with this fully. I would make only three observations. The first is that, in the application by Sergeant Latorre that was made to the Indian Supreme Court on 4 July, just a few weeks ago, which I addressed in my opening submissions this morning, Italy gave an undertaking that Sergeant Latorre would return to India following the final determination of rights by the Annex VII tribunal, if this was required by the award of that tribunal. Italy repeats this undertaking here as an undertaking to this Tribunal in respect of both marines.

My second observation is to recall your *Arctic Sunrise* provisional measures Order and the bond that you required of the Netherlands. Pursuant to the bail order of the Indian Supreme Court in this case, Italy has been required to provide surety in respect of the two marines of approximately €300,000 for each marine, denominated in Indian rupees. Such that there may be any conceivable issue of prejudice to India from the provisional measures requested by Italy in these proceedings, Italy would be prepared to transform that surety through some appropriate arrangement into a surety given to India in accordance with the stipulations of an order of this Tribunal. The amount of the surety that Italy is currently maintaining in India, and is now offering to continue as a bond pursuant to an order of this Tribunal, overshadows that required by the Tribunal in *Arctic Sunrise*, in which the amount stipulated was in respect of the release of the vessel and 30 crew members.

My third observation is that the appropriate course for the Tribunal to adopt in this case, in our respectful submission, is to order the provisional measures that Italy has requested for the period to the end of the Annex VII proceedings. This would properly reflect the risk of irreversible prejudice to Italy's rights that we have described. If circumstances change, or if India for any other reason wishes to contest the measures that are prescribed, its right to do so before the Annex VII tribunal in due course is safeguarded and indeed expressly envisaged by article 290(5) of UNCLOS, which would allow India to apply to modify or revoke the provisional measures prescribed. India's rights are more than adequately safeguarded. The risk of irreversible prejudice to Italy's rights, and the nature of any conceivable burden to India, properly warrants this approach.

Mr President, Members of the Tribunal, that concludes Italy's first-round submissions. I thank you for your attention.

**THE PRESIDENT:** Thank you, Sir Daniel.

This brings us to the end of the first round of arguments of Italy. We will continue the hearing in the afternoon, at 3 p.m. to hear the first round of oral arguments of India.

The sitting is now closed.

*(Luncheon adjournment)*

**PUBLIC SITTING HELD ON 10 AUGUST 2015, 3 P.M.**

**Tribunal**

*Present:* *President* GOLITSYN; *Vice-President* BOUGUETAIA; *Judges* CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, PAIK, KELLY, ATTARD, KULYK, GÓMEZ-ROBLEDO *and* HEIDAR; *Judge* ad hoc FRANCIONI; *Registrar* GAUTIER.

**For Italy:** [See sitting of 10 August 2015, 10.00 a.m.]

**For India:** [See sitting of 10 August 2015, 10.00 a.m.]

**AUDIENCE PUBLIQUE TENUE LE 10 AOÛT 2015, 15 HEURES**

**Tribunal**

*Présents :* M. GOLITSYN, *Président* ; M. BOUGUETAIA, *Vice-Président* ; MM. CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, PAIK, MME KELLY, MM. ATTARD, KULYK, GÓMEZ-ROBLEDO *et* HEIDAR *juges* ; FRANCIONI, juge *ad hoc* ; M. GAUTIER, *Greffier*.

**Pour l'Italie :** [Voir l'audience du 10 août 2015, 10 h 00]

**Pour l'Inde :** [Voir l'audience du 10 août 2015, 10 h 00]

**THE PRESIDENT:** Please be seated. The Tribunal will now continue the hearing in the case concerning the *Enrica Lexie* incident. This afternoon, we will hear the first round of oral arguments presented by India.

Before I give the floor to the Agent of India, I would like to appeal to you to speak in a way that will allow the interpreters to keep up with your presentations. This morning we experienced some difficulties.

I now call on the Agent of India, Ms Neeru Chadha, to begin her statement.

**First Round: India**

STATEMENT OF MS CHADHA
AGENT OF INDIA
[ITLOS/PV.15/C24/2/Rev.1, p. 1–4]

Mr President, Mr Vice-President and distinguished Members of the Tribunal, it is an honour and indeed a privilege for me to appear before this august Tribunal as Agent of India.

I will give a broad overview of the case while my colleagues will dwell in greater detail on the legal issues raised by Italy in this provisional measures proceeding.

Mr President, India was surprised at the tone and tenor of Italy's pleadings this morning. They portrayed the accused Italian marines as the real victims while totally ignoring the two fishermen, who are the real victims of the *Enrica Lexie* incident, who lost their lives.

This morning Italy's Agent strongly objected to India using the term "murder" to describe the incident, while their own documents do so. The document at tab 11 of the Italian folder highlighted by Sir Daniel Bethlehem clearly specifies that the Office of the Prosecutor of the Military Tribunal in Rome has opened a criminal investigation against the marines for the crime of murder. Therefore it is surprising to us why it is accusing India of presenting an intemperate document.

This case which is listed as the *Enrica Lexie* Incident really arises from the killing of two innocent Indian fishermen on board an Indian fishing vessel, *St. Antony*, which was lawfully fishing in India's exclusive economic zone.

On 15 February 2002, at about 4.30 p.m. Indian Standard Time, *St. Antony*, engaged in fishing at a distance of about 20.5 nautical miles from the Indian coast, faced a volley of fire originating from two uniformed persons on board an oil tanker which was about 200 metres from the boat. Valentine Jelastine, who was at the helm of the boat, received a bullet hit on his head, and Ajeesh Pink, who was at the bow, received a bullet hit on his chest. Both died on the spot following this evidently "shoot to kill' incident. In addition to these casualties, the incident also caused serious damage to the boat, endangering its safe navigation and the lives of the other nine crew members.

When the reports of the killings reached the Indian authorities, it was entirely reasonable for them that, as per the law, they would open an investigation. From the vessel movements in the area, it was ascertained that *Enrica Lexie* was involved in the so-called incident so it was requested to turn back and join the investigation. There was no ruse, no coercion, as alleged by Italy.

There were six Italian marines on board *Enrica Lexie*. Two of them were arrested after it was established that they fired the shots that killed the two fishermen. Legal proceedings then commenced in Indian courts under the relevant provisions of Indian law, as the victims were Indian nationals and they were killed on board an Indian fishing vessel.

Italy pointed out repeatedly in the morning that it has asserted early jurisdiction in the case. The early assertion of jurisdiction by Italy does not preclude India from exercising jurisdiction over the killing of its nationals who were fishing in India's exclusive economic zone.

Mr President, it may be noted that the two Indian fishermen died as a result of firing from *Enrica Lexie*, a merchant vessel. While this is not the time to get into the merits, I feel compelled to make some observations on Italy's remarkably one-sided and insensitive description of the event in its Notification.

In explaining the incident, Italy cleverly builds the scenario to show that firing from the *Enrica Lexie* was to fend off an apprehended piracy attack and to avoid possible collision on the high seas. This has been done primarily to find grounds of jurisdiction for Italy under the

United Nations Convention on the Law of the Sea and not on the basis of any thorough investigation by Italy. It also needs to be emphasized here that on the day of the incident there was no piracy alert in the region nor did the fishing boat resemble a pirate skiff.

Italy has failed to mention that that the Italian marines opened fire with military-grade arms on a defenceless fishing boat, which could possibly have posed absolutely no threat to the *Enrica Lexie*. The truth, Mr President, is that the Italian marines, on board a merchant vessel, not on board a warship or a non-commercial ship on government duty, on a clear day, with excellent visibility, shot to kill two persons in a small boat. Under articles 95 and 96 of the Convention, immunity from the jurisdiction of any State other than the flag State is available only to warships and Government ships operated for non-commercial purposes. Admittedly, the Italian marines were on board a merchant vessel, therefore, the Government of India was not obliged to recognize their claim of immunity under the Convention or any other principle of international law.

Further, no bilateral agreement exists between India and Italy for granting such immunity to armed forces personnel of Italy. India had, in fact, even prior to the *Enrica Lexie* incident, refused Italy's request to enter into an agreement for admittance, stay or transit of their Vessel Protection Detachments through India, since the same is not permitted under Indian law.

Therefore, Mr President, it is very clear from a brief recapitulation of this case that there was no collision, no incident of navigation, so as to attract article 97 vesting the jurisdiction to the flag State. Also there was no piracy attack or threat thereof that could justify the killing of two Indian fishermen so as to attract the application of the Convention and thus the *prima facie* jurisdiction of an Annex VII tribunal.

Mr President, India is proud of its adherence to rule of law and its judicial system that gives access to justice, ensures due process and equal opportunity to everybody to assert their rights. Throughout the past three years, Italy has benefited from this process. India's courts have acted with the utmost fairness towards both Italy and the two accused marines, despite being flooded by numerous applications, delays and inconsistent submissions by them. It will be clear from subsequent Indian presentations how Italy has invoked the Indian judicial system to its advantage and now complains against the same system for alleged delays and lack of jurisdiction.

India and the Indian courts have also gone to great lengths to ease the living conditions of the marines, far more than that which would be accorded to individuals who had killed two unarmed persons with gunfire. This will be elaborated in greater detail by Professor Pellet.

Mr President, India has legitimate apprehensions on Italy's ability to fulfil its promises as it has earlier attempted to renege twice on the same. The first time, Italy attempted to renege on the assurance it had provided to the Indian Supreme Court and officially informed India that marines who were allowed to go back to Italy for four weeks to exercise their voting rights would not return. As indicated, they did return, but only after intense diplomatic efforts pursued by the Government of India.

Thereafter, Italy actually impeded the investigation by reneging on its promise to send back four other marines on board *Enrica Lexie* for examination, and much later made them available to give evidence only through videoconferencing. There is pattern in Italy's conduct that India views seriously and therefore it has legitimate concerns regarding the extent to which Italy can be trusted to keep its commitments.

India and Italy have also been engaged on this matter through diplomatic channels. India's position has been consistent throughout these engagements that it wanted an early resolution of the matter so that it did not cast a shadow over the friendly relations between the two countries. To this end, India has always urged Italy to join the judicial process in India to move things forward, and not delay or derail the trial by the Special Court.

India has repeatedly assured the Italian Government of a speedy, independent, free and fair trial for the Italian marines in India that would take into account all legal aspects raised by the Italian side, including the question of jurisdiction.

Special care was taken to assure Italy that the marines would be treated fairly and with dignity.

India also allayed Italy's concerns on the quantum of punishment with the assurance that, if found guilty, no death penalty would be imposed on the accused.

That was, Mr President, always India's position from the onset of this case and Italy is aware of it. Nothing has changed or acquired an imminent urgency in the recent past for Italy to now approach this Tribunal for prescribing provisional measures pending the setting up of an Annex VII tribunal.

My colleagues will discuss the above issues in more detail and show that that there is absolutely no justification for Italy's Request for provisional measures. The Annex VII tribunal that is to be constituted would not have jurisdiction in this case and there is no imminent urgency which demands prescribing of provisional measures by this Tribunal pending the setting up of the Annex VII tribunal.

Before I outline the sequence of rest of India's pleadings, I would like to mention one more point. Italy has referred to circumstances of a medical and humanitarian nature in the case. In this context, I would request the Tribunal to recall the greater loss, trauma and suffering of the families of the two Indian fishermen who have been killed. Their loss, Mr President, is permanent and irreversible. They are still waiting for the justice that has been delayed by Italy's intransigence.

Mr President, the rest of India's pleadings will be presented in the following manner. First, the Additional Solicitor General of India will provide an overview of the case and the judicial proceedings in India involving Italy and the marines and present the true facts.

Professor Alain Pellet will then deal with subject matter of the dispute and the questions of jurisdiction and admissibility. He will show that Italy's presentation of the subject matter of this case is flawed and misleading in several ways and casts strong doubts on the jurisdiction of the Annex VII tribunal and present the other elements that confirms that Italy's request is inadmissible.

Mr Rodman Bundy will also deal with the issues of jurisdiction and admissibility and prove that in this case there is neither any urgency nor a risk of irreparable harm to Italy's rights.

Professor Alain Pellet will come back to the podium to demonstrate that this Tribunal is not in a position to prescribe the second provisional measure requested by Italy. He will show that there is no urgency, let alone an "aggravated" urgency that article 290, paragraph 5, requires. He will then establish that the second provisional measure would necessarily prejudge the merits of this case and irreversibly prejudice India's own rights.

I request the Tribunal to call upon the Additional Solicitor General, Mr P.S. Narasimha, for his presentation.

**THE PRESIDENT:** Thank you, Ms Chadha.

I now give the floor to Mr Narasimha. I would like to appeal to you to speak in such a way that the interpreters can catch up with you.

STATEMENT OF MR NARASIMHA
COUNSEL OF INDIA
[ITLOS/PV.15/C24/2/Rev.1, p. 4–12]

Mr President, and honourable Members of this Tribunal, it is indeed a pleasure and a privilege for me to appear before this Tribunal on behalf the Republic of India.

A bare reading of the Request for provisional measures followed by the submissions made by the learned Counsel for Italy will unfortunately show that the foundation has been laid on facts which are either incomplete or in some cases inaccurate. The conclusions drawn from such facts and also the propositions that have been advanced are to some extent a little away from the truth.

Mr President, I believe that facts must speak for themselves. It will be in my endeavours to show that many of the questions and the issues that have arisen for consideration could actually be resolved in the light of the facts that are correctly stated. What are these facts? There are four sets of facts that become relevant for our consideration. First, the correct factual background in which Italy has invoked the jurisdiction of the Annex VII arbitration in 2015. This understanding, Mr President, will have a direct bearing on the principle of the *prima facie* view which this Tribunal will have to take on the jurisdiction of the Annex VII tribunal.

The second set of facts that are important to us relate to the legal system of India and the remedies that are available in law and particularly the procedure that Italy has adopted and the marines have adopted from time to time. This factual narration will throw much light on an important issue that needs to be considered that relates to the exhaustion of remedies.

A third important factual aspect that it is also necessary for me to elaborate on and take up is the true and correct facts on the basis of which one could attribute blame to a particular party and say that it is for this reason that the delay has occurred. This factual background will have an implication on the issue relating to urgency or the equity, perhaps, of what my learned friends have pleaded.

Lastly, the other factual matrix that it becomes necessary for us to consider is the background in which the marines had approached the Supreme Court of India for deferment of proceedings coupled with the fact that the Supreme Court had suspended the proceedings before the Special Court. These aspects and this particular fact will again have a bearing on the two prayers that have been made by Italy before this Tribunal.

The basic fact is that on 15 February 2012 two Italian marines on board the vessel *Enrica Lexie* fired at an Indian boat. This incident claimed the precious lives of two innocent fishermen. Immediately thereafter the investigations revealed that the firing was not supported by any reasonable belief of danger to life or property/or even that this firing was done in self-defence. My senior colleague, Professor Alain Pellet, will deal with this aspect in greater detail.

Mr President, in simple terms, two unarmed fishermen of my country were killed for no fault of theirs and thus, the Government of India, or, for that matter, any civilized country of the world, would be duty-bound to inquire, investigate and try the accused, of course through a process of law which is informed by the rule of law and, very importantly, I agree with my friends, on the principles of criminal justice.

Let us now see the follow-up actions taken immediately after the incident. Upon receiving information about the incident, the State of Kerala, one of the twenty-nine states constituting the Indian Federation, conducted an investigation and arrived at a *prima facie* conclusion of the commission of an offence. This conclusion led to the two marines being taken into judicial custody on the 19 February 2012.[1] Following custody, Italy and the marines

[1] The Italian Marines Massimiliano Latorre and Salvatore Girone were arrested by the police of the State of Kerala on 19.02.2012.

approached the highest court of the State of Kerala,[2] the High Court, challenging the jurisdiction of the State of Kerala.

What is interesting, Mr President, is that the challenge before the State of Kerala was on the ground that the State would not have jurisdiction in that matter and that it is only the Union of India which would have the jurisdiction to investigate. Also, pleas were taken with respect to immunity and lack of jurisdiction. The High Court heard the matter in detail and delivered its judgment. It accepted the contention of Italy completely on some aspects of the matter. On the question of immunity, the High Court said it is not available with respect to the death of a person. With respect to jurisdiction the High Court also said that the State Government would have the jurisdiction in the matter. It also granted bail to them on more than one occasion.

The judgment of the High Court was carried on appeal to the Supreme Court of India. In the Supreme Court of India, apart from the appeal that had been filed, they had also by this time instituted a writ petition, a petition which is filed directly in the Supreme Court instead of an appeal. The writ petition and the appeal were heard together. The matter was heard in detail and the Supreme Court delivered a judgment.

Three very important findings were given in the High Court judgment. The first finding is that the submission made on behalf of Italy was accepted. The Supreme Court held the State of Kerala would not have jurisdiction at all. Then the Court said: "We would agree with the state of Kerala and hold that the jurisdiction to try and investigate the case would lie only with the Union of India."

That is one aspect which was very important for the Court to consider in view of the fact that it was an unusual incident which occurred in our country, and if we had subjected them to our regular criminal courts it would have taken a long time. The Supreme Court was concerned about that. It took the Government into confidence and the Court said "We shall in this case ask for the establishment of a Special Court to look into and try this case" and also considered one of the submissions made by them, which is that the Indian Union and the Republic of India does not have jurisdiction to try this case.

In view of the findings that had been given in the High Court, which came to the conclusion that there is jurisdiction for the State Government, there were certain facts which were to be brought on record by virtue of evidence. So the Supreme Court said:

> We will enable you to raise this plea before the Special Court that has been constituted and the Special Court can go into the matter and decide the question whether India has jurisdiction or does not have jurisdiction. Before it does that, some amount of evidence is necessary. Immediately after the evidence is put in, you can take the plea and the court could as well hold that there is no jurisdiction for India to try this matter at all.

Mr President, it is evident from the judgment of the Supreme Court that Italy was successful in arguing that the State of Kerala has no jurisdiction, and it had also reserved the question of jurisdiction to be re-agitated before the Special Court, where it could well prove that India had no jurisdiction over the incident. Two and a half years after this question was kept open, Italy and the marines have come up with the same prayer before the Annex VII tribunal. This tribunal would definitely be going into this very question as to who has the jurisdiction at all, whether India would have the jurisdiction at all, which is the question which

[2] Writ Petition No. 4542/2012 filed by the Italian Republic and the Italian Marines in the Kerala High Court (Vol. 2 – Annex 15 to Annex A – Italy Request for Provisional Measures)

Italy sought to be kept open for them to be argued specifically, and the Supreme Court agreed and provided that forum for them.

Much has been said about the Special Court which has been constituted. It is definitely a matter of concern for someone who is not aware of the Indian legal system. What are these Special Courts? Rest assured, Mr President and Honourable Members of this Tribunal, that a Special Court is not a court which is for the first time constituted. Special Courts are designated courts. Courts which require to hear and dispose matters expeditiously are identified amongst the existing courts of the country, and to that court a particular case is assigned, and the learned judge of that court is asked to determine the dispute between the Parties. It is completely constitutional and what is far more reassuring in a case of this nature is that this is a court which has been asked specifically to be constituted and to hear by the directions of the Supreme Court the entire procedure of law relating to a criminal court, and all of the provisions apply equally to this court, so there is, really speaking, no distinction between a Special Court and any ordinary criminal court which exists in our country.

Immediately after the judgment of the Supreme Court, the Government complied with the directions of the Supreme Court. A Special Court was constituted on 15 April 2013. The Government appointed an independent public prosecutor. The Government also entrusted the matter to an independent agency called the National Investigation Agency, the NIA. Immediately steps were taken and this constitution took place and the Special Court would have started its proceedings on 15 April 2013. This court would be a completely dedicated court. It would not have, speaking as a law officer with responsibility to the court, taken more than five or six months, because the approach that India took towards this incident was not adversarial. It was compelled to take up that issue and bring to justice whatever the fact situation was. Instead of that, we have a situation today where the proceedings before the Special Court never took place at all.

That is the second part of the question which I had marked: how did it happen that a Special Court, constituted on 15 April 2013, to date has no adjudication and there is no determination of the dispute between the Parties?

The following facts would show how, instead of participating in the proceedings to be conducted before the Special Court and enabling the Special Court to arrive at its decision on the jurisdiction of India after the recording of evidence as a preliminary issue, Italy and the marines instead chose to adopt a course of filing multiple applications which have brought the entire legal proceedings to a standstill.

In the meantime, even though applications were filed in the Supreme Court, the National Investigation Agency proceeded with the investigation. It commenced the investigation and sought to record the statements of witnesses to the incident. The ship owners who had honoured the commitment made to the Supreme Court at the time of release of the ship by the Supreme Court made available six crew members and their statements were recorded. It is easy to say that there was no difficulty in recording the statements so far as the Italian marines are concerned through video recording, but that incident occurred after repeated prayers. India requested Italy to secure the presence of the four Italian marines as promised by them to the Supreme Court. The order of the Supreme Court specifically recorded an undertaking given by Italy saying at the time of investigation "When the evidence of these witnesses is to be recorded, we undertake to bring them back for examination." The Court recorded that statement and permitted the ship to leave the coast of our country.

At this point in time, after India repeatedly requested for the witnesses to be brought to say what were the weapons used at the time of the incident, to say that it could well have been recorded on the basis of videoconference is easy in hindsight. The entire evidence was stalled due to that refusal, and the NIA was left with no option but to finally record the statements of these witnesses by video recording.

There is another very important development which took place. Mr President, it is also important to note that even before the NIA took charge of the proceedings to investigate the matter, Italy and the marines again approached the Supreme Court, seeking an injunction against the NIA investigating the case. If I may now request this honourable Tribunal to permit me to refer to tab 1 of your documents, paragraph 5, it is the order of the Supreme Court considering their application.

> Mr Rohatgi - the learned counsel who had appeared on behalf of the Italian marines and the government - submitted that since the National Investigation Agency could only try the Scheduled Offences referred to in the Act, the investigation could not in any way be taken up by the NIA under the Agency Investigation Agency Act 2008.

Paragraph 6:

> Having heard the learned Attorney General for India and Mr Mukul Rohatgi for the Petitioners, we do not see why this Court should be called upon to decide as to the agency that is to conduct the investigation. The direction which we had given in our judgment dated 18 January 2013 was in the context of whether the Kerala Courts or the Indian Courts or even the Italian Courts would have the jurisdiction to try the two Italian marines. It was not our desire that any particular Agency was to be entrusted with the investigation and to take further steps in connection therewith. Our intention in giving the direction for formation of a Special Court was for the Central Government to first of all entrust the investigation to a neutral agency, and, thereafter, to have a dedicated Court having jurisdiction to conduct the trial. Since steps have been duly taken for the appointment of a Court of competent jurisdiction to try the case, the Central Government appears to have taken steps in terms of the directions given in our judgment dated 18 January 2013. It is for the Central Government to take a decision in the matter.

The next paragraph, paragraph 7, is important.

> If there is any jurisdictional error on the part of the Central Government in this regard, it will always be open to the accused to question the same before the appropriate forum.

They were successful in taking this direction from the Supreme Court that this issue can actually be raised by us when the matter is taken up before the Special Court.

As indicated above, with the completion of the investigation by the NIA, the marines again approached the Supreme Court on January 2014 and sought to injunct the NIA from even filing charges in the Court. Meanwhile, Italy also requested India to exclude the charge under the special law called the Suppression of Unlawful Activities Act. The Government accepted this request and excluded the charge under the SUA Act, which shows that the Government has taken a very fair and liberal stance towards the request made on behalf of the marines. This was followed by an affidavit by the Union of India and a statement by the learned Attorney General in the Court. The Supreme Court, in response to this application, passed an order on 26 February 2014, which is at tab 2 of this compilation, a very short order. If I can request this honourable Tribunal to look at the first page of this order:

> An affidavit has been filed today on behalf of the Union of India, the same is taken on record. According to the affidavit, the Union of India has accepted the opinion of the Law Ministry, according to which in the facts and circumstances of the case, the provisions of SUA Act are not attracted in this case. It has further been stated that appropriate steps will be taken to ensure that the charge-sheet reflect the opinion to the decision taken by the Union of India.

That is how the charge sheet was kept pending, because there was an objection about the enforcement of this Act.

> To that extent there is no objection by Shri Mukul Rohatgi, learned senior counsel appearing for the petitioner. The learned counsel who appeared on behalf of the Republic of Italy had no objection to this issue at all. However, he has raised the issue that in view of the opinion given by the Law Ministry and the acceptance thereof by the Union of India it will denude the NIA to investigate or prosecute the petitioner or submit the charge sheet. The learned Attorney General has disputed this position.

The later portion is important.

> In view of the earlier order … passed by a three-Judge Bench of this Court … and in such a fact situation, it is desirable to hear the parties limited to the extent and on that issue being a pure question of law. However, to meet the technicalities, Mr Mukul Rohatgi, learned senior counsel has pointed out that he would like to file an application to that effect.

They have raised this plea about the ability of the NIA to investigate the matter. The Court permitted them to file an application. The matter was adjourned. These three orders which I have shown to this honourable Tribunal and a narration of facts bring to light the success Italy obtained with the institution of the cases before the Supreme Court. They are: jurisdiction to investigate and prosecute lies only with the Union of India and not the State of Kerala; the question relating to lack of jurisdiction of the Republic of India is kept open and now to be argued before the Special Court, which could very well hold that India has no jurisdiction; Italy could also argue on the jurisdiction of the NIA before the Special Court.

In light of these three orders, Italy could not have any grievance, and all that was left for Italy was to proceed with the hearing before the Special Court.

Unfortunately, however, now the marines alone approached the Supreme Court of India and instituted a fresh case[3] (Writ Petition No. 236/2014) with questions similar to those that are being raised before the Annex VII tribunal. The Supreme Court heard the marines and, at their request, passed an order dated 28 March 2014, which issued notice to the Union of India and also granted complete abeyance of the trial before the Special Court. By issue of this order the proceedings before the Special Court have come to a standstill.

My colleague Rodman Bundy will deal with this writ petition in very great detail.

Mr President, as a consequence of this order, the entire proceedings before the trial court were kept in abeyance. This stay over the Special Court proceedings still continues, the

[3] Writ Petition No. 236/2014 instituted by the two Italian Marines in the Supreme Court. (Vol. 2 – Annex 40 – Written Observations by India)

result of which is that the legal enforcement mechanism has come to a complete standstill. Consequently, the charges prepared by the NIA have been kept in abeyance and the Special Court, which is subject to orders of the Supreme Court, has been unable to proceed further in its adjudication process.

This is the factual background, in my respectful submission, which throws light on two very important submissions made by my learned friends. One is that charges have not been filed; it is unacceptable for a civilized society to do that. The second thing arising from the facts is that the reason for the delay, the reason for the courts and institutions like the NIA not filing the charge until the investigation was complete is attributable to Italy and the marines, who themselves had the carriage of the proceedings.

I can understand a situation where, in a case is pending before the courts, the determination has not taken place. This is clearly a case where at their instance, at their petition and their act of participation, the court was called upon to pass orders from time to time to see that the investigation does not proceed any further.

This is one aspect of the matter. I will now deal with another aspect that was touched upon on the ground that India should have taken a humanitarian approach.

When both the marines filed an application before the Supreme Court seeking permission to travel to Italy for the purpose of casting their votes in the election that was to be held in their country, the Supreme Court, on hearing this application, allowed both the marines to travel to Italy and remain there for a period of four weeks and to return back.[4]

The next request was made to the Supreme Court when an application was filed on behalf of Mr Latorre[5] seeking the permission of the court to leave for Italy on health grounds. When the Supreme Court enquired from the Government its view on the relaxation of the bail conditions, I appeared and represented the Government at that point of time. The Government very clearly instructed me that we are not adversarial in this matter, particularly when a man is unwell – why should there be any objection? I reflected the views of my Government to the Court and there was no further adjudication on that. There was no examination as to whether or not it was true. It was unnecessary for us to get into the merits of the matter and the merits of the documents to prove ill health. We were unconcerned about that. The statement that he was not well was sufficient for us. We would not need to go any further. We accepted it at its face value and said that if he is unwell he is entitled to go abroad and have medicine. That order is on record. It clearly reflects the statement made by me that we have no objection to him leaving the country.

Mr President, even before the expiry of the four months granted by the Supreme Court, Mr Latorre[6] filed another extension for a further period of four months on health grounds. Simultaneously, another application was also filed on behalf of Mr Girone[7] requesting that he too may be allowed to travel to Italy. It may be true that the court might not have been inclined to both, but then the reality is that both these applications were withdrawn.[8] There is no adverse order that Italy faced at any point of time from the Supreme Court in respect to grant of permission to leave the country.

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[4] Order dated 22.02.2013 passed by the Supreme Court in I.A. No. 4/2013 in SLP(C) No. 20370/2012. (Vol. 2 – Annex 16 – Written Observations by India)

[5] Application for Directions and relaxation of Bail Conditions dated 05.09.2014 (Vol. 2 – Annex 21 to Annex A – Italy Request for Provisional Measures)

[6] Interim Applications No.7-10 in SLP(C) No. 20370/2012 (Bail condition relaxation for Massimiliano) (Vol. 2 – Annex 22 to Annex A – Italy Request for Provisional Measures)

[7] Interim Applications No.7-10 in SLP(C) No. 20370/2012 (Bail condition relaxation for Salvatore Girone) (Vol. 2 – Annex 23 to Annex A – Italy Request for Provisional Measures)

[8] Order dated 16.12.2014 by the Supreme Court (Vol. 2 – Annex 29 to Annex A – Italy Request for Provisional Measures)

Mr Latorre, who was already in Italy, made a third application to the Supreme Court seeking an extension of stay. This request was heard by the Supreme Court on 14 January 2015[9] and a further extension of three months of his stay in Italy was permitted to Mr Latorre.

Even at this hearing it was the specific instruction of the Government – and my submission was that there was no difficulty about that at all.

Mr Latorre then made his fourth application immediately prior to his return, seeking a further extension of his stay in Italy for health and medical reasons. This application was again heard by the Supreme Court which did not deny him the relief he sought and passed an order on 9 April 2015.[10] By the same order, the Court also directed that the main petition be listed for hearing.

It is at this stage that there is reference to a tribunal by a notification that was issued. The Court asked why the matter had been adjourned so many times. However, we had no difficulty about the medical grounds.

It is at this stage that we were called upon, by the Notification that was issued, saying that this matter needed to be decided by the arbitration under Annex VII.

It is against this factual background that the steps taken by Italy must be understood.

Instead of returning to India, two further applications were filed. My friends have referred to those in detail.

One application said that he was unwell but that you would not insist that he should come back until the tribunal decides the matter. The second application said that the proceedings before the courts must be adjourned *sine die*.

In reality, the proceedings before the court were never stayed. There is no hearing because the Supreme Court suspended it. Those proceedings will not go on. It is possible that it would not go on until the hearing before the Annex VII tribunal either because they have the carriage of the proceedings. They have instituted the case.

I really do not understand therefore that on the one hand these proceedings are instituted before the Supreme Court and then the trial and everything is stayed. Then this application says that you actually postponed those hearings when the decision takes place.

It is in this perspective I humbly request that this honourable Tribunal should look at the requirement of passing provisional measures.

I will conclude because two more speakers after me will deal with very important aspects of the matter.

The prayer for provisional measures is in two parts. The first part:

> India shall refrain from taking or enforcing any judicial or administrative measures against Sergeant Massimiliano Latorre and Sergeant Salvatore Girone in connection with the *Enrica Lexie* incident and from exercising any other form of jurisdiction over the '*Enrica Lexie*' incident.

This, in my submission, is accomplished by the fact that the Supreme Court has actually stayed it. It would not be going too far to say that until the tribunal is constituted and hears the matter, there is no compelling assumption that the matter will be taken up and that there will be an adverse decision against them.

The second part relates to the two marines. One is already in Italy on health grounds. It is not our case that he should come back if his health does not permit him to do that at all. As far as the other person is concerned, that is the only issue today; the rest has been accomplished.

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[9] Order of the Supreme Court dated 14.01.2015 (Vol. 2 – Annex 30 to Annex A – Italy Request for Provisional Measures)

[10] Order of the Supreme Court dated 09.04.2015 (Vol. 2 – Annex 31 to Annex A – Italy Request for Provisional Measures)

That much, I suppose, the Government of the Indian Republic, which is trying to prosecute the case and find the truth of the matter and how this incident incurred and who is responsible, is entitled to see the proceedings taken to their logical end.

Mr President, with your permission I request that Mr Alain Pellet take the floor.

**THE PRESIDENT:** Thank you, Mr Narasimha.

I now give the floor to Mr Alain Pellet.

EXPOSÉ DE M. PELLET
CONSEIL DE L'INDE
[TIDM/PV.15/A24/2/Rev.1, F, p. 13–22]

Monsieur le Président, Madame la juge (un singulier bien regrettable), Messieurs les juges,

Dans cette première intervention, je reviendrai sur l'objet réel de l'affaire qui nous réunit et que l'Italie présente sous un jour erroné. Et je montrerai que ceci n'est pas sans incidence sur la compétence du Tribunal pour se prononcer sur les mesures conservatoires que l'Etat requérant lui demande de prescrire. Je m'attacherai ensuite aux autres éléments qui établissent que le tribunal de l'annexe VII dont l'Italie demande la constitution n'a pas compétence pour se prononcer sur l'affaire qu'elle veut lui soumettre.

Monsieur le Président, je me demande si le Tribunal de céans ne s'est pas laissé quelque peu abuser par le nom que l'Italie avait cru bon de donner au différend dont elle entend saisir un tribunal arbitral constitué conformément à l'annexe VII à la Convention des Nations Unies sur le droit de la mer.

« L'incident de l'*Enrica Lexie* », cela donne à penser qu'il s'agit d'un « évènement de caractère secondaire [même si] généralement fâcheux... » pour reprendre les termes du dictionnaire *Larousse*[1] – or les faits à l'origine de cette affaire, très fâcheux assurément, n'ont rien de « secondaires » : il s'agit de la mort de deux pêcheurs indiens, M. Ajeesh et M. Valentine, embarqués sur le *St Antony* (vous le voyez à l'écran), victimes des tirs irresponsables, à l'arme automatique, de deux *marines* italiens embarqués sur le tanker *Enrica Lexie,* dont vous voyez maintenant la photo.

Alors bien sûr, Monsieur le Président, si on se fonde sur la taille respective des deux navires, l'*Enrica Lexie* l'emporte, et de beaucoup ! Mais l'incident n'a causé aucun dommage au tanker ; ce sont le *St Antony* et ses occupants qui ont été victimes de la fusillade : deux morts, des traumatismes pour les neuf autres pêcheurs, et de graves dommages pour le bateau lui-même. C'est de l'affaire du *St Antony* qu'il s'agit en réalité. Et que l'on ne vienne pas nous raconter que la réalité des faits est contestable : malgré les mensonges et les truquages des marines embarqués sur l'*Enrica Lexie*[2], les faits sont confirmés par l'enquête minutieuse menée par la police de l'Etat du Kerala[3] puis par la *National Investigation Agency* indienne, et par le simple fait que l'Italie a versé des indemnités aux ayant-droit des victimes et au propriétaire du *St Antony*[4]. Et à qui fera-t-on croire qu'une personne sensée et sobre pouvait prendre le *St Antony* pour un dangereux bateau pirate lancé à l'assaut de l'*Enrica Lexie*, un tanker protégé par des barbelés et six membres des forces armées italiennes ? Ceci étant, Monsieur le Président, les accusés n'ont pas été jugés et leur procès démontrera peut-être qu'ils ne sont pas pénalement responsables ou qu'ils peuvent bénéficier de circonstances atténuantes. Encore faudrait-il qu'ils puissent enfin être jugés pour les crimes dont ils sont accusés avec, pour dire le moins, une bonne dose de vraisemblance. Ils s'y opposent, l'Italie aussi – qui semble considérer que la présomption d'innocence implique absolution totale.

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[1] http://www.larousse.fr/dictionnaires/francais/incident/42245 ; voir aussi, par ex. http://fr.thefreedictionary.com/incident ; http://www.thefreedictionary.com/incident.

[2] Voir déposition de M. Vitelli Umberto, capitaine de l'*Enrica Lexie*, 15 juin 2013 (observations écrites de l'Inde (ci-après « OE », annexe 27) ; déposition de M. Sahil Gupta, membre d'équipage de l'*Enrica Lexie*, 26 juin 2013 (OE, annexe 29) et déposition de M. Victor James Mandley Samson, membre d'équipage de l'*Enrica Lexie*, 24 juillet 2013 (OE, annexe 29).

[3] Procès-verbal (charge sheet) de la police du Kerala, 15 février 2012 (OE, annexe 3).

[4] A. Katz, « Brother Shot Dead Fishing Tests Armed Guards' Accountability », *Bloomberg*, 29 novembre 2012 (OE, annexe 12). A. Banerji, « India Has Jurisdiction to Try Italian Marines for Fishermen Deaths: Court », *Reuters*, 18 janvier 2013 (http://www.reuters.com/article/2013/01/18/us-india-italy-marines-idUSBRE90H07E20130118). Voir aussi ordonnance de la Cour suprême indienne confirmant la mainlevée de l'immobilisation de l'*Enrica Lexie* et de son équipage, 2 mai 2012 (OE, annexe 10).

Tel est, Monsieur le Président, Madame et Messieurs les juges, l'objet même de cette affaire qui, à part de s'être [le fait qu'elle se soit] produite en mer, dans la zone économique exclusive de l'Inde, n'a guère de contacts [liens/rapports] avec le droit de la mer : ce n'est pas d'une collision maritime qu'il s'agit – comme c'était le cas dans l'affaire du *Lotus* –, pas non plus d'un « incident de la navigation » au sens de l'article 97 de la Convention sur le droit de la mer ; il s'agit de deux meurtres de pêcheurs indiens commis par deux ressortissants italiens.

Or, Monsieur le Président, en vertu de l'article 287 de la Convention, le Tribunal de céans, comme les tribunaux constitués en vertu de l'annexe VII ou la CIJ, si elle était saisie, n'ont compétence pour se prononcer sur un différend que si celui-ci porte sur l'interprétation ou l'application de la Convention. Et il ne suffit pas d'énumérer la longue litanie de dispositions de celle-ci qui pourraient avoir un vague rapport avec les faits de la cause, comme l'ont fait ce matin le professeur Tanzi et Sir Michael, pour que la compétence de la juridiction saisie soit établie. La véritable question est de savoir si le différend entre les Parties est couvert par une ou des dispositions de la Convention. Ce n'est *prima facie* pas le cas si l'on se focalise sur l'objet réel du différend. En effet, la Convention n'envisage pas la situation qui vous est soumise et ceci fait peser des doutes sérieux sur la compétence du tribunal arbitral dont l'Italie demande la constitution et, par ricochet, sur la vôtre, Madame et Messieurs les juges.

Du reste, dans la déclaration interprétative qu'il a faite en ratifiant la Convention, le Gouvernement de la République de l'Inde considère :

> Que les dispositions de la Convention n'autorisent pas d'autres Etats à effectuer, dans la zone économique exclusive et sur le plateau continental, des exercices ou des manœuvres militaires, en particulier s'ils impliquent l'utilisation d'armes ou d'explosifs, sans le consentement de l'Etat côtier[5].

Dans le même ordre d'idée, il n'est pas possible de soutenir que le meurtre des deux pêcheurs indiens relève de la lutte contre la piraterie. Le *St Antony* n'a vraiment rien d'un navire pirate et les pêcheurs qui s'y trouvaient ne pouvaient raisonnablement pas être confondus avec des pirates alors que les deux bateaux étaient éloignés l'un de l'autre d'à peine cent mètres lorsque la fusillade a eu lieu[6], surtout si les marines ont utilisé des jumelles comme l'Italie l'affirme[7]. Et les deux *marines* sont les seuls à prétendre avoir vu des armes sur le *St Antony*[8].

L'invocation des nécessités de la lutte contre la piraterie est d'autant plus excentrique que l'Inde a lutté victorieusement contre ce fléau qui, à l'époque des faits, était déjà pratiquement éradiqué de la zone litigieuse comme le montre le tableau reproduit sous l'onglet 11 de votre dossier, qui est également projeté en ce moment. En tout cas, il est manifeste qu'il n'y a eu, à l'époque des faits, aucun signalement de navire pirate dans la région.

La carte que vous voyez maintenant le confirme pleinement : elle provient du site internet du NATO Shipping Centre[9] et illustre les différentes alertes et attaques effectives durant l'ensemble de l'année 2012. Comme vous pouvez le voir sur le document figurant à l'onglet 12 de vos dossiers, onze alertes et une activité suspecte ont été recensées dans la région s'étendant des côtes de l'Inde occidentale aux côtes somaliennes en février 2012 et c'est cette activité – seulement suspecte – qui est représentée par le signet bleu figurant à la pointe du

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[5] Déclaration de la République de l'Inde lors de la ratification de la Convention des Nations Unies sur le droit de la mer du 10 décembre 1982, 29 juin 1995 (https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&lang=fr&clang=_fr).

[6] Voir déposition de M. Vitelli Umberto, Capitaine de l'*Enrica Lexie*, 15 juin 2013 (OE, annexe 27).

[7] Voir notification (ci-après « N. »), par. 7.

[8] *Contra*, voir déposition de M. Vitelli Umberto, Capitaine de l'*Enrica Lexie*, 15 juin 2013 (OE, annexe 27) ; déposition de M. Sahil Gupta, membre d'équipage de l'*Enrica Lexie*, 26 juin 2013 (OE, annexe 29) et déposition de M. Victor James Mandley Samson, membre d'équipage de l'*Enrica Lexie*, 24 juillet 2013 (OE, annexe 29).

[9] http://www.shipping.nato.int/Pages/LargeAlertMap2012.aspx.

sous-continent indien, c'est-à-dire la région qui nous intéresse. Et je me permets, Madame et Messieurs du Tribunal, d'attirer votre attention sur deux points particuliers : premièrement, cette « activité suspecte » date du 2 février 2012 ; aucune autre, non plus qu'aucun acte de piraterie, n'ont été signalés le 15 février ; et deuxièmement la carte confirme que la partie orientale de l'Océan indien, au large des côtes indiennes, était, déjà à l'époque des faits pratiquement débarrassée des pirates ; certes il fallait (et il faut) rester vigilant, mais cette situation ne justifie aucune nervosité particulière et certainement pas la fébrilité dont ont fait preuve MM. Girone et Latorre.

L'Italie, Monsieur le Président, ne peut pas davantage invoquer les articles 100 et suivants de la Convention de 1982 qu'elle ne peut se prévaloir de l'article 97.

Il en va de même de l'article 32 de la Convention, le seul relatif aux immunités (mis à part ceux portant sur celles de l'Autorité[10] et les vôtres, Madame et Messieurs les juges[11]) : cette disposition – que l'Italie n'invoque d'ailleurs pas – est relative aux immunités *des navires de guerre et autres navires utilisés à des fins non commerciales* – il ne s'agit pas ici d'immunités de l'*Enrica Lexie*, qui ne répond du reste pas à cette définition, mais des immunités auxquelles prétend l'Italie en faveur des *marines* qui y étaient embarqués et sur lesquels la Convention ne dit rien et n'a rien à dire.

Comme vous l'avez dit dans votre ordonnance du 15 décembre 2012, dans l'affaire de l'*ARA Libertad* :

> *(Read in English)*
> at this stage of the proceedings, the Tribunal does not need to establish definitively the existence of the rights claimed by Argentina and yet, before prescribing provisional measures, the Tribunal must satisfy itself that the provisions invoked by the Applicant appear prima facie to afford a basis on which the jurisdiction of the Annex VII arbitral tribunal might be founded[12]

*(Poursuit en français)* Ceci fait écho à la jurisprudence constante de la CIJ, qui considère elle aussi qu'à ce stade des mesures conservatoires, il ne s'agit pas de :

> *(Read in English)*
> does not need to settle the Parties' claims [...or to] determine definitively whether the rights which [the Parties] wish to see protected exist.[13]

*(Poursuit en français)* Toutefois, et le professeur Tanzi et Sir Michael l'ont rappelé ce matin, le Tribunal doit décider si les droits revendiqués par l'Italie sur le fond, et dont elle sollicite la protection, sont plausibles[14].

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[10] Voir les articles 177 et s. de la Convention.

[11] Annexe VI, Statut du TIDM, art. 10.

[12] *"ARA Libertad" (Argentina* v. *Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012,* p. 332, para. 60.

[13] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Provisional Measures, Order of 22 November 2013, I.C.J. Reports 2013*, at p. 360, para. 27. See also *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, Separate Opinion of Judge Abraham, I.C.J. Reports 2006,* at pp. 140-141.

[14] Voir *ibid.* ; voir aussi *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua), mesures conservatoires*, ordonnance du 8 mars 2011, *C.I.J. Recueil 2011*, p. 19, par. 56 à 58 citant *Plateau continental de la mer Égée (Grèce c. Turquie), mesures conservatoires, ordonnance du 11 septembre 1976, C.I.J. Recueil 1976*, p. 10 et 11, par. 31, et *Frontière terrestre et maritime entre le Cameroun et le Nigeria (Cameroun c. Nigeria), mesures conservatoires, ordonnance du 15 mars 1996, C.I.J. Recueil 1996*, p. 22, par. 39.

Cette condition à la compétence du futur tribunal de l'annexe VII n'est *prima facie* pas remplie et comme nos amis de l'autre côté de la barre y ont insisté ce matin, et son appréciation plus approfondie par le Tribunal de céans supposerait une revue des faits, que vous êtes, Madame et Messieurs les juges, d'autant moins fondés à entreprendre que vous n'êtes pas juges du fond. Si vous le faisiez, vous ne pourriez qu'empiéter sur la compétence du futur tribunal, auquel il appartiendra de toute manière de se prononcer *seconda facie*, puisqu'aux termes de l'article 290, paragraphe 5, de la Convention que je cite,

> *(Read in English)*
> Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4.

*(Poursuit en français)* Et il peut, bien entendu, en prescrire, même si le tribunal de céans s'en est abstenu.

J'ajoute que les très longs développements qu'a consacrés l'autre partie ce matin à des considérations essentiellement étrangères au droit de la mer constituent un autre aveu : que – et je le dis avec le plus grand respect – l'Italie s'est trompée de forum.

Faute de lien réel avec la Convention, l'initiative de l'Italie constitue un abus des voies de droit sur lequel l'Inde se réserve la possibilité d'attirer en temps utile l'attention du futur tribunal de l'annexe VII en application de l'article 294 de la Convention. Malheureusement, Madame et Messieurs du Tribunal, cette disposition ne vous donne pas compétence pour vous prononcer à cet égard.

Monsieur le Président, un autre motif dirimant exclut *prima facie* la compétence du futur tribunal constitué en application de l'annexe VII – qui sera, bien sûr, appelé à se prononcer définitivement à cet égard en temps utile.

Aux termes de l'article 295 de la Convention des Nations Unies sur le droit de la mer :

> *(Read in English)*
> Any dispute between States Parties concerning the interpretation or application of this Convention may be submitted to the procedures provided for in this section

– *(Poursuit en français)* la section relative aux procédures obligatoires aboutissant à des décisions obligatoires –

> *(Read in English)*
> only after local remedies have been exhausted where this is required by international law.

*(Poursuit en français)* Or, en l'espèce, deux raisons décisives imposent l'épuisement des recours internes par la Partie italienne.

Bien que l'Italie s'en défende[15], elle agit en réalité pour la protection des droits de ses ressortissants : les deux accusés d'une part, le tanker *Enrica Lexie* battant pavillon italien d'autre part. Le vocabulaire qu'elle emploie ne trompe pas. Cette intention transpire clairement dans la notification du 26 juin aux termes de laquelle par sa première demande l'Italie prie le tribunal de l'annexe VII de dire et juger que – et je cite :

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[15] Voir N., par. 43 à 46.

*(Read in English)*
India has acted and is acting in breach of international law by asserting and exercising jurisdiction over the *Enrica Lexie* and the Italian Marines in connection with the *Enrica Lexie* Incident.

*(Poursuit en français)* L'intention exclusive de protéger les ressortissants italiens devient limpide lorsque l'on se reporte aux deux mesures conservatoires que l'Italie vous demande de prescrire – et je rappelle que les mesures conservatoires sont exclusivement destinées à protéger les droits des Parties en litige sur lesquels l'organe qui statuera au fond se prononcera ; ce sont donc ces droits-là que l'Italie entend protéger.

*(Read in English)*
India shall refrain from taking or enforcing any judicial or administrative measures against Sergeant Massimiliano Latorre and Sergeant Salvatore Girone in connection with the Enrica Lexie Incident, and from exercising any other form of jurisdiction over the Enrica Lexie Incident.

*(Poursuit en français)* Telle est la première demande de l'Italie.
Et voici la seconde :

*(Read in English)*
India shall take all measures necessary to ensure that restrictions on the liberty, security and movement of the Marines be immediately lifted to enable Sergeant Girone to travel to and remain in Italy and Sergeant Latorre to remain in Italy throughout the duration of the proceedings before the Annex VII Tribunal.

*(Poursuit en français)* Je répète :

*(Read in English)*
to ensure that restrictions on the liberty, security and movement of the Marines be immediately lifted to enable Sergeant Girone to travel to and remain in Italy and Sergeant Latorre to remain in Italy.

*(Poursuit en français)* Et je puis me référer aussi à ce que le professeur Verdirarme a dit ce matin :

*(Read in English)*
The Marines, and in consequence Italy, would have suffered irreparable damage.

*(Poursuit en français)* C'est bien, pour faire allusion à la fameuse formule Mavrommatis sur la protection diplomatique, « en la personne de ses ressortissants »[16] que l'Italie prétend faire respecter le droit international.

Ce sont bien les *marines*, le sergent Girone et le sergent Latorre, qu'il s'agit de protéger et c'est alors de protection diplomatique qu'il faut parler. Mais, comme l'on sait, son exercice est soumis à deux conditions essentielles[17] : que les bénéficiaires de la protection aient la

[16] Voir *Concessions Mavrommatis en Palestine, arrêt n° 2, [30 août] 1924, C.P.I.J. série A n° 2,* p. 12.
[17] Voir les articles 3, 4, 5 et 14 du projet d'articles de la CDI sur la protection diplomatique annexé à la résolution 62/67 de l'Assemblée générale des Nations Unies en date du 6 décembre 2007.

nationalité de l'Etat protecteur – elle est remplie ; et que les voies de recours internes aient été épuisées –, comme le *Solicitor General* l'a souligné, elles ne l'ont assurément pas été ; nous l'avons déjà dit et nous y reviendrons. Il s'agit là, comme l'a souligné la CIJ, d'« une règle bien établie du droit international coutumier »[18] et même d'« un important principe » de ce droit[19].

Certes, comme la CDI l'a souligné dans son commentaire de l'article 14 de son projet d'articles sur la protection diplomatique, il n'est pas toujours aisé

> *(Read in English)*
> to decide whether the claim is "direct" or "indirect" where it is "mixed", in the sense that it contains elements of both injury to the State and injury to the nationals of the State.[20]

*(Poursuit en français)* Mais, en l'espèce, comme le montrent les citations que j'ai faites des écritures italiennes, il ne peut y avoir de doute sur le fait que le critère de la prépondérance posé au paragraphe 3 de l'article 14 du projet de la CDI – le seul critère qui, selon la CDI permette de faire la distinction[21] – est satisfait :

> La réclamation ici est faite principalement en raison d'un préjudice causé à une personne ayant la nationalité de l'Etat réclamant.

Ici, comme dans l'affaire *ELSI* par exemple :

> *(Read in English)*
> the matter which colours and pervades the claim as a whole, is the alleged damage to [the two Italian nationals] said to have resulted.[22]

*(Poursuit en français)* Dès lors, un tribunal de l'annexe VII ne pourrait exercer sa compétence et se prononcer sur les demandes de l'Italie qu'une fois les recours à la disposition des deux accusés épuisés – ils ne le sont pas et il n'est pas raisonnable de prétendre qu'ils ne pourraient pas être efficaces – d'abord parce que l'Inde a une tradition judiciaire d'indépendance et d'impartialité de la justice qui est incontestable ; ensuite parce que les juridictions indiennes ont fait preuve d'une très remarquable bienveillance à l'occasion des très nombreux recours dilatoires dont les ont saisies les deux accusés et l'Italie. S'il en est résulté que les recours internes n'ont pas été épuisés, ils ne peuvent s'en prendre qu'à eux-mêmes.

Mais il y a autre chose, Monsieur le Président, il y a une autre raison pour laquelle la saisine d'un tribunal arbitral de l'annexe VII est vouée à l'échec. Elle tient précisément à la stratégie judiciaire qu'a adoptée l'Italie. En effet, au lieu d'encourager ses ressortissants à épuiser au plus vite les voies de recours interne qui donnent toutes les garanties souhaitables, afin de pouvoir, le cas échéant, exercer sa protection en leur faveur, l'Italie elle-même a saisi les juridictions indiennes à l'appui des réclamations temporisatrices qu'ils ont multipliées.

Monsieur le Président, je n'entrerai pas dans le détail de ces interventions de l'Italie dans les procédures concernant l'« incident de l'*Enrica Lexie* » – ou plutôt l'affaire du meurtre des deux pêcheurs du *St Antony* – d'abord parce que les procédures pénales de *common law*

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[18] *Interhandel, exceptions préliminaires, arrêt [du 21 mars 1959], C.I.J. Recueil 1959,* p. 27.
[19] *Elettronica Sicula S.p.A. (ELSI), arrêt [du 20 juillet 1989], C.I.J. Recueil 1989,* p. 42, par. 50.
[20] Article 14 of the ILC Draft articles on diplomatic protection, *ibid.*, para. 10 of the commentary.
[21] *Ibid.*, par. 11.
[22] *Elettronica Sicula S.p.A. (ELSI), Judgment [of 20 July 1989], I.C.J. Reports 1989,* p. 15, at p. 43, para. 52. See also *Interhandel, Preliminary Objections, Judgment [of 21 March 1959], I.C.J. Reports 1959,* p. 6, at p. 28.

constituent pour moi des mystères insondables, mais aussi parce que ces technicalités n'ont guère d'importance : le fait est que,

- *primo*, pour tenter d'obtenir l'ajournement ou l'abandon des poursuites contre MM. Latorre et Girone, l'Italie s'est adressée aux tribunaux indiens[23] ; le *Solicitor General* a expliqué ceci et Maître Bundy y reviendra ;

- *secundo*, les procédures en ce sens n'ont pas été menées à leur fin mais demeurent pendantes ; il en va ainsi en particulier de la procédure devant la Cour spéciale, comme vient de l'expliquer le *Solicitor General*, ce n'est pas une juridiction d'exception, contrairement à ce que nos amis de l'autre côté de la barre insinuent, celle-ci a compétence pour se prononcer sur tous les aspects de l'affaire, y compris sur la question de la compétence des juridictions indiennes. Et ceci est un élément-clé et de l'affaire en général et de cette instance en particulier. Je fais référence à l'arrêt de la Cour suprême de l'Inde, en date du 18 janvier 2013, transférant l'affaire vers une Cour spéciale afin de faire en sorte qu'elle soit « réglée avec diligence » (« *the same shall be disposed of expeditiously* »)[24] – le passage pertinent figure sous l'onglet 13 de vos dossiers. Il en résulte (et je cite toujours le paragraphe 101) que :

> *(Read in English)*
> the question of jurisdiction of the Union of India to investigate into the incident and for the Courts in India to try the accused may be reconsidered.

*(Poursuit en français)* Encore plus frappant, au paragraphe 102 :

> *(Read in English)*
> once the evidence has been recorded, it will be open to the Petitioners to re-agitate the question of jurisdiction before the Trial Court which will be at liberty to reconsider the matter in the light of the evidence which may be adduced by the parties and in accordance with law.

*(Poursuit en français)* - et *tertio*, il est à la fois paradoxal et regrettable qu'alors qu'elle a obtenu qu'il soit pleinement tenu compte de ses préoccupations, l'Italie ait ensuite fait tout ce qui était en son pouvoir (et, apparemment, la procédure judiciaire indienne offre beaucoup de possibilités !) pour retarder, voire empêcher, la décision rapide envisagée par la Cour suprême ; et il est particulièrement inconvenant que l'Italie dénonce aujourd'hui des lenteurs dont elle est seule responsable.

Je veux être clair, Monsieur le Président, l'objection ici ne tient pas au non-épuisement des recours internes (qui est une autre objection), mais au fait que l'Italie, qui a *choisi* de saisir les juridictions indiennes, s'en détourne maintenant et veuille porter l'affaire au plan international alors même qu'aucun élément nouveau n'est intervenu – qui permettrait, par exemple de mettre en doute l'impartialité des juridictions indiennes. C'est le principe de bonne foi qui est en cause – pas la peine de parler d'*estoppel* – celui tout à fait fondamental en droit international selon lequel on ne peut pas souffler à la fois le chaud et le froid, et qui se traduit dans une situation de ce genre par l'obligation de ne pas changer de forum juridictionnel ; lorsque l'on en a élu un, il faut s'y tenir (sans que ceci interdise de faire ultérieurement appel à un autre forum si celui-ci est ouvert). Comme nombre de principes élémentaires du droit international, celui-ci s'exprime en latin ; en abrégé : *electa una via* et, pour avoir l'air encore plus savant : *Electa una via, non datur recursus ad alteram* et cela sonne particulièrement bien en italien : *Scelta una via, non è ammesso il ricorso ad un'altra ...*

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[23] Voir OE, par. 1.16 à 1.20, 2.9 à 2.13 et 3.22 à 3.28.

[24] *Republic of Italy & Ors v. Union of India & Ors*, arrêt de la Cour suprême indienne du 18 janvier 2013, (N., annexe 19, p. 83, par. 101).

Le principe est d'application plus courante dans le droit de l'investissement[25] par exemple qu'en droit international public car il est rare qu'un Etat se présente devant les juridictions internes d'un autre Etat, comme l'Italie l'a fait, – au risque de perdre son immunité de juridiction (comme l'a fait l'Italie dans notre affaire). Il n'en reste pas moins que les raisons d'économie de procédure et de loyauté qui justifient l'application de ce principe *electa una via* dans des cadres transnationaux sont tout aussi pressantes, sinon plus, dans le cadre des litiges interétatiques. En l'espèce, l'Italie a choisi de recourir aux tribunaux indiens ; ceux-ci ont annoncé leur intention d'examiner la question de leur compétence (ou de leur incompétence) pour juger les deux accusés. L'Italie ne peut maintenant, sans mauvaise foi, se détourner des tribunaux qu'elle a saisis elle-même et demander à un organe judiciaire international de se prononcer, alors que les instances qu'elle a initiées sont toujours pendantes en Inde et que rien n'indique qu'elles ne sont pas susceptibles d'aboutir dans un délai assez bref – n'étaient les manœuvres dilatoires des intéressés et de l'Italie elle-même.

Madame et Messieurs les juges, l'affaire du meurtre dont vous êtes saisis ne peut être réglée par application du droit de la mer – dont vous êtes les gardiens vigilants – si bien que vous ne pouvez en connaître, pas davantage que le tribunal de l'annexe VII dont l'Italie demande la constitution. Ni celui-ci ni vous-même n'avez de raison de vous substituer aux juridictions indiennes auxquelles l'Italie s'est d'abord adressée pour faire trancher la question qu'elle entend maintenant soumettre à un tribunal international, sans que les cours indiennes aient été à même de se prononcer sur leur propre compétence (ou incompétence). Et de toute manière, mais c'est un argument différent, puisqu'il s'agit, à titre principal, de protéger les droits et intérêts de MM. Girone et Latorre, la compétence d'une juridiction internationale quelle qu'elle soit ne serait pas fondée à l'heure actuelle, faute pour les voies de recours internes d'avoir été épuisées.

Monsieur le Président, la compétence *prima facie* du tribunal de l'annexe VII est loin d'être établie ; du même coup, Madame et Messieurs les juges, il vous est impossible de faire droit à la demande en prescription de mesures conservatoires de l'Italie.

Je vous remercie très vivement de votre attention. Monsieur le Président, le prochain représentant de l'Inde à prendre la parole – si vous voulez bien la lui donner – sera maître Rodman Bundy. Je vous remercie.

**THE PRESIDENT:** Thank you, Mr Pellet.

As we are approaching the break, I do not want Mr Bundy to start and then be interrupted, so I suggest we withdraw for 30 minutes and reconvene at five to five, when Mr Bundy will have the floor.

*(Short adjournment)*

We will now begin the hearing.

I give the floor to Mr Rodman Bundy.

[25] Pour un exemple ancien, voir Commission mixte Venezuela-Etats-Unis, *Woodruff case* (1903), *R.S.A.*, vol. IX, p. 222 et 223 ; plus récemment, voir par ex. *Pantechniki S.A. Contractors & Engineers c. Albanie*, Aff. CIRDI n° ARB/07/21, sentence du 10 juillet 2009, par. 31 et 64 ; ou *Getma International c. Guinée*, aff. CIRDI n° ABR/11/29, décision sur la compétence du 29 décembre 2012, par. 129 et 134.

STATEMENT OF MR BUNDY
COUNSEL OF INDIA
[ITLOS/PV.15/C24/2/Rev.1, p. 21–31]

Thank you very much, Mr President, distinguished Members of the Tribunal. It is indeed an honour to appear before you today and to represent the Republic of India in this important case.

In this portion of India's pleadings, we will turn to the inadmissibility of the two submissions that appear at the end of Italy's Request for provisional measures. I shall start by addressing Italy's first submission, its requests that the Tribunal order India to refrain from taking or enforcing any judicial or administrative measures against the two Italian marines in connection with the *Enrica Lexie* incident, and from exercising any other form of jurisdiction over that incident. Following me, Professor Pellet will deal with Italy's second submission, in which Italy asks the Tribunal to take all measures necessary to ensure that the restrictions on the liberty, security and movement of the marines be immediately lifted so as to enable the marines to travel to and remain in Italy throughout the duration of the proceedings before the Annex VII arbitral tribunal.

It is undisputed that both requests depend on a showing by Italy that, as provided in article 290, paragraph 5, of the Convention, "the urgency of the situation so requires".

Thus, "urgency" is a critical condition for the Tribunal to prescribe any provisional measures.

I will not belabour the point because the Tribunal's jurisprudence on the issue is well-known. What I would recall is that the Tribunal has made it clear that provisional measures shall not be prescribed unless there is a

> need to avert a real and imminent risk that irreparable prejudice may be caused to the rights in issue before the final decision is delivered.

The Special Chamber recently reiterated that in the *Ghana/Côte d'Ivoire* case.[1]

There is a further element to the notion of "urgency" which arises out of article 290, paragraph 5. Ordinarily, I should not have to mention it but the manner in which Italy has cast its requests for provisional measures reveals that Italy is oblivious to the point, despite Sir Michael's attempt to repair the damage this morning. Let me place Italy's submissions on the screen so that you can see the problem.

The Tribunal will observe that, with respect to Italy's first submission, Italy places no time limit on its request. Italy simply seeks a blanket injunction of India's right to take or enforce any judicial or administrative measures against the two marines or other form of jurisdiction over the incident. If we turn to Italy's second submission, it requests that the restrictions on the marines be immediately lifted "throughout the duration of the proceedings before the Annex VII Tribunal."

Presumably, Italy's first submission should also be read as a request for a provisional measure to last up until the time the Annex VII tribunal renders its final decision, although Italy does not specifically say that in its first submission; it leaves the time completely open.

But that is not what article 290, paragraph 5, says. It provides that, "[p]ending the constitution of an arbitral tribunal to which a dispute is being submitted," this Tribunal may prescribe provisional measures, and that, "[o]nce constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures …".

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[1] *Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/ Côte d'Ivoire), Provisional Measures, Order of 25 April 2015*, para. 41, citing *M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain), Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010*, p. 58, at p. 68. para. 72.

Given that Italy has submitted the dispute to Annex VII arbitration with its Notification of 26 June, it follows that there is a temporal limitation to the duration of any provisional measures that may be prescribed by this Tribunal. By the same token, there is a temporal element to the question of whether there is a situation of urgency. As your Tribunal stated in its Order in the *Land Reclamation* case:

> the urgency of the situation must be assessed taking into account the period during which the Annex VII arbitral tribunal is not yet in a position to "modify, revoke or affirm those provisional measures".[2]

In other words, contrary to Italy's submissions, recourse to this Tribunal before the Annex VII arbitral tribunal is constituted is an exceptional procedure. With respect, your Tribunal is not called on to consider any provisional measures that will remain in force throughout the duration of the Annex VII arbitration. To do so would trespass on the competence of the Annex VII arbitral tribunal. The question is only whether there is any urgency over the next few months, after which the Annex VII arbitral tribunal will have been constituted and will be in a position to deal with the matter.

In addition to the requirement of urgency, article 290, paragraph 1, of the Convention states that a court or tribunal may prescribe any provisional measures that it considers appropriate under the circumstances to preserve the rights of the Parties to the dispute – in other words, it is the rights of both Parties that must be preserved. Again, I need to emphasize this point because of the one-sided nature of Italy's requests. Italy assumes that it is the only party that has rights that need to be preserved. That was repeated by Mr Busco this morning when he said that Italy's rights are at issue, without even mentioning the rights that India possesses.

As we will show, India has even more fundamental rights that need to be preserved. After all, as Professor Pellet and the Agent of India described, the entire dispute arose because of the killing of two innocent and unarmed Indian fishermen off India's coast in its exclusive economic zone. That is the key fact, constantly ignored by our opponents, that has given rise to the exercise of jurisdiction by India's courts over the matter. Italy and its marines have taken full advantage of the rights they possess in those proceedings before the Indian courts, and have been treated with the utmost fairness by the Indian Supreme Court.

The allegation, unfortunately repeated by both Sir Daniel and Professor Verdirame, that there has been a failure of due process before the Indian courts is as offensive as it is wrong. The Tribunal need only examine the record before India's Supreme Court, which has been placed on file in these proceedings, to appreciate the irresponsible character of the allegation. As I will explain, the marines have even gone so far before the Indian courts as to request the Supreme Court of India to rule on the question of jurisdiction and their own alleged immunity. The fact that just one month ago the marines changed their mind and asked the Supreme Court for a deferral of those proceedings, proceedings which they had introduced, is prejudicial to India's rights to exercise a jurisdiction that the marines themselves resorted to, and it is fatal to the present application for provisional measures.

Lastly, of course, it is well settled that the prescription of provisional measures is not appropriate where they would tend to prejudge the merits of the case, which, in this case, are reserved for the Annex VII arbitral tribunal.

As Professor Pellet and I will show, there is no urgency whatsoever justifying the prescription of provisional measures, and no real and imminent risk that irreparable prejudice may be caused to Italy's alleged rights before the Annex VII arbitral tribunal is in a position to

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[2] *Land Reclamations in and around the Straits of Johor (Malaysia* v. *Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003,* p. 10, para. 68.

take up the case. To the contrary, it is India's right to see that justice is done for the two dead fishermen, to see that the proceedings which Italy and its marines itself have launched before the Indian courts are allowed to see out their course, and that the families of the fishermen would be seriously prejudiced by the granting of Italy's request in joining the continuation of India's jurisdiction in the matter.

With that brief overview of the legal principles that govern consideration of Italy's Request, let me now turn to the facts, for it is only in the light of the particular circumstances of the case that the question whether there is a situation of urgency, in the sense of a real and imminent risk that irreparable prejudice may be caused to the Parties' rights, can be assessed.

The essence of Italy's claim is based on the following assertions: the marines have been subjected to the jurisdiction of the Indian courts for over three years (Request, para. 24); this is due to delays and complications resulting from the actions of India (Request, para. 24); the Indian legal process has failed throughout this period properly to address the position on jurisdiction to try the marines and their alleged immunity from prosecution (Request, para. 25); India has refused to cooperate with the Italian investigating authorities (Request, para. 35(d)); and the situation has now reached a level of critical urgency (Request, para. 25).

Those assertions are simply untrue. They are based on a highly selective and misleading account of what has actually happened before the Indian courts and in connection with the investigation of the incident. Any delays in the Indian investigative and judicial process, and thus delays in bringing charges against the Italian marines before the Special Court, are entirely the result of Italy's and its marines' tactics in constantly submitting new applications before the Indian Supreme Court, challenging the right of India's National Investigation Agency (NIA) to carry out the investigation of the incident, challenging the jurisdiction of the Special Court, and preventing the NIA providing their findings to the prosecutor. Receipt by the prosecutor who will be responsible in the Special Court proceedings of the investigation report, which has been blocked by Italy and the marines' tactics, is a precondition to the ability to bring charges against the marines. There has been no failure of due process for failure to bring charges; the reason the charges have not been brought before the Special Court is because Italy and the marines have filed applications blocking that process.

Notwithstanding that, India's Supreme Court has gone out of its way to consider favourably many of the marines' applications, whether for the relaxation of bail conditions, which Professor Pellet will address later, or for other forms of relief. Far from India interfering with Italy's purported investigation of the matter, it was Italy which obstructed the investigation that was entrusted to the NIA, first, by reneging on a solemn undertaking it made to ensure that certain key witnesses – the four other marines who were stationed on the *Enrica Lexie* – would be made available for questioning in India, and, second, by challenging the legality of the investigation and the NIA's investigation.

But perhaps the most striking example of Italy's abusive behaviour came one month ago, when the two marines filed an application before India's Supreme Court asking for the deferral of a petition that they themselves had lodged in March 2014, requesting the Supreme Court – not you, not an Annex VII arbitral tribunal – to rule on the question of India's jurisdiction over the marines and whether they enjoyed immunity, and seeking to suppress not only the NIA investigation, but also the entire proceedings before the Special Court. How that conduct – the marines' desire to defer proceedings that they themselves commenced – can possibly give rise to a situation of urgency that justifies the prescription of the provisional measures requested by Italy is left unexplained by our opponents.

Let me summarize some of the key elements of the story that Italy has failed to bring to the Tribunal's attention, but which place the misguided nature of its Request in proper perspective.

As the distinguished Additional Solicitor General has explained earlier, in April 2012 Italy together with the two marines filed a writ (Writ No. 135) before India's Supreme Court requesting a ruling that the courts of the State of Kerala, which had been exercising jurisdiction over the marines, did not have jurisdiction, and that the Union of India – that is the State itself – should take custody of the two marines.

While the application also requested that India should then hand the marines over to Italy, it argued, as you will see from the extract from the petition (paragraph D) that is attached under tab 15 of your folders, that, at the least, India should retain custody over the marines until India and Italy had made a final decision as to the jurisdictional principles and immunities that should apply. The application then went on to request the Supreme Court to pass any further orders that the Court deemed appropriate in the facts and circumstances of the case.

The Supreme Court acted favourably on these requests in its order of 18 January 2013, which has been referred to by both Parties today (tab 13). The Supreme Court ordered that custody over the two marines be transferred from the courts of Kerala to those of Delhi. It also ruled that, in the light of the circumstances and legal issues involved, the Kerala courts did not have jurisdiction. India was therefore directed by the Supreme Court to establish a Special Court, in consultation with the Chief Justice of India, to try the matter. Investigation of the incident was also left to an agency to be designated by the Government of India.

As you have heard, in its order the Supreme Court emphasized that Italy's right to argue the jurisdiction question before the appropriate forum remained preserved. What should also be recalled is that the action that led to the establishment of the Special Court, and transferring custody over the marines to Delhi, did not come from India. It was the result of the application Italy had made requesting that India secure custody over the latter, and that the Supreme Court pass any other measures it deemed appropriate. Thus Italy, in its formal petition to the Supreme Court left it to the discretion of the Supreme Court how to proceed.

Following this order, India took the necessary steps to set up the Special Court. On 1 April 2013, it also entrusted the NIA with responsibility to conduct the investigation of the incident, and it notified the Special Court and the Special Public Prosecutors accordingly. However, it was at this point, in the spring of 2013, that Italy and the two marines embarked on a concerted effort to thwart the judicial process that they themselves had put in motion.

First, Italy approached the Supreme Court challenging the decision of the Government of India to entrust the NIA with the investigation. The Supreme Court declined to intervene in the matter because it considered that it had already given appropriate directions in its order of 18 January 2013. After rehearsing the substance of the order it had given at that time, the Supreme Court noted that steps had been taken pursuant to its order to appoint the court of competent jurisdiction – the Special Court. In respect to the investigation, the Supreme Court indicated that it was for the Government of India to take a decision on the matter with the important caveat that, if there was any jurisdictional error on the matter, the accused marines could question it before the appropriate forum. Once again, Italy's and the marines' rights were fully preserved.

During this period, Italy threw down two further roadblocks, which significantly delayed the investigative and judicial process. The first roadblock involved Italy's initial refusal to honour its commitment to return the two marines to India after they had been granted leave by the Indian courts to return to Italy for four weeks, ostensibly to vote in the Italian elections. That happened in early 2013. Professor Pellet will come back to that incident in a moment. The second involved Italy's failure to live up to another undertaking it made to India to return the four other marines that had been stationed on the vessel to India in the event they were needed as part of the investigation of the incident.

Let me explain what happened in this connection. In 2012, the year the incident took place, the Government of Italy had provided India with a formal Statement as part of the

arrangements for securing the release of the *Enrica Lexie*, its crew and the other four marines that had been stationed on the ship. That Statement at tab 16, which was annexed in our Written Observations contained the following commitment, which is on the screen:

> The Republic of Italy is agreeable to give an assurance to the Supreme Court of India that if the presence of these marines is required by any Court or in response to any summons issued by any Court or lawful authority, then (subject to their right to challenge such summons or the legality of any such order for production) the Republic of Italy *shall ensure their presence before an appropriate court or authority.*

On 10 May 2013, the NIA sent a note to the Indian Ministry of External Affairs requesting the Ministry to issue notices to Italy via diplomatic channels for the four marines to come to India to give statements in connection with the shooting of the fishermen. The Ministry, in turn, sent a Note Verbale to Italy three days later enclosing the Notices to Witness that had been issued by the NIA.

Italy responded by a Note Verbale dated 15 May 2013. In its response, Italy referred to the request by the NIA and expressed "its willingness and commitment to extend all possible co-operation to the investigation in order to establish the unvarnished true and complete facts in the case".

Italy also stated in the Note that it was fully committed to an expeditious completion of the investigation – fully committed to an expedition completion of the investigation. However, the Italian Note went on to say that the Italian Embassy had been informed that the four marines were presently deputed on sensitive postings and that it would be difficult to relieve them of their duties immediately in order to present them for examination by the NIA. Italy in the Note thereafter proposed alternatives for examining the four marines that would not involve their return to India.

India objected by its own Note Verbale of 5 June 2013, in which it informed Italy that its proposals were contrary to its earlier undertaking – the Italian Statement. The matter went back and forth for several months without being resolved. Despite its previous assurance that Italy "shall ensure" the presence of the marines, and the Italian Note that said that the marines could not be delivered immediately, Italy refused to budge. Yet, it defies belief that the marines could not be made available at any point during the six-month period from May 2013 to November 2013. In those circumstances, when six months had passed and Italy had still not lived up to its commitment to ensure the presence of the marines, the NIA was left with no alternative but to question the marines by videoconference in November 2013. Not only did that disrupt and delay the investigation, but it constituted another example of a broken promise on Italy's part.

This morning, Sir Daniel argued that Italy had fulfilled its undertaking because interview by videoconferencing is a legally acceptable procedure under Indian law. That misses the point. Italy had committed to ensure the presence of the four marines in India. Italy did not honour that commitment.

This development also shows the cynicism on Italy's part with respect to India's investigation. None of the Italian Notes concerning the questioning of the four marines ever questioned the authority of the NIA to carry out the investigation. To the contrary, Italy said it was committed to the expeditious completion of the investigation and it eventually allowed the four marines to be questioned by investigating officers from the NIA by videoconference. There was no problem with the NIA questioning these marines and carrying out the investigation, at least when you read the Notes Verbales of Italy during this period in 2013. However, what our opponents do not tell you is that at the very same time this was happening

Italy and the two other marines were challenging the NIA's authority and right to conduct the investigation before the Indian Supreme Court; and by doing so, it was Italy and the marines who were responsible for the fact that charges could not be brought against the marines. Charges could only be brought after the investigative report was submitted to the prosecutor; but the NIA was prevented from submitting that report because the matter was being challenged by Italy and the marines before the Supreme Court. To attempt to lay the blame for that situation at India's door, as Counsel tried to do this morning, is, I suggest, perverse.

Mr President, Members of the Tribunal, I now come to another critical element of the proceedings before the Indian Supreme Court that Italy's written pleadings avoided discussing. This concerns an important application that the two marines filed with the Supreme Court in March 2014, and which the two marines subsequently decided to ask the Supreme Court to defer consideration of just a month ago, on 4 July 2015, shortly before Italy filed its Request for provisional measures. As I shall show, the manner in which the marines framed their application, and then 16 months later asked the Supreme Court to defer consideration of it, totally undermines Italy's argument that a situation of urgency exists that risks causing it irreparable prejudice if India's judicial proceedings are not enjoined. The salient facts of this episode are as follows:

On 6 March 2014, the two marines filed a petition under article 32 of India's Constitution before the Supreme Court. This petition came to be known as Writ No. 236. It is a very important document. While Italy did not deem fit to produce it in its written pleadings, the Tribunal will find a copy filed under Annex 40 of India's Written Observations.

In the petition, the applicants, the marines, complained that it had been over one year since the 18 January 2013 judgment of the Supreme Court ordering the establishment of a Special Court, during which time the investigating agency, the NIA, had not been able to submit its report before any court. As a result, so the Petition asserted, the two marines had been detained in India without any case being presented against them. This is what they said in March 2014, and it sounds rather similar to what we heard this morning.

Significantly, Italy apparently did not consider that this presented a sufficiently urgent situation to warrant filing of an Annex VII notification against India or a request for provisional measures.

That being said, what is even more striking about the petition is the relief that the two marines sought from the Supreme Court, which you will find under tab 17 of your folders, which is an extract of their petition under Writ 236.

First, the petitioners asked the Supreme Court to declare that the investigation and prosecution by the NIA of the two marines was illegal, invalid and null and void. This was no more than a repeat of what Italy had submitted to the Court earlier in 2013. However, the petition failed to point out that the reason why the NIA had not been able to file its report was because Italy had delayed its preparation by refusing to make the four marines available for questioning in India as Italy had earlier undertaken to do, and because Italy and the marines had also earlier challenged the right of the NIA to carry out the investigation.

In the petition the marines also asked the court to declare that the designation of the Special Court to try the case by the Ministry of Home Affairs was illegal and without jurisdiction, and somehow in conflict with the Supreme Court's Order of 18 January 2013. But the Ministry had acted in full compliance with the instructions of the Supreme Court in that 2013 order.

In addition, the marines requested the Supreme Court to declare that they – the marines – had functional and sovereign immunity from being prosecuted in India, and thus to order their discharge.

Let me pause here for a moment so that the Tribunal can appreciate the significance of this application, and the repercussions it has for Italy's request that the Tribunal enjoin India from exercising any further jurisdiction in the matter.

In its Writ 236, the two marines first asked the Supreme Court of India to quash, suppress, the NIA investigation. Yet, in 2013, Italy had said just the opposite. In its Notes Verbales to India, Italy had assured India of its willingness and commitment to extend all possible cooperation in the investigation so that it could be expeditiously completed. A complete *volte face*. Second, the marines asked the Supreme Court to rule on the question whether the Special Court had jurisdiction to hear the case against them. Now, however, in these proceedings Italy is asking your Tribunal to order the opposite: namely, that India refrain from exercising any jurisdiction to decide that question of jurisdiction, when it was the marines themselves who had asked the Supreme Court to do so. Third, the marines also asked the Supreme Court to decide the question whether the marines had immunity. Yet, once again, in its Request for provisional measures, Italy is now seeking the reverse: that the courts of India should abstain from exercising any further jurisdiction over this question – over a question that the marines themselves had asked the court to decide. That borders on bad faith; and it certainly does not justify the prescription of provisional measures.

But that is not the end of the story, for in response to Writ No. 236 introduced by the marines, on 28 March 2014, the Supreme Court ordered the Special Court proceedings to be placed in abeyance so that the Writ could be fully considered. You will find the relevant order of the Supreme Court staying the Special Court proceedings under tab 3 of your folders.

That remains the case today. The proceedings before the Special Court are in abeyance. There is no prospect that the stay of those proceedings will be lifted, or that the prosecution will present the results of the NIA investigation, which has been blocked by the application of Italy and the marines, that it will present that report to the Special Court, or that the defendants will have their opportunity to answer that case. There is no chance that that is going to happen in the near future, and certainly not before the Annex VII arbitral tribunal is set up and running.

Sir Daniel's alarmist statement this morning that criminal proceedings against the marines are imminent and that this has crystallized the situation of urgency is entirely untrue. It is not what the situation is, and it is not what the situation is because of Italy's and the marines' applications before the Indian courts. Apart from the dilatory tactics that Italy and the marines have engaged in over the past two and a half years, there is no risk that irreparable prejudice will be caused to Italy's rights by the continued exercise of jurisdiction by India's judicial and administrative authorities.

And there is still more. For, at the marines' urging, a hearing had been scheduled for 13 July 2015 to hear arguments on Writ No. 236. On 4 July, however, the marines filed a new application before the Supreme Court asking the Court to defer hearing the Writ until after the Annex VII arbitral tribunal had decided the case. In other words, having complained of delays and having introduced a petition in 2014 asking the Supreme Court of India to rule on the questions of jurisdiction and immunities, the marines now have changed their mind and want the Supreme Court to abstain from considering that petition.

In response to this new application, the Court indulged the marines once more by cancelling the 13 July hearing and allowing both parties to file pleadings over the ensuing weeks. But before India could even file its response, Italy introduced its Request for Provisional Measures before this Tribunal.

In short, Italy's position is totally disingenuous. On the one hand, sixteen months ago the marines asked the Supreme Court of India to decide two of the essential questions in the case: the questions of jurisdiction and immunity. On the other hand, just before the Supreme Court was scheduled to convene a hearing on that matter, the marines came before you and said, "no, we want to defer those proceedings," and Italy came with its Request for provisional

measures, saying that an injunction is necessary because these questions should be left to the Annex VII arbitral tribunal.

At its most generous, these manoeuvres demonstrate that the timing of Italy's Request for provisional measures is totally arbitrary and that there is no situation of urgency justifying Italy's first submission. Looked at more objectively, they constitute, really, an abuse of the Indian judicial process and they put the lie to Italy's accusation that there has been a failure of the Indian judicial process or somehow a failure in due process. That is simply not the case.

To sum up on the question of urgency with respect to the first submission, nothing has changed since March 2014 that has created a situation of urgency. The Special Court proceedings have been in abeyance for 16 months. The last diplomatic note that Italy sent to India was in April 2014. There is absolutely no evidence to support Counsel's allegation that it was only in May of this year that it became apparent that a diplomatic settlement of the dispute was not possible. Nothing happened in May to change what had been the status quo over the previous 14 months. Moreover, the recent *démarche* created on behalf of the marines in connection with their request to the Supreme Court to defer a hearing on the issues that the marines had themselves introduced is entirely of their own making. The timing of Italy's Notification as well as its Request for provisional measures is thus entirely arbitrary; it is contrary to the requests that the marines themselves had made to the Supreme Court; and it is artificial in asserting urgency when none exists.

In the last few minutes I have, Mr President, I need to say a few words about the question of irreparable prejudice and the need to preserve the rights of the Parties, including the rights of India.

Italy's Request is premised on the assumption that "Italy's rights will suffer irreversible damage" if India is allowed to continue to exercise jurisdiction over the marines and the incident. I have shown that this is simply not the case. Italy and its marines have used over and over again – indeed one might say abused – the Indian judicial process. Given the impartial way in which India's Supreme Court has treated their applications, coupled with the nature of the applications that the marines have themselves made to the Court, there is no failure of due process whatsoever and no risk of irreparable harm to Italy's rights and no need to enjoin India from the ability to continue exercising its jurisdiction, despite the impediments that Italy and the marines have sought to place into the Indian proceedings.

What Italy blithely ignores is that, if anything, India possesses even more important rights that need to be preserved. The two fishermen have already suffered the most irreversible prejudice that can be imagined. They have been killed as a result of the actions of the marines. This morning Sir Daniel suggested that that was prejudging the issue. Where does my learned friend think that the gunfire came from? And why did Italy open criminal proceedings against the marines for the crime of murder? No amount of reparation can bring back the dead fishermen or bring solace to their families and loved ones. We do not need medical certificates to make that point quite obvious. The families and the loved ones of the victims will continue to suffer severe emotional harm until the case is tried and decided. What can be preserved and what should be preserved, India submits, is the expectation of these individuals that justice is done and that the Indian courts will be able to continue the judicial process that has been set in motion despite Italy's and the marines' repeated attempts to disrupt it. The right to see through this process is a fundamental right of India, and a responsibility it owes to the victims of this tragic event, and Italy's first submission has the effect of trampling on those rights. India respectfully submits that it should be rejected.

Italy argues that if India's courts and administrative authorities are allowed to continue exercising jurisdiction, Italy will suffer irreversible harm because of the – and I quote from Italy's written pleadings – "risk of prejudice to the carrying out of future decisions of the Annex VII arbitral tribunal".

That assertion is offensive to India and has no merit. India's courts have acted in an exemplary fashion. The same really cannot be said of Italy's and the marines' own conduct. There are no grounds for the spectre raised by Italy that India and its courts will not act appropriately in the future. India respects international law. That includes the commitments India has entered into under the provisions of UNCLOS, including Annex VII. As the Tribunal is well aware, article 11 of Annex VII provides that the award of the arbitral tribunal will be final and binding, and that it shall be complied with by the Parties to the dispute. That is more than sufficient meet Italy's concerns.

Mr President, distinguished Members of the Tribunal, that brings me to the end of my presentation. I have shown why Italy's first submission does not meet the requirements for the prescription of provisional measures or result in the preservation of India's rights, not to mention the rights of the victims, the real victims here, the fishermen and their families.

I thank the Tribunal for its attention, and would ask, Mr President, that the floor now be given to Professor Pellet.

**THE PRESIDENT:** Thank you, Mr Bundy.

I now give the floor again to Mr Pellet to continue the oral argument of India.

EXPOSÉ DE M. PELLET
CONSEIL DE L'INDE
[TIDM/PV.15/A24/2/Rev.1, F, p. 34–45]

Merci Monsieur le Président.

Monsieur le Président, Madame et Messieurs les juges, par sa seconde demande, l'Italie prie le Tribunal de prescrire que :

> *(Read in English)*
> ensure that restrictions on the liberty, security and movement of the Marines be immediately lifted to enable Sergeant Girone to travel to and remain in Italy and Sergeant Latorre to remain in Italy throughout the duration of the proceedings before the Annex VII Tribunal.

*(Poursuit en français)* Indépendamment de l'incompétence *prima facie* du tribunal de l'annexe VII pour en connaître – que j'ai évoquée avant la pause – cette demande se heurte à plusieurs objections qui vous interdisent d'y faire droit.

Madame et Messieurs les juges. Comme la première, elle n'est justifiée par aucune urgence I.) ; sans être nécessaire pour préserver les droits allégués par l'Italie dans la présente affaire, elle compromettrait gravement ceux de l'Inde et elle constituerait un « pré-jugement » d'autant plus contestable que le Tribunal de céans n'est pas compétent pour se prononcer sur le fond de l'affaire II.).

Monsieur le Président, l'allègement du contrôle judiciaire bénin et bienveillant, imposé à MM. Girone et Latorre ne se justifie en aucune manière et n'a à l'évidence rien d'urgent.

Je vais m'employer à le montrer mais, suite à ce que nous avons entendu ce matin, permettez-moi une remarque liminaire, Monsieur le Président : ces deux individus sont accusés de meurtres et nul ne soutient que cette accusation soit faite à la légère – pas même l'Italie, qui prétend, sans le démontrer, avoir diligenté une enquête criminelle. Le placement sous contrôle judiciaire est la conséquence, absolument normale, d'une telle situation et il est inévitable que ceci entraîne un certain inconfort et du stress pour les intéressés et leurs proches. Le meurtre des deux pêcheurs indiens en a entraîné aussi et, même s'il est toujours hasardeux de peser la souffrance des hommes, je me permets de suggérer que leur disparition irrémédiable est assurément plus tragique que la menace d'un procès.

Monsieur le Président, avant de montrer que l'urgence invoquée par l'Italie est chimérique, je pense qu'il n'est pas mauvais de rappeler brièvement le contexte factuel :

Après l'enquête préliminaire sur le meurtre des deux pêcheurs indiens, MM. Girone et Lattore ont été arrêtés par la police de l'Etat du Kerala le 19 février 2012[1]. Le 19 avril, avant même la fin de l'enquête, les accusés et l'Italie ont saisi la Cour suprême pour contester la légalité de celle-ci[2]. Une fois le rapport d'enquête bouclé (qui confirmait les charges retenues contre eux), le 15 mai 2012[3], les accusés ont été présentés, le 30 mai suivant à la Haute Cour du Kerala, qui a ordonné leur mise en liberté conditionnelle[4]. Les accusés, libérés de prison, auraient pu et dû être jugés très rapidement si, conjointement avec l'Italie, ils n'avaient pas contesté la compétence de la Haute Cour du Kerala et, dès le 19 avril 2012, saisi la Cour suprême[5]. Ceci ne les a pas empêchés de demander à la Haute Cour un assouplissement des conditions de leur libération sous caution et la permission d'aller passer deux semaines en Italie

[1] Voir OE, par. 2.5.
[2] Voir requête (Writ Petition No. 135) de 2012, 19 avril 2012 (N., annexe 16).
[3] Voir procès-verbal (charge sheet) de la police du Kerala, 15 février 2012 (OE, annexe 3). Voir aussi OE, par. 2.5.
[4] Voir ordonnance de la Haute Cour du Kerala, 30 mai 2012 (OE, annexe 11). Voir aussi OE, par. 2.5.
[5] Voir requête (Writ Petition No. 135) de 2012, 19 avril 2012 (N, annexe 16).

à l'occasion des vacances de Noël – la Cour a fait droit à leur demande le 20 décembre[6] ; ils sont revenus en Inde le 3 janvier 2013, comme prévu.

Il n'en n'a pas été de même à la suite de la décision, de la Cour suprême cette fois, du 22 février faisant droit à leurs demandes de retourner en Italie pour quatre semaines afin d'y voter, à la condition expresse qu'ils reviendraient en Inde à l'expiration de cette période généreusement calculée[7] ; malgré la garantie en ce sens donnée par l'ambassadeur d'Italie, ils ne sont revenus qu'à la suite d'une forte tension diplomatique entre les deux pays[8].

Cela n'a pas empêché la Cour suprême de faire une nouvelle fois droit à la demande de M. Latorre de le dispenser de l'obligation de faire périodiquement rapport au poste de police suite à ses problèmes de santé[9]. La Cour suprême a également fait droit à la demande du même accusé de pouvoir se rendre en Italie pour des raisons médicales pour quatre mois – accordé par une ordonnance du 12 septembre 2014[10]. Même chose pour les deux demandes suivantes de M. Latorre d'étendre la période durant laquelle il pouvait demeurer en Italie – extension de trois mois accordée par l'ordonnance de la Cour suprême du 14 janvier 2015[11] ; nouvelle extension, de trois mois également, le 9 avril 2015[12] ; et même après la notification du 26 juin dernier, la Cour suprême a encore étendu cette autorisation à six mois supplémentaires[13].

Dans aucune de ces circonstances l'Inde ne s'est opposée à l'assouplissement des conditions de contrôle judiciaire des accusés, dans aucune de ces circonstances.

Contrairement à ce que l'Italie veut faire croire[14], l'Union indienne ne s'est pas non plus opposée à la demande de M. Girone du 9 décembre 2014[15] et pour une raison péremptoire : cette demande a été formellement retirée ainsi que le relève l'ordonnance de la Cour suprême du 16 décembre 2014[16]. Quant à sa requête du 4 juillet 2015, l'Inde a été invitée à y réagir par l'ordonnance de cette même Cour du 13 juillet 2015, qui prévoit une audience pour les examiner le 26 de ce mois.

Ces faits parlent d'eux-mêmes : aucune urgence n'impose de supprimer purement et simplement le contrôle judiciaire (très léger) auxquels sont astreints les deux marines italiens accusés de meurtre, y inclus leur maintien indéfini – pour M. Latorre – ou leur retour – pour M. Girone – en Italie.

S'agissant du premier, il y est déjà. Certes, l'autorisation d'y demeurer n'a été prolongée par la Cour suprême le 13 juillet dernier « que » pour six mois supplémentaires[17], alors que lui-même et l'Italie demandaient qu'il en soit ainsi jusqu'à la fin de la procédure devant le tribunal de l'annexe VII[18] – ce qui, soit dit en passant, ne laissait pas augurer d'une

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[6] Voir Haute Cour du Kerala, ordonnance autorisant MM. Latorre et Girone à se rendre en Italie pour deux semaines (vacances de Noël), 20 décembre 2012 (OE, annexe 13). Voir aussi OE, par. 2.15.

[7] Cour suprême indienne, ordonnance autorisant MM. Latorre et Girone à se rendre en Italie pour quatre semaines (élections), 22 février 2013 (OE, annexe 16).

[8] Voir OE, par. 2.16 à 2.18.

[9] Cour suprême indienne, ordonnance du 8 septembre 2014 (OE, annexe 42). Voir aussi OE, par. 2.19.

[10] Cour suprême indienne, ordonnance autorisant M. Latorre à se rendre en Italie pour quatre mois afin d'y suivre un traitement médical, 12 septembre 2014 (OE, annexe 43). Voir aussi OE, par. 2.20.

[11] Cour suprême indienne, ordonnance du 14 janvier 2015 accordant une prorogation au sergent Latorre (N, annexe 30). Voir aussi par. 2.22.

[12] Cour suprême indienne, ordonnance du 9 avril 2015 accordant une nouvelle prorogation au sergent Latorre (N, annexe 31). Voir aussi par. 2.23.

[13] Voir Cour suprême indienne, ordonnance du 13 juillet 2015 (requête de l'Italie (ci-après « R »), annexe F) et OE, par. 2.24 et 2.25.

[14] Voir R, par. 49.

[15] Voir demande d'allègement des obligations liées au contrôle judiciaire déposée au nom de maître Salvatore Girone, 9 décembre 2014 (N, annexe 22).

[16] Voir demande d'allègement des obligations liées au contrôle judiciaire déposée au nom de maître Salvatore Girone, 9 décembre 2014 (N, annexe 22).

[17] Cour suprême indienne, ordonnance du 13 juillet 2015 (R, annexe F).

[18] Requête en référé (Interim Application No. 13) de 2015 in SLP (C) No. 20370/2012 (OE, annexe 55).

attitude, je dirais, très « allante » de l'Italie en vue de faire aboutir cette procédure rapidement, et les propos de Sir Michael ce matin ne sont pas de nature à rassurer à cet égard *(Read in English)* "We do not know when the Annex VII tribunal will be constituted, or when it will be in a position to act."

*(Poursuit en français)* Cet argument n'est pas fondé. D'après les calculs de mon diligent assistant, Benjamin Samson, en moyenne la constitution d'un tribunal de l'annexe VII prend à peine trois mois. Au demeurant, rien ne justifie une telle extension indéfinie du séjour de M. Latorre en Italie et évidemment pas l'urgence : il peut rester en Italie jusqu'au 15 janvier prochain (c'est-à-dire en tout état de cause certainement après que le tribunal de l'annexe VII aura été constitué) et tout concourt à établir que, si son état de santé le justifiait, la Cour suprême ne manquera pas d'autoriser l'extension de son séjour en Italie dans la mesure nécessaire. Sans discuter le contenu du dossier médical que l'Italie a joint confidentiellement au dossier, je me permets de vous renvoyer, Madame et Messieurs du Tribunal, aux passages de celui-ci, de ce dossier confidentiel, cités au paragraphe 3.43 de nos Observations écrites, qui établissent que, contrairement à ce qui vous a été dit, l'état de santé de l'accusé est non seulement évolutif, ce que Sir Daniel a concédé ce matin *(Read in English)* "as a static consideration". *(Poursuit en français)* Contrairement à ce que lui et ses collègues ont dit que son état va en s'améliorant[19]. Ceci justifie un réexamen périodique et n'impose nullement une extension indéfinie dans l'urgence.

Quant à M. Girone, son sort est infiniment moins tragique et pitoyable que l'Italie veut le faire croire : sa seule obligation est de pointer une fois par semaine au poste de police situé à trois kilomètres de la résidence de l'ambassadeur d'Italie[20] dans laquelle il coule des jours paisibles. Sa famille peut lui rendre visite comme cela s'est produit à de nombreuses reprises. Son fils et sa femme lui ont rendu visite huit fois. Sa sœur six fois. Ses parents cinq fois. Et les chiffres concernant les visites de sa famille, à M. Latorre, lorsqu'il était assigné à résidence en Inde, sont à l'avenant. Je relève d'ailleurs que depuis le retour de M. Girone à Delhi, en mars 2013, à la suite des quatre semaines – généreusement accordées mais indument prolongées – qu'il a pu passer en Italie pour s'acquitter de ses devoirs civiques, M. Girone n'a formulé aucune demande de modification du régime de contrôle judiciaire auquel il était astreint avant le 9 décembre 2014[21]. A cette date, il a demandé l'autorisation de retourner en Italie – mais, contrairement à l'affirmation répétée de l'autre partie, la Cour suprême n'a pas rejeté cette requête : c'est M. Girone lui-même qui l'a retirée lors de l'audience ; la Cour suprême indienne s'est bornée à prendre acte de ce retrait par son ordonnance du 16 décembre 2014[22]. Ni le délai de vingt-deux mois qui s'est écoulé entre le retour de M. Girone en Italie et sa demande de décembre 2014 ni le retrait de cette demande (avant toute réaction de l'Inde) ne témoignent d'une urgence particulière. Or rien n'a changé depuis lors en ce qui concerne la situation de l'accusé, sinon la notification italienne du 26 juin qui ne peut raisonnablement avoir en elle-

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[19] Voir OE, par. 3.43, note 138, renvoyant notamment à la demande d'allègement des obligations liées au contrôle judiciaire déposée au nom du maître principal Massimiliano Latorre, 5 septembre 2014, p. 28 et 31 (N, annexe 21) ; résumé de dossier médical rédigé par le Dr. Rajashekar Reddi, Consultant principal et Chef du service neurologie, Max Institute of Neurosciences, Hôpital Max Super Speciality, 9 septembre 2014, p. 4 (R, annexe K) ; rapport clinique du Docteur Mendicini, Médecin spécialiste (neurologie), Hôpital militaire de Taranto, 14 octobre et 14 novembre 2014, p. 1 (N, annexe 24) ; rapport clinique du Docteur Mendicini, Chef du service neurologie, Hôpital militaire de Taranto, 2 janvier 2015, p. 1 (R, annexe M) ; et Rapport clinique du Docteur Mendicini, Chef du service neurologie, Hôpital militaire de Taranto, 31 mars 2015, p. 1 (R, annexe N).

[20] http://indianexpress.com/article/india/india-others/the-plight-of-italian-marines-family-visits-cafe-outings/.

[21] Voir demande d'assouplissement du régime de contrôle judiciaire présentée pour le compte du maître principal Massimiliano Latorre, 9 décembre 2014 (N, annexe 22).

[22] Voir Cour suprême indienne, ordonnance du 16 décembre 2014 enregistrant le retrait des demandes (N, annexe 29).

même aucun effet en ce qui concerne l'urgence de la levée du contrôle judiciaire auquel il est astreint.

Ceci n'a cependant pas empêché M. Girone d'introduire, le 4 juillet 2015, une requête demandant l'arrêt de toute la procédure jusqu'à la décision du tribunal de l'annexe VII[23]. Ceci concerne davantage la première mesure conservatoire demandée – dont maître Bundy a établi le mal-fondé – mais n'a, en tout état de cause, aucune espèce d'incidence en ce qui concerne l'urgence qu'il y aurait à vous prononcer sur la seconde.

Monsieur le Président, Madame et Messieurs les juges, aucune urgence ne justifie la seconde mesure conservatoire demandée par l'Italie – et, *a fortiori*, elle ne peut invoquer aucune urgence « aggravée » pouvant motiver la saisine du Tribunal de céans sans attendre la constitution du tribunal de l'annexe VII. Cette raison est suffisante pour entraîner l'irrecevabilité de la demande. Elle n'est pas la seule.

En effet, si vous y faisiez droit, Madame et Messieurs les juges, vous préjugeriez les droits de l'Inde en cause dans cette affaire et leur porteriez une atteinte irrémédiable.

Je projette à nouveau, pendant un instant, la seconde mesure conservatoire demandée par l'Italie – celle qui nous intéresse pour l'instant. Elle vise à obtenir que vous prescriviez à l'Inde de « prendre toutes les mesures nécessaires afin d'assurer que les restrictions à la liberté, à la sécurité – comme si cette sécurité était menacée ! – et à la liberté de mouvement des deux marines soient levées immédiatement afin qu'ils puissent se rendre en Italie et y rester jusqu'à la fin de la procédure devant le tribunal de l'annexe VII ». En clair, il s'agit de lever purement et simplement toutes les mesures de contrôle judiciaire, particulièrement douces, auxquels les accusés – accusés de meurtres je le rappelle – sont soumis.

Or je constate que, par la demande qu'elle formule *sub littera* (*d*), l'Italie prie la Cour de décider que – je cite : « l'Inde doit cesser d'exercer toute forme de juridiction sur l'incident de l'*Enrica Lexie* et les Marines italiens, y compris toute mesure restrictive affectant le sergent Latorre et le sergent Girone » [*including any measure of restraint with respect to Sergeant Latorre and Sergeant Girone*]. Mais justement, si le Tribunal de céans faisait droit à la demande italienne, le tribunal de l'annexe VII n'aurait plus rien à décider à cet égard : les deux accusés couleraient des jours paisibles en Italie sans faire l'objet d'aucune mesure restrictive puisque celles-ci auraient été levées par votre Tribunal. C'est bien d'un pré-jugement qu'il s'agirait, Monsieur le Président – ce qui viderait de toute substance cette demande – au fond, c'est elle qui est affichée – au fond de l'Italie.

Une telle décision serait incompatible avec la fonction même des mesures conservatoires, qui est de préserver les droits des Parties dans l'attente de l'arrêt sur le fond, pas de préfigurer celui-ci ou d'aboutir à ce qu'il n'y ait, *in fine*, plus rien à décider. Comme le Tribunal l'a constamment dit, une ordonnance prescrivant des mesures conservatoires ne doit préjuger : « En rien la question de la compétence du tribunal arbitral prévu à l'annexe VII pour connaître du fond de l'affaire, ni aucune question relative au fond lui-même »[24].

Et la Chambre spéciale constituée dans l'affaire *Ghana/Côte d'Ivoire* l'a encore rappelé tout récemment : « L'ordonnance ne doit pas préjuger de la décision au fond[25]. Cette exigence est également conforme à la jurisprudence constante de la C.I.J. »[26].

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[23] Demande de sursis à statuer sur la requête présentée au titre de l'article 32, 4 juillet 2015 (R, annexe E).

[24] *« ARA Libertad » (Argentine c. Ghana), mesures conservatoires, ordonnance du 15 décembre 2012, TIDM Recueil 2012*, par. 106. Voir aussi *Navire « Louisa » (Saint-Vincent-et-les Grenadines c. Royaume d'Espagne), mesures conservatoires, ordonnance du 23 décembre 2010, TIDM Recueil 2008-2010*, p. 70, par. 80, ou *« Arctic Sunrise » (Royaume des Pays-Bas c. Fédération de Russie), mesures conservatoires, ordonnance du 22 novembre 2013, TIDM Recueil 2013*, p. 224, par. 100.

[25] Chambre spéciale, *Délimitation de la frontière maritime dans l'océan Atlantique (Ghana/Côte d'Ivoire), mesures conservatoires, ordonnance du 25 avril 2015,* par. 98.

[26] Citée à la note 100 des OE.

Au surplus, Madame et Messieurs les juges, deux éléments supplémentaires doivent, je pense, vous inspirer une prudence toute particulière en la matière :

- en premier lieu, et surtout en prescrivant la mesure conservatoire que demande l'Italie, vous ne préjugeriez pas seulement le fond de l'affaire en sa faveur mais vous compromettriez gravement – et sans doute irrémédiablement – ceux que l'Inde entend faire valoir ; et,

- en second lieu, il ne serait pas convenable que le Tribunal de céans, qui n'est pas, dans cette affaire, le juge du fond « naturel » si je puis dire, se substitue au tribunal de l'annexe VII, dont l'Italie a demandé la constitution et qui, seul a, en principe, vocation pour se prononcer au fond.

En ce qui concerne le premier point, il s'agit juste d'un rappel – mais il concerne une particularité d'importance. Vous êtes saisis en l'espèce, Madame et Messieurs les juges, d'une certaine manière « par défaut », parce que l'instance en principe compétente pour se prononcer sur l'affaire n'a pas encore été constituée. Bien sûr, ceci n'empêche pas les Parties de décider, d'un commun accord – comme ceci a été le cas dans *Bangladesh c. Myanmar*, de porter l'affaire devant le Tribunal de céans ou, le cas échéant, devant une chambre spéciale, comme l'ont décidé la Côte d'Ivoire et le Ghana dans l'affaire que je viens d'évoquer ; mais tant que ce n'est pas le cas – et ce ne l'est pas pour l'instant – votre Tribunal doit, je crois, agir avec une prudence et une retenue particulières – et ceci d'autant plus qu'il s'agit d'apprécier des faits qui, sauf accord contraire des Parties, seront discutés et jugés dans une autre enceinte.

Sans doute, en vertu du paragraphe 5 de l'article 290 de la Convention sur le droit de la mer, une fois constitué, le tribunal saisi du différend, dans notre affaire un tribunal de l'annexe VII, pourrait-il en principe « modifier, rapporter ou confirmer ces mesures conservatoires ». Mais vous avouerez, Monsieur le Président, que ce n'est pas particulièrement commode : cela supposerait que les Parties (à leur initiative ou à celle de ce Tribunal) plaident à nouveau leur cas devant celui-ci, en en faisant une sorte d'organe d'appel de ce qu'aurait décidé votre Haute Juridiction. Ce n'est ni très satisfaisant ni très sain et il y a d'autant moins de raison de procéder ainsi que, comme tant aussi bien Rodman Bundy que moi l'avons montré, la précipitation avec laquelle l'Italie vous a saisis n'est aucunement justifiable – sinon peut-être par des « raisons » (je mets le mot entre guillemets) de politique intérieure ou électoralistes auxquelles, bien sûr, Madame et Messieurs du Tribunal, vous ne sauriez vous arrêter.

Par ailleurs, comme je l'ai dit, il y a une autre raison qui appelle le Tribunal de céans à faire preuve de retenue.

On ne saurait trop insister sur le fait que les mesures conservatoires que prescrit un organe juridictionnel, quel qu'il soit, visent à préserver les droits des deux Parties. Comme la Chambre spéciale dans *Ghana/Côte d'Ivoire*, le Tribunal doit « se préoccuper de sauvegarder les droits que son arrêt au fond pourrait éventuellement reconnaître *à chacune des Parties* »[27].

Sir Michael a cité ce passage ce matin et Rodman Bundy l'a souligné à son tour. Or, en faisant droit à la demande de l'Italie vous iriez bien au-delà de la préservation des droits de ce pays : vous anticiperiez leur reconnaissance dans l'arrêt au fond ; et, du même coup, vous compromettriez toute possibilité pour l'Inde de voir les siens reconnus ou, en tout cas, effectivement mis en œuvre.

On a déjà beaucoup insisté, Monsieur le Président, sur les manquements répétés de l'Italie à sa parole souveraine – à la parole d'un Etat souverain. Croyez bien que nous le faisons sans plaisir mais c'est un élément clé – sur lequel d'ailleurs l'Italie a gardé un silence pudique et total dans la notification du 26 juin, comme dans la requête du 21 juillet, et ses avocats, ce matin, ont fait ce qu'ils pouvaient pour contourner le problème :

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[27] Chambre spéciale, *Délimitation de la frontière maritime dans l'océan Atlantique (Ghana/Côte d'Ivoire), mesures conservatoires, ordonnance du 25 avril 2015*, par. 40.

Je me réfère en premier lieu à l'assurance donnée par une déclaration solennelle faite devant la Cour suprême de l'Inde selon laquelle l'Italie :

> *(Read in English)*
> … agreeable to give an assurance to the Supreme Court of India that if the presence of these marines is required by any Court or in response to any summons issued by any Court or lawful authority, then (subject to their right to challenge such summons or the legality of any such order for production) Italy shall ensure their presence before the appropriate court or authority.[28]

*(Poursuit en français)* Cette déclaration, projetée tout à l'heure par Rodman Bundy, figure sous l'onglet 16 de vos dossiers, Madame et Messieurs les juges ; et j'attire votre attention sur le mot « présence » qui y figure deux fois – n'en déplaise à Sir Daniel, il est difficilement compatible avec la simple tenue d'une téléconférence.

L'autre engagement solennel pris par l'Italie, et qu'elle n'a pas tenu, l'a été, également devant la Cour suprême indienne, par le biais d'un *affidavit* de l'ambassadeur d'Italie appuyant l'engagement des accusés de revenir en Inde après les quatre semaines de séjour en Italie dont ils demandaient à bénéficier afin de pouvoir voter lors des élections de février 2013 ; c'est à cette condition expresse, le retour, que la Cour suprême, ayant pleine confiance dans la parole d'un Etat souverain, fit droit à la demande de MM. Latorre et Girone :

> *(Read in English)*
> The said respondent [i.e. Daniele Mancini, Ambassador of Italy in India] has also affirmed an Affidavit of Undertaking on 9th February, 2013, whereby he has taken full responsibility for the petitioner Nos. 1 and 2 [that is the two marines] to proceed to Italy in the custody and control of the Government of Italy and to ensure their return to India in terms of this Order.[29]

And I repeat: "to ensure their return to India".

*(Poursuit en français)* Dans aucun de ces deux cas, l'Italie n'a respecté ses promesses souveraines. Les quatre autres fusiliers ne se sont pas rendus en Inde pour être entendus par l'Agence nationale d'instigation chargée de l'enquête, l'Italie ayant affirmé que – je cite, note verbale :

> Les quatre fusiliers marins italiens – bizarrement, les quatre en même temps – sont actuellement en poste en des lieux sensibles et il serait difficile de les relever de leurs fonctions[30].

Quant aux accusés, certes, comme l'a relevé Sir Daniel ce matin, ils sont revenus en Inde, après leurs quatre semaines de « congé électoral », mais seulement à la suite d'une période

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[28] Assurances given by the Republic of Italy to the Supreme Court of India ensuring that Mr Renato Voglino, Mr Massimo Andronico, Mr Alessandro Conte and Mr Antonio Fontana will remain at the disposal of India's courts and authorities, 2012 (WO, Annex 9).

[29] Supreme Court of India, Order permitting Mr Latorre and Mr Girone to return to Italy for a period of four weeks (elections), 22 February 2013, para. 5 (WO, Annex 16).

[30] Note verbale No. 198/1097 adressée au Ministère indien des affaires étrangères par l'ambassade d'Italie en Inde à propos de la convocation des témoins, 15 mai 2013 (OE, annexe 24) ; voir aussi les annexes 25 (note verbale No. 415/6 adressée à l'ambassade d'Italie en Inde par le Ministère indien des affaires étrangères, 5 juin 2013) et 26 (lettre de Titus & Co., conseil de MM. Renato Voglino, Massimo Andronico, Alessandro Conte et Antonio Fontana à propos de la convocation des témoins, 11 juin 2013).

de très vive tension diplomatique entre les deux Etats[31], après que l'Italie a formellement déclaré – je cite à nouveau :

> *(Read in English)*
> the two Italian Marines, Mr Latorre and Mr Girone, will not return to India on the expiration of the permission granted to them.[32]

*(Poursuit en français)* Sir Daniel n'a pas cité ceci – c'est pourtant aussi clair que brutal.

Vous pourriez penser, Madame et Messieurs les juges, qu'une telle désinvolture à l'égard de la parole donnée ne saurait se reproduire s'agissant non d'engagements unilatéraux pris par l'Italie, mais d'obligations découlant de la décision d'une haute juridiction internationale et que l'Inde n'a pas de souci à se faire quant au respect de ses droits : si le tribunal de l'annexe VII décide, comme nous croyons qu'il le doit, que l'Inde est en droit de juger les accusés, l'Italie doit faire en sorte qu'elle le puisse. Malheureusement, je crains que ceci soit une vision excessivement optimiste des choses.

Nul ne conteste, Monsieur le Président, que l'Italie soit un Etat de droit – du moins dans la mesure où son droit interne est concerné ; mais quand il s'agit du droit international, c'est autre chose ! Comme nous l'avons rappelé dans nos Observations écrites, les plus hautes juridictions italiennes, la Cour constitutionnelle et la Cour de cassation, font systématiquement prévaloir les principes du droit constitutionnel italien (largement interprétés) sur les obligations internationales de l'Italie. A cet égard, l'arrêt 238/2014, de la Cour constitutionnelle italienne, qui cite une jurisprudence nombreuse des deux cours suprêmes, ne laisse aucun doute (des extraits pertinents, plus longs que ceux qui sont projetés à l'écran, sont reproduits sous l'onglet 20 de vos dossiers). Je vais lire ce qui me paraît le plus significatif :

> *(Read in English)*
> As was upheld several times by this Court, there is no doubt that the fundamental principles of the constitutional order and inalienable human rights constitute a "limit to the introduction (…) of generally recognized norms of international law, to which the Italian legal order conforms under Article 10, paragraph 1 of the Constitution" (…).
> It falls exclusively to this Court to ensure the respect of the Constitution and particularly of its fundamental principles, and thus to review the compatibility of the international norm (…) with those principles.
> (...)
> […S]uch a control is essential in light of Article 10, paragraph 1, of the Constitution, which requires that this Court ascertain whether the customary international norm of immunity from the jurisdiction of foreign States, as interpreted in the international legal order, can be incorporated into the constitutional order, as it does not conflict with fundamental principles and inviolable rights. [On the contrary], if there were a conflict, "the referral to the international norm [would] not operate" (Judgment No. 311/2009). Accordingly, the incorporation, and thus the application, of the international norm would inevitably be precluded, insofar as it conflicts with inviolable principles and rights.[33]

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[31] Voir OE, par. 3.69 à 3.71, N, annexe 20, et OE, annexes 16 et 51.
[32] Note Verbale 89/635 of 11 March 2013 (N, Annex 20).
[33] Constitutional Court of Italy, Judgment of 22 October 2014, sections 3.2, 3.3 and 3.4 (extracts) – see WO, Annex 44.

*(Poursuit en français)* Voici de bien longues citations, Monsieur le Président, mais elles sont utiles pour comprendre pourquoi le retour des accusés en Italie – en tout cas de M. Girone car M. Latorre y est déjà – signerait la fin de tout espoir de l'Inde de pouvoir les juger – d'autant plus que le droit indien exclut un procès par contumace dans un tel cas.

Je ne doute pas, Monsieur le Président, de la sincérité de Sir Daniel lorsqu'il croit pouvoir prendre, devant vous, l'engagement que les accusés retourneraient en Inde si la compétence de ses juridictions est décidée par le tribunal arbitral de l'annexe 7. Malheureusement, je ne crois pas que mon éminent ami puisse empêcher la jurisprudence que je viens de citer de s'appliquer dans notre affaire comme elle l'a été dans l'affaire *Allemagne contre Italie*.

J'ajoute, sans avoir le temps de m'y arrêter trop longuement, que l'arrêt du 22 octobre 2014 n'est pas seulement intéressant pour ces motifs de principe. Plus concrètement :

Premièrement, il manifeste un clair refus de la Cour constitutionnelle suprême italienne de donner suite à un arrêt de la Cour mondiale – il pourrait évidemment en aller de même d'une sentence d'un tribunal arbitral « encore plus » dépourvu de force exécutoire en l'absence d'équivalent de la protection (il est vrai passablement illusoire) qu'offre l'article 94 de la Charte des Nations Unies à l'exécution des arrêts de la CIJ.

Deuxièmement, l'arrêt de la Cour constitutionnelle italienne porte sur des questions d'immunités juridictionnelles, certes différentes de celles qu'invoque l'Italie dans la présente espèce, mais il n'en apporte pas moins quelques précisions intéressantes sur la conception italienne de la notion d'immunité et de ses limites ; je n'en donnerai pour preuve que cette dernière citation – je repars sur l'anglais, je n'ai pas trouvé de traduction française de l'arrêt de la Cour :

> *(Read in English)*
> Immunity from jurisdiction of other States ... can justify on the constitutional plane the sacrifice of the principle of judicial protection of inviolable rights guaranteed by the Constitution, only when it is connected – substantially and not just formally – to the sovereign functions of the foreign State, i.e. with the exercise of its governmental powers.[34]

*(Poursuit en français)* Je doute, Monsieur le Président, que le meurtre de deux pêcheurs non armés et nullement menaçants relève de l'exercice des fonctions gouvernementales. Et troisièmement, les droits qui étaient en cause sont loin d'être dépourvus de tout lien avec notre affaire ; en effet, dans cet arrêt – toujours de la cour constitutionnelle italienne – la Cour se fonde sur les articles 2 (relatif à la garantie des « droits inviolables de l'homme ») et 24 de la Constitution italienne (sur le droit au juge), dont l'Italie risque fort de ne pas hésiter à se prévaloir en l'espèce pour s'affranchir de l'obligation d'exécuter la future sentence du tribunal arbitral.

Si, d'une part, le Tribunal de céans prescrit la seconde mesure conservatoire qui lui est demandée et si, d'autre part, le tribunal de l'annexe VII fait droit à la thèse indienne, il est très peu probable – et c'est une litote – que l'Italie exécutera la sentence et imposera aux deux accusés de se rendre en Inde pour y être jugés – il en irait ainsi à plus forte raison si le tribunal de l'annexe VII devait constater que les deux Etats auraient compétence pour procéder à leur jugement. Nous ne le pensons pas, mais l'hypothèse, qui ne peut être entièrement écartée *a priori*, montre combien la thèse du pré-jugement est sérieuse : prescrire à l'Inde de renvoyer les accusés, du moins M. Girone, car pour M. Latorre, les perspectives de le voir revenir en Inde, même si son état de santé s'améliore, ce que j'espère de tout cœur, sont ... faibles (et c'est

[34] *Ibid.* section 3.4.

une autre litote, « infinitésimales » serait sans doute plus exact !), le prescrire, disais-je, reviendrait à considérer par avance que l'Inde n'a pas compétence pour les juger ou en tout cas à la priver par avance de toute chance d'exercer cette compétence.

Cela fait-il de M. Girone un « otage » comme le prétend assez scandaleusement l'Italie[35] et comme Sir Daniel a osé le répéter ce matin ? Evidemment non ! Je me réfère à la Convention contre la prise d'otages de 1979 :

> *(Read in English)*
> Any person who seizes or detains and threatens to kill, to injure or continue to detain another person (...) in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ("hostage-taking") within the meaning of this Convention.[36]

*(Poursuit en français)* L'Inde n'a jamais exercé un tel chantage et l'insinuer est parfaitement odieux. Ce qui est vrai en revanche est que la présence de M. Girone sur le sol indien donne la garantie qu'il pourra y être jugé le moment venu – autrement dit, que les droits que l'Inde fera valoir devant le tribunal de l'annexe VII si celui-ci se reconnaît compétent, pourront être exercés effectivement – tel est le but, parfaitement légitime, de tout contrôle judiciaire. En prescrivant que l'Inde devrait le laisser aller en Italie comme cet Etat le demande, vous « garantiriez » (si l'on peut dire!) que l'Inde en sera privé – vous prescririez, en quelque sorte, une mesure « anti-conservatoire ».

Une mesure anti-conservatoire et une mesure injuste, qui serait ressentie comme illégitime par l'opinion publique indienne, et on le comprend : ces deux individus, Monsieur le Président, sont accusés de meurtre.

Le placement sous contrôle judiciaire est la conséquence normale d'une telle accusation ; qu'il en résulte un stress pour ceux qui en sont l'objet et leur entourage est sûrement exact, mais en l'espèce, les deux marines bénéficient d'un traitement particulièrement favorable. Je n'ai pas entendu parler de cas dans lesquels des personnes sur lesquelles pèsent d'aussi lourdes charges sont libres d'à peu près tous leurs mouvements et mènent une vie plutôt plaisante, n'étaient sans doute les problèmes de santé de M. Latorre.

Mais les juridictions indiennes, que ce soit la Haute Cour du Kerala ou la Cour suprême, ont fait preuve à son égard d'une grande mansuétude pour des raisons humanitaires, sans lui faire payer les mauvaises manières de son pays.

On ne peut pas dire que l'Italie ait manifesté la même compassion à l'égard des victimes et de leurs ayant-droit, qui sont les oubliés absolus des écritures italiennes. La Notification et la Requête – pour ne rien dire des plaidoiries de ce matin – s'efforcent de vous apitoyer sur le sort des deux accusés, mais il n'y est pas une fois question des victimes. C'est bien simple, Monsieur le Président, le mot n'y est pas employé une seule fois – *pas une seule* ! C'est vrai pour les écritures ; c'est également vrai s'agissant des plaidoiries de ce matin ! Monsieur le Président, je n'ai pas coutume de jouer sur la corde sensible et je suis le premier à penser qu'il arrive que le droit doit s'appliquer même s'il conduit à des résultats humainement contestables – *dura lex, sed lex*. Mais ce n'est pas le problème ici : la Partie italienne utilise « l'argument compassionnel » par lui-même, sans lien avec le droit. Alors, Madame et Messieurs les juges,

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[35] R, par. 23 et 47.

[36] Article 1(1) of the International Convention Against the Taking of Hostages, 17 December 1979, *U.N.T.S.*, vol. 212, 1983, No. 21931, p. 213.

compassion pour compassion, je me permets d'appeler votre attention[37] sur le fait que deux familles pleurent la disparition d'un fils, d'un époux, d'un père et, moins affectivement, même si ce n'est pas négligeable, d'un soutien de famille qui faisait vivre la maisonnée (et une maisonnée déjà bien pauvre) par son travail. Le propriétaire du *St Antony* n'a plus de revenu faute de pouvoir utiliser ou vendre son bateau (et l'indemnité versée par l'Italie ne compense pas les pertes subies ou le gain manqué)[38]. Les neuf autres pêcheurs qui se trouvaient sur le bateau le jour de la fusillade sont durablement traumatisés ; et au-delà, la communauté villageoise, traditionnellement orientée vers la pêche, a été et demeure profondément sous le choc, au point que, semble-t-il – et c'est l'archevêque de l'endroit qui le dit – les pêcheurs hésitent à sortir en mer, redoutant de se faire tirer comme des lapins par des gardes incompétents ou ayant perdu leur sang-froid[39].

Monsieur le Président, Madame et Messieurs les juges, il s'agit là de considérations extrajuridiques, nous en sommes parfaitement conscients, mais la justice n'est pas forcément aveugle, et puisque l'Italie s'est placée résolument sur ce terrain, il nous a semblé nécessaire que vous bénéficiez d'une description plus équilibrée de la situation « humanitaire » dont elle se prévaut sans vergogne, mais à tort !

Madame et Messieurs du Tribunal, ma présentation clôt le premier tour des plaidoiries de la République de l'Inde. Au nom de toute notre équipe, je vous remercie très vivement de votre écoute attentive et bienveillante.

Merci Monsieur le Président.

**THE PRESIDENT:** Thank you, Mr Pellet.

The first round of arguments by both Parties is concluded. We will continue the hearing tomorrow at 10 a.m. to hear the second round of oral arguments of Italy, and in the afternoon, at 4.30 p.m. of India.

*(The sitting is closed at 6.27 p.m.)*

[37] Voir aussi OE, par. 1.15, 1.25, 3.67 et 3.88.

[38] Voir OE, par. 3.88 et OE, annexe 46.

[39] Voir par ex. : http://www.hindustantimes.com/india-news/fishermen-shootings-marines-chargesheeted/article1-857699.aspx.

**PUBLIC SITTING HELD ON 11 AUGUST 2015, 10 A.M.**

**Tribunal**

*Present:* *President* GOLITSYN; *Vice-President* BOUGUETAIA; *Judges* CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, PAIK, KELLY, ATTARD, KULYK, GÓMEZ-ROBLEDO *and* HEIDAR; *Judge* ad hoc FRANCIONI; *Registrar* GAUTIER.

**For Italy:** [See sitting of 10 August 2015, 10.00 a.m.]

**For India:** [See sitting of 10 August 2015, 10.00 a.m.]

**AUDIENCE PUBLIQUE TENUE LE 11 AOÛT 2015, 10 HEURES**

**Tribunal**

*Présents :* M. GOLITSYN, *Président* ; M. BOUGUETAIA, *Vice-Président* ; MM. CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, PAIK, MME KELLY, MM. ATTARD, KULYK, GÓMEZ-ROBLEDO *et* HEIDAR *juges* ; FRANCIONI, juge *ad hoc* ; M. GAUTIER, *Greffier*.

**Pour l'Italie :** [Voir l'audience du 10 août 2015, 10 h 00]

**Pour l'Inde :** [Voir l'audience du 10 août 2015, 10 h 00]

**THE PRESIDENT:** Good morning. The Tribunal will continue today its hearing in the case concerning the *Enrica Lexie* Incident. We will hear this morning the second round of oral arguments presented by Italy but before I give the floor to the representative of Italy, in light of yesterday's oral presentation, Judge Cot has a question. It was communicated just now to the parties in writing but I would like to invite Judge Cot to ask his question.

**Question de M. le juge Cot**
[TIDM/PV.15/A24/3/Rev.1, p. 1]

Je vous remercie, Monsieur le Président.

Au nom de l'Italie, Sir Daniel Bethlehem a proposé de transformer la caution de 300 000 euros pour chacun des deux fusiliers marins – je cite - « au moyen d'un accord approprié, en une garantie donnée à l'Inde conformément aux stipulations d'une ordonnance de ce Tribunal ». L'Italie pourrait-elle préciser cette proposition ? Et l'Inde souhaite-t-elle réagir à cette proposition ?

Merci, Monsieur le Président.

**THE PRESIDENT:** As indicated in the written communication to the parties, the answer to this question could be either provided during these oral hearings or in writing by tomorrow noon.

Now we will resume our consideration and I will give the floor to Sir Daniel Bethlehem to begin his statement.

**Second Round: Italy**

STATEMENT OF SIR DANIEL BETHLEHEM
COUNSEL OF ITALY
[ITLOS/PV.15/C24/3/Rev.1, p. 1–8]

Thank you, Mr President, Members of the Tribunal. Let me say at the outset that we will take the opportunity to reply in writing to Judge Cot by tomorrow, as indicated.

Mr President, Members of the Tribunal, I will open Italy's reply submissions. I will be followed by Sir Michael Wood. He will be followed in turn by Professor Guglielmo Verdirame. Italy's Agent will conclude Italy's reply with some substantive remarks as well as the formal statement of the provisional measures that Italy requests.

Mr President, Members of the Tribunal, we heard a rising tide of rhetoric yesterday afternoon accusing Italy of dissembling, dishonesty and delay. This case, it was said, is about a double murder committed by the Italian marines that has only an incidental connection to the sea, and not one that is sufficient to bring the dispute within the ambit of UNCLOS. It is a remarkable contention. We agree that the most regrettable deaths of the two Indian fishermen require investigation and, as appropriate, prosecution; and the Prosecutor of the Military Tribunal in Rome has an open investigation for the crime of murder that must be pursued to its conclusion.

But there is an antecedent issue that requires prior determination, which is the subject-matter of the dispute between Italy and India, namely, who has jurisdiction to pursue the investigation and, as appropriate, prosecution, and what account is to be taken of the immunity of State officials. Counsel for India simply ignored this jurisdictional dispute. Indeed, the submissions by India yesterday were a remarkable exhibit of India's unrelenting commitment to continue to exercise its criminal jurisdiction over the marines regardless of the Annex VII proceedings that will now take place.

The Indian submissions yesterday were also remarkable for their persistence in characterizing the Italian marines as murderers, as if the only issue that remained to be determined is the extent of their guilt, issues of mitigation and so forth. It is a little more basic and fundamental than that, I'm afraid. The marines contest the allegation that they fired the shots that killed the unfortunate Indian fishermen. It is not accepted that the fatal shooting took place from the *Enrica Lexie*. There were other vessels in the area at the time and other reports of pirate attacks. While it is accepted that the marines fired shots into the water to warn off what was apprehended to be a pirate attack, the rest is disputed. And, I must emphasize, the marines have not even been charged with murder under Indian law. Even allowing for differences in appreciation between civil lawyers and common lawyers – *pace*, Professor Pellet – there is a baseline standard that operates in this field: a person is not guilty of an offence unless and until convicted by a properly constituted court or tribunal on the basis of charges of which they are informed in a timely manner and to which they have had an opportunity to respond. If the Tribunal is tempted down the road that Counsel for India is paving, it will find itself an outlier. There is nothing redeemable about India's approach on this issue. It is wrong. It is dangerous. You ought to have no regard for it whatever.

Mr President, Members of the Tribunal, much of what you heard yesterday on the Indian proceedings is irrelevant to the case now before you. We may get there in due course, if India submits objections to the jurisdiction of the Annex VII tribunal on the basis of the points that it put before you yesterday, but these issues do not go directly to the questions before you in these proceedings. They were advanced by Counsel for India yesterday for one reason and one reason only: as an attempt to create prejudice, to taint Italy in some manner as coming before you as an abusive applicant.

It is a dangerous game that India plays. It has constructed a house of cards. A number of examples will illustrate the shortcomings of its case.

Let me begin with the contention that the incident in question could not possibly have been apprehended to have been a pirate attack, a proposition advanced in an attempt to remove the incident from the ambit of UNCLOS and to call into question the *prima facie* jurisdiction of the Annex VII tribunal to deal with the merits of the case and also, therefore, of this Tribunal to prescribe provisional measures. Counsel for India sought to substantiate the point by reference to declining statistics of piracy off the west coast of India in 2012 and the suggestion, advanced with incredulity, that no one could possibly believe the *St. Antony* to be a pirate skiff.

Let me take you to one or two documents in your Judges' folders. The first is the Indian National Maritime Search & Rescue Board Report that I took you to yesterday. It is at tab 5. I would like to take you to page 15, the page to which I drew your attention yesterday but in the interests of time did not read out. Counsel for India were on full notice of this. I did not read it but it bears reading. Let me start with paragraph 3:

> Increasing shipping traffic closer to the Indian coast causes the merchant ships to, at times, transgress the fishing nets. On observing the approaching merchant vessel onto their fishing nets/gear, it is common for the fishing boats to raise alarm and to "sail towards" the merchant ship to attract attention so as to avoid damage to their nets.
>
> Reports are being received where merchant ships have mistaken the fishing boats to be pirate skiffs. In one such recent incident off the coast of west coast of India, Kerala, a merchant ship fired on the fishermen, killing two of the fishermen. The ship's security guards had assumed the innocent fishermen to be the pirates. In addition, there has been a report of another report of firing of warning shots on Indian fishermen.
>
> In another case a merchant ship collided with a fishing boat. This resulted in sinking of the boat and the loss of life of three fishermen.

Skipping to the next paragraph:

> It has been reported that merchant ships are transiting very close to the coast to avoid the High Risk Area which starts 12 nautical miles from the Indian coast.

A number of points emerge from this Notice. First, it affirms the designation of a piracy High Risk Area that starts at 12 nautical miles from the Indian coast. Second, it records explicitly that reports had been received of merchant vessels mistaking fishing boats to be "pirate skiffs". Third, it reports on the *Enrica Lexie* incident, although without identifying it as such, in the context of a misapprehension about pirate attacks. Fourth, it describes a *modus operandi* of fishing boats that may lead them to be mistaken for pirate skiffs. Fifth, it notes a second report of firing of warning shots on Indian fishermen, as well as other incidents involving death and injury.

Let me take you to another document. It is at tab 31. This is in our original annexes. It is an International Maritime Bureau report that details the *Enrica Lexie* incident. If you look at the bottom of the page, you will see the references and the coordinates of the *Enrica Lexie* incident, giving 1600 local time as the time. If you look to the right of the barely discernible map, you will see reference to a second reported pirate attack in the same vicinity about six hours later in which 20 robbers in two boats approached an anchored tanker and attempted to

board her. So, we have two reports of pirate attacks in the same vicinity along the Kerala coast within hours of each other.

Counsel for India doth protest too much when he tries to make the case that it is not credible for an oil tanker crew to apprehend a fast-approaching fishing boat as a possible pirate attack. Even a cursory review of the monthly statistics published by the International Maritime Organization reporting on acts of piracy indicates that a not uncommon *modus operandi* is for pirate attacks to be launched from skiffs, easily mistaken for fishing boats.[155]

With the greatest of respect to Counsel for India, they are making it up as they go along. There is no serious foundation for the propositions that they put to the Tribunal yesterday on this issue.

Mr President, Members of the Tribunal, let me turn to another allegation made by India's Counsel yesterday that has no basis whatever. In its written statement, India impugned Italy's good faith by saying that Italy had failed to present the other four marines for interview by the Indian agency that was responsible for investigating incidents. Counsel for India went on to say that it was this delay, caused by Italy's obstruction, that caused the agency to fail to issue the charge sheet. To drive home his point, Counsel for India took you to tab 16 of the Indian Judges' folder and read out the language of the Italian Statement regarding the presentation of the four marines for interview. You will recall that the relevant portion of the Statement read:

> The Republic of Italy is agreeable to give an assurance to the Supreme Court of India that if the presence of the marines is required … Italy shall ensure their presence before an appropriate court or authority.

Counsel for India dwelt on this language of "ensure their presence",[156] hammering it again and again, as if the mere repetition of the words would drive home Italy's dissembling unreliability and untrustworthiness.

I endeavoured, in my opening submissions yesterday, to caution India pre-emptively about this argument, saying that it ought to know its own law better than it described it to the Tribunal. They charged ahead nonetheless. Let me take you, therefore, to section 161 of India's Code of Criminal Procedure, which is at tab 33 of your Judges' folder. This addresses the examination of witnesses by police. Paragraph 1 of section 161 provides that "Any police officer … may examine orally any person supposed to be acquainted with the facts and circumstances of the case". Paragraph 3 provides that "The police officer may reduce into writing any statements made to him in the course of an examination under this section …". There follows a sentence in square brackets, denoting that the language was added to the section by Act 5 of 2009. It reads: "Provided that statements made under this sub-section may also be recorded by audio-video electronic means." So, here we have it that audio-video testimony is expressly contemplated and authorized by India's Code of Criminal Procedure.

So what then of the language of ensuring the "presence" of the marines? Let me take you to the 2003 judgment of the Indian Supreme Court in the *Praful Desai* case. It is at tab 34 of your Judges' folder. The case concerned the interpretation of section 273 of the Indian Code of Criminal Procedure, which addresses evidence in inquiries and trials. The section is headed "Evidence to be taken in the presence of accused". Here we have the language of "presence". If I may ask you to turn to page 603 of the judgment, which is the headnote or summary of the judgment. You will see part-way down the page the question that is framed, and it is stated to be "whether in a criminal trial, evidence can be recorded by video-conferencing". The answer

[155] http://www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Reports/Documents/184-Apr2012.pdf. See, for example, at Annex 2, page 2, item 3; Annex 2, page 3, item 5.
[156] ITLOS/PV.15/C24/2, 10 August 2015, p. 27 (Bundy); p. 39 (Pellet).

is: "Section 273 contemplates constructive presence". This shows that actual physical presence is not a must. This indicates that the term "presence", as used in this section, is not used in the sense of actual physical presence." It goes on: "Further evidence can be both oral and documentary and electronic records can be produced as evidence. This means that evidence, even in criminal matters, can also be given by way of electronic records. This would include video-conferencing." The relevant passages in the full judgment are at paragraphs 12 and 19.

Mr President, Members of the Tribunal, with the greatest of respect to Counsel for India, they are making it up as they go along. Italy fully acquitted its assurance to India to ensure the presence of the four marines for interview. Italy's senior Indian Counsel at the time that all this occurred was Mr Mukul Rohatgi, now the Attorney General of India. He would not have countenanced anything else.

Mr President, Members of the Tribunal, let me turn to yet another allegation made by India's Counsel yesterday that has no basis whatever. Counsel for India sought to characterize what they described as Italy's "litigation strategy" as capricious and inconsistent and merely a matter of convenience, with the filing of the Notification initiating Annex VII arbitration as simply the latest twist. You were told, for example, by both the Additional Solicitor General and Mr Bundy that in April 2012 Italy filed a petition before the Indian Supreme Court in which Italy asked the Indian Supreme Court to take custody of the two marines – this at the time when the marines were still being held in Kerala. You were referred to a two-page extract of Writ Petition No.135 at tab 15 of India's Judges' folder and directed to a paragraph in which Italy argued that "at the very least" the Union of India was under an obligation to take custody of the marines pending a final decision being reached on jurisdiction.

The whole document was annexed to Italy's Request for provisional measures as Annex A/16. A review of the whole document gives a rather different picture. An accurate appreciation of what Italy was asking for is seen in the Prayer for Relief that sets out the formal requests being made. This is at tab 35 of your Judges' folder. You will see on the front cover the petitioners, no.1 being the Italian Republic, no.2 is Sergeant Latorre and no.3 is Salvatore Girone, and then you have the respondents, the Union of India and others. If you turn over the page you will see the Prayer for Relief, and it says:

> In view of the facts and circumstances stated hereinabove, it is most respectfully prayed that this Honourable Court may be graciously be pleased to:-
>
> Declare that any action by Respondent in relation to the alleged incident referred to in Para 6 and 7 above, under the Criminal Procedure Code or any other Indian law, would be illegal and *ultra vires* and violative of Articles 14 and 21 of the Constitution of India; and
>
> Declare that the continued detention of Petitioners 2 and 3 – Sergeants Latorre and Girone – by the State of Kerala is illegal and *ultra vires* being violative of the principles of sovereign immunity and also violative of Art. 14 and 21 of the Constitution of India; and
>
> Issue writ of Mandamus and/or any other suitable writ, order or direction under Article 32 directing that the Union of India take all steps as may be necessary to secure custody of Petitioners 2 and 3 and make over their custody to Petitioner No. 1

In other words, to hand them over to Italy.

Far from supporting India's contention of Italian inconsistency and capriciousness, this illustrates that Italy was saying then to the Indian Supreme Court what it has been saying throughout, and what it has been saying to you in these proceedings, namely, that India's

assertion of jurisdiction over the *Enrica Lexie* incident is unlawful, that the continued detention of the marines is illegal, and that they should be delivered into Italian custody.

Mr President, Members of the Tribunal, once again, with the greatest of respect to Counsel for India, they are making it up as they go along. Italy was saying then what it is saying now.

Mr President, Members of the Tribunal, let me take you to another example of India's creative lawyering. We heard yesterday from India's Counsel that the Indian Supreme Court judgment of 18 January 2013 left open the possibility for Italy to "re-agitate"[157] all issues of jurisdiction. They were clear about this yesterday. This argument was variously part of India's allegations against Italy of abuse of process, of exhaustion of local remedies, of *electa una via*, of equity. It is at the core of India's argument not simply that Italy must stick to the path that it has chosen but that every avenue remains open to Italy in the Indian domestic proceedings.

Mr President, Members of the Tribunal, what India said in oral argument yesterday does not comport with what it said in its Written Observations. In its Written Observations, at paragraph 1.19, India says: "... in spite of a clear ruling by the Supreme Court in its judgment of 18 January 2013 ... Italy has disregarded the principle of *res judicata* and repeatedly approached the court on jurisdictional issues ...". Further, and even more tellingly, in the affidavit submitted by the Indian Ministry of Home Affairs to the Indian Supreme Court in the Article 32 Writ Petition proceedings, which seeks to re-visit the issues of jurisdiction and immunity, the Indian Government objects to the entire petition on the grounds that it seeks to "re-agitate issues which have already been raised by the Petitioners before this Hon'ble Court and which have been decided by this Hon'able Court," including as regards both jurisdiction and immunity.

Mr President, Members of the Tribunal, what India is saying to you in these proceedings is the diametric opposite of what it is saying to its own Supreme Court. I hesitate to use the phrase again that India is making it up as it goes along. It is more than that. It is rather more pernicious.

Mr President, Members of the Tribunal, Counsel for India also sought to persuade you that the delay in the Indian proceedings is all to be laid at the doorstep of Italy and that, but for Italy's machinations, a charge sheet would have been issued years ago, due process would have been served, and all this would be behind us.

This is so far from reality as almost to amount to fiction. In the 16 months since the Article 32 Writ Petition was filed, the Indian Government has missed filing deadline after filing deadline. Affidavits from Indian ministries and agencies are still outstanding today. In order after order, in four separate hearings, the Registrar of the Indian Supreme Court required various Indian Government ministries to submit affidavits required of them. Submissions are still outstanding. The delay in the Article 32 Writ Petition is due completely and utterly to delays by India.

This brings me to the affidavit that was due to be filed by the Indian Government yesterday in the Article 32 Writ Petition deferment proceedings in respect of which a hearing is scheduled to take place on 26 August. The Indian Government did not submit that affidavit. Not only is this but the latest example of missed filing deadlines by India, but it also calls into question the viability of the 26 August hearing date. In the light of what we heard from India yesterday, we also anticipate that it signals that India will in due course submit an affidavit opposing the deferment application, which would trigger exactly the kind of precipitous aggravation of the dispute that we are concerned about.

India has, in these proceedings, been clear that it wishes to press ahead with the criminal trial of the marines, notwithstanding the Annex VII proceedings that have now been

[157] ITLOS/PV.15/C24/2, 10 August 2015, p. 7, line 6 (Pellet).

commenced. The more we hear from India, the more we are alarmed by what they intend. It injects a new urgency into the Request for provisional measures that we have made to you.

Mr President, Members of the Tribunal, let me conclude on urgency. Counsel for India, although, we note, not the Indian Agent, questioned whether what Italy had said yesterday about the impasse in the political process was reliable. In my submissions yesterday morning I outlined the political process that Italy had pursued, an open process, through correspondence to the Ministry of External Affairs, and a private process through the most senior advisers of Prime Minister Renzi and Prime Minister Modi.

On 31 May this year, India's Minister of External Affairs, Sushma Swaraj, gave a wide-ranging media briefing to mark one year in government. In the course of this briefing she was asked a general question about Indian relations with the European Union. Her reply, which is at tab 36 of your Judges' folder, included the following:

> So far as the marines issue is concerned, we have repeatedly conveyed to Italy, you please join us in judicial process. The matter is *sub judice*. So far, they have not even joined the judicial process. If they join our judicial process, things can move forward.

Some days after this statement, Italy was informed on the private channel of engagement between the senior Prime Ministerial advisers that the statement by Minister Swaraj reflected the position of the Government. There was no scope for the Indian Government to engage in further discussions about a political settlement. This is the reason why Italy instituted Annex VII proceedings on 26 June. There was no longer any prospect of a negotiated solution.

The situation has changed fundamentally in recent weeks. There is no prospect of a political settlement. The unavoidable consequence is that India intends to press ahead with the criminal trial of the marines. Notwithstanding the dispute over jurisdiction that will now go to the Annex VII tribunal, India has indicated that it intends to continue to exercise jurisdiction over the marines. It intends to require Sergeant Latorre to re-apply for leave to remain in Italy on humanitarian grounds, again and again, without regard for the Annex VII proceedings that will now address the question of whether India has jurisdiction over the marines.

India has not contested in any way the humanitarian evidence that has been put before you concerning Sergeant Girone, yet it has made it clear in these proceedings that it will have no regard to these circumstances whatsoever, and will keep Sergeant Girone in Delhi. Counsel for India, while characterizing Italy's description of Sergeant Girone as a hostage as "odious", nonetheless went on to say: "What is true, however, is that the presence of Mr Girone on Indian soil provides the guarantee that he will be able to be tried once that time comes." This sounds like a hostage to us, and this is the language that has been used to Italy by Indian officials to describe Sergeant Girone.

Mr President, Members of the Tribunal, there is an imminent risk of a serious aggravation of this dispute. There is evidence before you, uncontroverted, of acute humanitarian circumstances. You have India before you, in this Chamber, saying openly that they will press ahead with their domestic proceedings, notwithstanding that an Annex VII proceeding has been seised with a dispute over India's jurisdiction. We do not know what step India will take next. We are on the cusp of a precarious moment.

Mr President, Members of the Tribunal, that concludes my submissions this morning. Mr President, may I invite you to call Sir Michael Wood to the podium.

**THE PRESIDENT:** Thank you, Sir Daniel.

I now give the floor to Sir Michael Wood.

STATEMENT OF SIR MICHAEL WOOD
COUNSEL OF ITALY
[ITLOS/PV.15/C24/3/Rev.1, p. 8–11]

Mr President, Members of the Tribunal, I shall make just four points in response to what we heard from India yesterday. These concern a curious question of terminology; the local remedies issue; the supposed time limit on provisional measures; and India's assertion that the measures requested would prejudge the final award.

India has not yet responded to what I said yesterday, all of which I stand by but need not repeat.

I begin by noting that our friends opposite constantly refer to the "inadmissibility" of Italy's requests for provisional measures.[1] Inadmissibility is not a term normally associated with a provisional measures phase. India uses the term in a way that seems designed to sow confusion, to conflate provisional measures proceedings and a possible preliminary objections phase going to jurisdiction and admissibility. By using this novel terminology, they apparently seek to extend the requirements for the prescription of provisional measures beyond those that I set out yesterday and to turn the present phase into one concerning jurisdiction and admissibility.

A good example of this deliberate confusion is India's approach to local remedies. Professor Pellet devoted much of his first speech yesterday to article 295 of UNCLOS.[2] He failed, however, to respond in any way to what I had said in the morning.[3]

The main point is that it is inappropriate to address the application of article 295 in the course of a provisional measures phase. Exhaustion of local remedies is not an issue going to the *prima facie* jurisdiction of the Annex VII tribunal. Rather, it is an issue concerning the admissibility of a case. The question of exhaustion of local remedies requires a detailed examination of the facts relating to the merits, and is not appropriate to the urgent and expedited nature of provisional measures proceedings. If India wishes to raise a point about exhaustion of local remedies that will be considered by the Annex VII tribunal.

The jurisprudence of this Tribunal expressly confirms this. In the *M/V "Louisa" Case*, this Tribunal expressly stated that it was inappropriate to consider the issue of exhaustion of local remedies at the provisional measures phase and that it should instead be "examined at a future stage of the proceedings".[4]

I shall not therefore go into the application of the local remedies rule at this stage beyond what I said yesterday, except to say this. Article 295 provides that local remedies are to be exhausted "where this is required by international law", namely in the context of diplomatic protection. This is not a case of diplomatic protection. Yesterday, in this context, Professor Pellet studiously avoided referring to the marines as State officials, or acknowledging that the acts alleged were performed in the exercise of their official functions. As members of a Vessel Protection Detachment, they exercised official functions connected to the rights that States have under the law of the sea. As I explained yesterday, Italy is asserting a *direct* injury to its own rights as a result of the wrongful acts of India. The question whether an injury is direct or indirect, or mixed, may sometimes be a difficult issue,[5] though not in this case. I have

[1] See ITLOS/PV.15/C24/2, 10 August 2015, p. 4, lines 17, 20, 22 (Agent); p. 21, line 31 (Bundy); p. 36, line 31 (Bundy).
[2] ITLOS/PV.15/C24/2, 10 August 2015, p. 17, line 18-p. 19, line 35 (Pellet).
[3] ITLOS/PV.15/C24/1, 10 August 2015, p. 26, lines 22-34 (Wood).
[4] *M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain), Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010*, p. 58, at p. 69, para. 68.
[5] Commentary to article 14 of the ILC Draft articles on Diplomatic Protection, *ILC Yearbook*, 2006, Vol. II(2), pp. 45-46, paras. (10)-(12).

already addressed you on the injury to Italy's rights under a whole series of provisions of UNCLOS. Suffice to say, these are Italy's rights under UNCLOS; they are not the rights of the marines. This was the point that Avvocato Busco was making yesterday when he referred to "Italy's rights" being at issue,[6] not as Mr Bundy suggested Italy's rights in contradistinction to India's rights.[7]

The marines are not "private persons" to whom diplomatic protection applies. Exhaustion of local remedies is only relevant where a State espouses the claim of a "private citizen" (*ressortissant*). It does not apply where the individual was engaged in official business on behalf of his or her State. This is confirmed by the commentaries of the International Law Commission to the Draft Articles on Diplomatic Protection and the Articles on State Responsibility.[8] On the facts before us, the marines are not private individuals by any definition, nor were they acting in a private capacity. They are State officials of the Italian Navy. At the time of the incident in February 2012, they were deployed by the Italian Navy and exercising official functions on board the *Enrica Lexie.* The local remedies rule has no application in this situation.

I turn to my third point. Yesterday Mr Bundy claimed that Italy was oblivious to the point that "there is a temporal limitation to the duration of any provisional measures that may be prescribed by this Tribunal",[9] and he asserted that this Tribunal "is not called on to consider any provisional measures that will remain in force throughout the duration of the Annex VII arbitration."[10] I already answered that point yesterday, since it was also made in India's Written Observations.[11] It is simply wrong. That is clear from the practice of this Tribunal. Provisional measures prescribed by the Law of the Sea Tribunal under article 290, paragraph 5, do not have express temporal limits (whether extending beyond the constitution of the Annex VII tribunal or otherwise).[12] I refer you to two recent examples: the provisional measures prescribed in the *ARA Libertad* and *Arctic Sunrise* cases. Of course, under article 290, paragraph 5, this Tribunal may only prescribe provisional measures if they need to be prescribed before the Annex VII tribunal is able to do so, but that does not mean that the measures then prescribed may only last until the arbitral tribunal is itself in a position to act. Article 290, paragraph 5, refers to the arbitral tribunal modifying, revoking or affirming (as the *MOX Plant* tribunal did) the measures prescribed by this Tribunal; that would make no sense if Mr Bundy was right. So it is entirely proper for Italy to request provisional measures extending to the final award of the arbitral tribunal.

My next point is this: India has made much in its Written Observations, and yesterday, to the effect that the provisional measures requested by Italy should not be prescribed because to do so would prejudge the final result before the Annex VII tribunal. That is not and cannot be the case. To adopt the language of the Tribunal in *Ghana/Côte d'Ivoire*, relied upon by our friends opposite, a provisional measures order "in no way prejudges the question of the

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[6] ITLOS/PV.15/C24/1, 10 August 2015, p. 28, line 3 (Busco).

[7] ITLOS/PV.15/C24/2, 10 August 2015, p. 24, lines 16-17 (Bundy).

[8] Commentary to article 1 of the ILC Draft articles on Diplomatic Protection, *ILC Yearbook*, 2006, Vol. II(2), p. 28, para. (13): "Diplomatic protection mainly covers protection of nationals not engaged in official international business on behalf of the State." ["*La protection diplomatique s'entend surtout de la protection des nationaux qui ne se livrent pas à des activités internationales officielles pour le compte de l'État.*"]

[9] ITLOS/PV.15/C24/2, 10 August 2015, p. 23, lines 40-41 (Bundy).

[10] ITLOS/PV.15/C24/2, 10 August 2015, p. 24, lines 4-5 (Bundy).

[11] ITLOS/PV.15/C24/1, 10 August 2015, p. 23, lines 17-30 (Wood). See *Land Reclamation in and around the Straits of Johor (Malaysia* v. *Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p.10, at p. 22, para. 67.

[12] See, for recent examples, the provisional measures prescribed in *"Arctic Sunrise" (Kingdom of the Netherlands* v. *Russian Federation), Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013*, p. 230; and in *"ARA Libertad" (Argentina* v. *Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012*, p. 332.

jurisdiction of [the Annex VII tribunal] relating to the merits of the case or to deal with the merits themselves."[13]

India asserts that the implementation of the final decision would be made "impossible or more difficult" if either of the provisional measures which Italy seeks were prescribed. But they give no serious reasons for this assertion. In fact, most of the long section in India's Written Observations entitled *A request for "pre-judgment"*[14] is simply irrelevant to the question of pre-judgment. It is mostly an excuse for India to paint a distorted and self-serving picture of the facts.

As regards our first request for provisional measures, all India had to say in its Written Observations was that to grant it would prejudge the merits "by implying that the investigation and judicial proceedings conducted with rigorous fairness by India to date were somehow inappropriate".[15] Of course, it would do nothing of the kind; it would merely hold the ring pending final determination of the issues to be decided by the Annex VII tribunal.

As regards Italy's second request, India hardly says any more. They claim that "lifting all restrictions on the liberty and movement of Mr Latorre and Mr Girone, would mean that the Tribunal accepts that these restrictions ... are illegitimate and unlawful"[16] and that "what Italy tries to obtain ... is a recognition by the ITLOS that the accused individuals are entitled to claim immunities from the jurisdiction of Indian courts."[17] Merely to read these out shows how far-fetched these claims are. They show that India has simply not understood, or perhaps does not wish to understand, the nature of provisional measures. India conveniently overlooks the fact that the measures we seek, like all provisional measures, would remain in force until modified or, at the latest, until a final decision on the merits.

Yesterday, Professor Pellet argued that if Sergeants Latorre and Girone were in Italy when the award was given, and if the Annex VII tribunal found that both States had jurisdiction in terms of UNCLOS, that would prejudge the matter in Italy's favour.[18] That, with respect, is pure speculation. First, concurrent jurisdiction is not what either party is seeking. Second, we cannot know in what terms the arbitral tribunal would make any such finding. Third, any such finding would need to take account of the immunity of the two State officials in respect of acts performed in an official capacity, acts performed, moreover, in international waters. In any event, on India's reasoning Italy's rights would be equally prejudged by a decision that left the marines in India.

Mr President, Members of the Tribunal, that concludes what I have to say. I thank you for your attention, and would request that you invite Professor Verdirame to the podium.

**THE PRESIDENT:** Thank you, Sir Michael.

I will give the floor to Mr Guglielmo Verdirame.

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[13] *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015*, para. 104.

[14] Written Observations of India, paras. 3.48-3.75.

[15] Written Observations of India, para. 3.54.

[16] Written Observations of India, para. 3.65.

[17] Written Observations of India, para. 3.66.

[18] ITLOS/PV.15/C24/2, 10 August 2015, p. 42, lines 12-16 (Pellet).

STATEMENT OF MR VERDIRAME
COUNSEL OF ITALY
[ITLOS/PV.15/C24/3/Rev.1, p. 11–18]

Mr President, Members of the Tribunal, I will reply to a number of submissions made by India yesterday. I will begin by addressing India's contradictory position on the role of UNCLOS. I will then reply to India's more specific assertions on the issue of irreparable prejudice and on the question of urgency.

At the beginning let me recall a point, which Professor Pellet describes as a "key element",[1] namely that the question of India's jurisdiction is still to be determined by the Special Court.

Sir Daniel has shown that India has been speaking with two voices on this issue: saying in an affidavit to the Indian Supreme Court that the question has been settled and contending before this Tribunal that the question is still effectively pending before its courts.

Mr President, Members of the Tribunal, three and half years after the incident, India has not apparently yet decided if it has jurisdiction over this matter. Professor Pellet is right in describing this as a "key element", but it is a key element in Italy's favour.

India wants to continue to exercise jurisdiction. It wants to continue to detain an official of the Italian State, and to be at liberty to place under detention another official of the Italian State, but it has not even decided if it has jurisdiction over the event.

Quite extraordinarily, Mr President, India maintains that Italy must remain committed exclusively to the Indian domestic proceedings – proceedings to which Italy objected promptly. India says that it is even an abuse of process for Italy to have started international arbitral proceedings. It is Italy's right to start proceedings under UNCLOS in connection to a dispute which India's own Supreme Court accurately characterizes as concerning the interpretation UNCLOS provisions. As for the idea that there was some kind of "fork in the road" here and that Italy opted for the domestic process, this is so completely unfounded that it barely warrants attention. Italy did not opt for domestic proceedings. Its marines were subjected to them; and, in any event, there is no basis or precedent for the notion of "fork in the road" in the context of inter-State proceedings.

But Counsel for India goes further, maintaining that the question of jurisdiction under UNCLOS is for India's Special Court – not the Annex VII tribunal – to determine. At the same time, they say that the Annex VII tribunal and this Tribunal have no jurisdiction under UNCLOS. Professor Pellet went as far as suggesting that this matter "has barely a link with the law of the sea".[2]

India cannot credibly contend that the UNCLOS rights claimed by Italy are not even plausible for provisional measures, in circumstances where its own legal system has not been able to determine the position under UNCLOS in three and half years.

Mr President, Members of the Tribunal, as Sir Michael has just reiterated, this is about UNCLOS. The Supreme Court of India saw it in those terms too, and discussed various provisions at length. May I ask you to please take a look at the second sentence in paragraph 101 at tab 13 of the Indian judges' folder, from the judgment of the Indian Supreme Court.

> The Union of India is, therefore, directed, in consultation with the Chief Justice of India, to set up a Special Court to try this case and to dispose of the same in accordance with the provisions of [a number of Indian statutes]

[1] ITLOS/PV.15/C24/2, 10 August 2015, p. 20, line 16 (Pellet).
[2] ITLOS/PV.15/C24/2 (unchecked), 10 August 2015, p. 14, line 13 (Pellet).

and most importantly the provisions of UNCLOS 1982, where there is no conflict between the domestic law and UNCLOS 1982.

Mr President, Members of the Tribunal, Italy of course does not agree that Indian domestic law should displace UNCLOS. Italy wants its rights determined under UNCLOS – not under UNCLOS insofar as UNCLOS is compatible with Indian law. The best Italy will get at the end of the process to which Counsel for India says Italy should remain committed as a matter of "good faith"[3] is a determination of Italy's rights under UNCLOS "where there is no conflict with Indian law".

This comment is found in the key judgment by the Indian Supreme Court on the issues in dispute before the Annex VII tribunal. It takes a view on the hierarchy between international law and domestic law, which is of direct concern to obligations under UNCLOS. In any event, Italy and India have agreed under UNCLOS that disputes over the interpretation and application of the Convention shall be determined by an Annex VII tribunal, not by India's Special Court. The dispute has now being taken to that Annex VII tribunal.

This very important consideration aside, the Indian Supreme Court at least saw clearly what has been clear to Italy throughout – that in this matter, which India's Counsel says "has barely a link with the law of the sea",[4] UNCLOS provisions are actually "most important".

Mr President, Members of the Tribunal, I would now like to examine where India's contradictory submissions leave Italy's two requests, in particular as far as prejudice and urgency are concerned.

Our first request – it will be recalled – is that India should suspend its domestic jurisdiction during the pendency of the proceedings. The Indian Special Court cannot remain seized of the determination of rights under UNCLOS provisions, while the determination of those rights is simultaneously pending before the Annex VII tribunal.

It is now is for that tribunal to decide who, between Italy or India, is correct in the competing interpretations of the UNCLOS provisions which are clearly and "importantly" engaged in this case. It is Italy's right under UNCLOS to have this dispute concerning the interpretation and application of the Convention's provisions adjudged by the Annex VII tribunal. The exercise of domestic jurisdiction must now await the result of the Annex VII proceedings.

A principle to which I already referred yesterday is particularly important in this context. States must decide jurisdiction and immunity at the outset – *in limine litis*.[5]

But the "outset" cannot last three and half years – and beyond. And when it does, the prejudice cannot be said to have faded away. On the contrary, the prejudice to Italy's rights is more acute, given that India – although it has not yet decided if it has jurisdiction – is still exercising it.

Mr President, Members of the Tribunal, let me now come to the second request. The position of India comes down to this: We cannot let go of Sergeant Girone, whom we have already detained for three and half years. We need him as a *guarantee* – as Professor Pellet said "the presence of Mr Girone on Indian soil provides the guarantee".[6] As for Sergeant Latorre, it is for India to decide if and when his detention should resume. By the way, we may well decide we do not have jurisdiction over this matter after all. But he and Sergeant Latorre must remain

[3] ITLOS/PV.15/C24/2, 10 August 2015, p. 21, line 46 (Pellet).
[4] ITLOS/PV.15/C24/2 (unchecked), 10 August 2015, p. 14, line 13 (Pellet).
[5] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 62, at p. 88, para. 63 and p. 90, para. 67(2)(b).
[6] ITLOS/PV.15/C24/2, 10 August 2015, p. 42, lines 39-40 (Pellet).

subject to our jurisdiction. And as to the fact that the marines do not yet know with what offence, and the statute on which the charge is based,[7] it is all their fault and Italy's fault.

Mr President, Members of the Tribunal, this is a simply indefensible line for India to take. Let me make four points in this regard.

First, the point that no charges have, even until now, been laid against the two marines is a point that both Additional Solicitor General Narasimha and Mr Bundy have conceded.[8] Mr Narasimha explicitly stated in his address to this Tribunal that the stay of the Special Court proceedings meant that "the charges prepared by the NIA have been kept in abeyance".[9]

Mr Bundy admitted that there are no charges, alleging that it was the marines who blocked the receipt by the prosecutor of the investigation report.[10] Mr Narasimha blamed Italy for the failure to issue charges because it is Italy that has "carriage of the proceedings".[11]

Mr President, Members of the Tribunal, this is an exercise of criminal jurisdiction. The idea that the defence has "carriage of the proceedings" is not serious.

Second, not only has India failed to charge the marines and failed to identify the Statute under which they would have to defend themselves, India has also not decided if, after all, it has jurisdiction under UNCLOS. And it wants to deprive the Annex VII tribunal of its prerogatives in relation to the determination of that issue by saying – contrary to the position taken by its own Supreme Court – that this dispute has nothing to do with the law of the sea.

Third, delay, as we heard from Sir Daniel, can in no way be put at Italy's doorstep. India is responsible for its own legal system – not Italy. The contention that the delay in the legal system of a State is the fault of another State – and one State that was objecting to the jurisdiction throughout – is, on its face, absurd. India seeks to make this absurdity good by suggesting that the marines and Italy abused the Indian domestic process. As we heard, there is no basis for this suggestion. Let me emphasize that of this so-called abuse of process in connection to proceedings in India there is not a trace in the record of the Indian proceedings. It has not been alleged by India before its own courts, let alone established by those courts. There is not an order or a judgment that says that Italy or the marines are guilty of some form of abuse of process in the conduct of the litigation.

In any event, as I mentioned yesterday, even an uncooperative individual is entitled to due process. Wherever in Delhi the blame for this delay might lie, due process should have been respected.

Fourth, as we said yesterday, every day spent in detention is irreparable. That principle was clearly one of the bases for the Order in *Arctic Sunrise*, with which India has not really engaged. That principle is more acutely relevant here, given that constraints on liberty have gone on for longer, without charges, and with uncertainty over India's jurisdiction in India's own courts hanging over them.

Mr President, Members of the Tribunal, let me now return to the question of urgency.

India sought to respond to urgency with a long account of the Indian court proceedings. Again, India seeks to rely on delay produced by its own legal system to somehow argue that there is no urgency. But that misses the point. Liberty is being constrained, with jurisdiction not decided under Indian law or under international law, and, as you decided in *Arctic Sunrise*, constraints on liberty and movement constitute an urgent situation incapable of later being remedied. Delay here injures all those who want the facts around the *Enrica Lexie* incident established. It injures those who lost love ones and want to know the truth. But it also injures those who have had these allegations, never properly formalized as charges under any law,

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[7] Human Rights Committee, General Comment No. 32 (2007), para. 31.
[8] ITLOS/PV.15/C24/2, 10 August 2015, pp. 9-10 (Narasimha), pp. 25, 28 (Bundy).
[9] ITLOS/PV.15/C24/2, 10 August 2015, p. 10, lines 30-31 (Narasimha).
[10] ITLOS/PV.15/C24/2, 10 August 2015, p. 25, lines 22-36; p. 28, lines 27 (Bundy).
[11] ITLOS/PV.15/C24/2, 10 August 2015, p. 10, lines 39-40 (Narasimha).

hanging over their heads and who protest their innocence. And it cannot be seriously suggested that Italy and the marines are to be blamed for this delay because they refused to concede the case on jurisdiction and immunity in the Indian courts.

Mr Bundy recalled a passage in *Ghana/Côte d'Ivoire* which captures the test on urgency.[12] In that passage urgency is defined by the "need to avert a real and imminent risk that irreparable prejudice may be caused to the rights in issue".[13] If I may unpack this statement, the test for urgency comprises three elements.

The first element is that irreparable prejudice to the rights must be shown. Italy has clearly shown irreparable prejudice by reference to each of the two Requests and with ample support from this Tribunal's jurisprudence.

The second element is imminence. We are dealing here with ongoing exercises of jurisdiction, in relation to both the First and the Second Request. Ongoing prejudice must be assumed to be also imminent, unless there is some very good reason to think that is about to come to an end. Here, India has given you no such good reason.

On the contrary, India says – and I am quoting language used yesterday – that "the right to see through this process"[14] is a "fundamental right of India".[15] If it ever was a fundamental right, it is one that India chose to limit when it became a party to UNCLOS and accepted the principle of binding dispute settlement under the Convention. But, by stating in such clear terms that it will press on with the exercise of jurisdiction, India is dispelling any suggestion that in this case "ongoing" may somehow not mean "imminent". The requirement of imminence is clearly satisfied.

Moving on to the third requirement, Mr President and Members of the Tribunal, real risk, that requirement is satisfied here too because the irreparable prejudice to Italy's rights is not a matter of probable assessment. This is not about hypothetical risks that must be assessed on a "real risk" basis. The irreparable prejudice to Italy's rights is certain and, again, ongoing. What we have here is not just a real risk of prejudice; we have real irreparable prejudice. We satisfy that element to a higher degree.

In addition to irreparable prejudice that is real, Mr President and Members of the Tribunals, you must also factor into your assessment the real risk that there will be further and aggravated irreparable prejudice. This aspect must be examined closely in the light of India's submissions yesterday.

We know that there is an important hearing on August 26; we do not know what position the Union of India will take there. Different things could happen depending on the stance that the Union of India is due – or rather overdue – to take before India's courts. We do not need to provide you with a detailed assessment of these different short-term scenarios and the further risks that they pose to Italy because I can simply refer you to the contradictory assessments of the "short-term" scenarios here that you heard yesterday from India's Counsel.

Professor Pellet said: "nothing leads one to think that they" – meaning their cases still pending in India – "will not be settled in a reasonably short time".[16] Mr Bundy however says that "there is no chance" that the proceedings in the Special Court will start "in the near future".[17] On one assessment coming from India's Counsel, we are told that we should proceed on the basis that the Indian proceedings will come to an end in a short time. On another

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[12] ITLOS/PV.15/C24/2, 10 August 2015, p. 23, lines 5-6 (Bundy).
[13] *Dispute concerning delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean, Provisional Measures, Order of 25 April 2015*, para. 41.
[14] ITLOS/PV.15/C24/2, 10 August 2015, p. 32, line 14 (Bundy).
[15] ITLOS/PV.15/C24/2, 10 August 2015, p. 32, line 14 (Bundy).
[16] ITLOS/PV.15/C24/2, 10 August 2015, p. 20, line 32 (Pellet).
[17] ITLOS/PV.15/C24/2, 10 August 2015, p. 30, line 30 (Bundy).

assessment, we are told that there is not even a chance in the near future of the Special Court beginning its proceedings.

At a minimum, for the Indian proceedings to be settled "in a reasonably short time",[18] there must be a very significant risk that in the near future the Special Court will begin the trial. Simply on the basis of the assessments of what might happen in the short term – this is about a short time frame – from India's Counsel, you have enough to conclude that there is here a risk – and a risk that is at least a real risk – that further irreparable prejudice will soon be inflicted on Italy's rights through the commencement of the criminal trial.

Mr President, Members of the Tribunal, let me look briefly at the consequences of Indian proceedings moving on and even coming to a conclusion before the matter has been adjudged by the Annex VII tribunal.

India says that, even in that case, Italy's rights would suffer no prejudice because India would comply with the award of the Annex VII tribunal. But how could India's compliance with an award in favour of Italy undo the various consequences of India's exercise of jurisdiction? Those consequences cannot be undone. The criminal trial cannot be undone. The detention cannot be undone. Once Indian proceedings have reached what – you heard it from India's Counsel – is pretty much the foregone conclusion of finding the marines guilty, how could Italy at that point realistically assert any jurisdictional right? Any exercise of jurisdiction by the Italian authorities at that point would be severely undermined, in fact probably completely compromised. A criminal trial would have already taken place, although one vitiated *ab initio* by the lack of jurisdiction. There could also be severe impediments to having a second criminal trial in respect of the same offence: from arguments of *ne bis in idem*, to the fact that a long time in custody would have already been spent. Moreover, the punitive power, which is an essential element of criminal jurisdiction, would have been exercised not by the State which had jurisdiction but by the State which lacked it. This is all irreparable prejudice and the risk of this happening as a result of those assessments about the short-term scenarios is urgent.

Mr President and Members of the Tribunal, we have real irreparable prejudice that derives from the status quo, which is defined by the continuing exercise of jurisdiction and the ongoing imposition of bail conditions, but we also have a real risk of further and aggravated irreparable prejudice.

Let me now come to a final point on urgency, and that is the relationship between Italy's case on urgency and the timing of Italy's Request.

In the "*Camouco*" *Case*, this Tribunal drew an important distinction. (I am afraid we have not been able to provide you with a Judges' folder on this quotation but you will be familiar with it.) The Tribunal said:

> The Tribunal finds that there is no merit in the arguments of the Respondent regarding delay in the presentation of the Application. In any event, article 292 of the Convention requires prompt release of the vessel or its crew once the Tribunal finds that an allegation made in the Application is well-founded. It does not require the flag State to file an application at any particular time after the detention of a vessel or its crew.[19]

This was in relation to prompt release proceedings. In that context, there may perhaps have been some arguable basis for saying that delay in the filing of an application should cast a negative light on the State request, but even in that context the Tribunal said clearly that this

[18] ITLOS/PV.15/C24/2, 10 August 2015, p. 21, line 41-42 (Pellet).
[19] *"Camouco" (Panama* v. *France), Prompt Release, Judgment, ITLOS Reports 2000,* p. 10, at p. 28, para. 54.

is not the case. The well-foundedness of the application must be assessed without reference to the issue of delay in filing it. The preconditions for seeking the prompt release may have been satisfied before, but failing to act as soon as those preconditions arise does not produce a sort of estoppels, rendering the application inadmissible – again to use language from the other side. There is just no basis for that principle. The well-foundedness of the application is to be assessed when it is brought before the Tribunal.

That same important analytical distinction applies here, and it applies here *a fortiori*. You have heard about the history of the negotiations and I will not repeat what Sir Daniel said. I will just add that a negotiated solution, once reached, can take effect immediately and settle the dispute permanently, even if it takes a long time to reach and does not involve a consistent trajectory. As Sir Daniel said, there was a sustained effort when two new governments were formed in April 2014 but that clearly came to an end in May 2015. That explains timing here, but, I repeat, this is not the issue when it comes to urgency. This Tribunal has to assess urgency on the circumstances before it now. May 2015 is the point when it became clear to Italy that there was no other way for it to address the severe and increasing concerns other than by resorting to international arbitration under UNCLOS.

Mr President, Members of the Tribunal, with the further guarantees to address India's concerns, which Sir Daniel explained yesterday and to which Italy's Agent will soon return, we submit that Italy's two Requests are appropriate, necessary and urgent.

Mr President, I have concluded and I will now ask you to call Italy's Agent.

**THE PRESIDENT:** Thank you, Mr Verdirame.

I now give the floor to the Agent of Italy, Mr Azzarello.

STATEMENT OF MR AZZARELLO
AGENT OF ITALY
[ITLOS/PV.15/C24/3/Rev.1, p. 18–20]

Mr President, Members of the Tribunal, before I read our final submissions, allow me to say a few words.

I would like to start with the issue of the death of the two Indian fishermen on 15 February 2012. India submits that Italy has disregarded the fact that two Indian citizens lost their lives.

Mr President, Members of the Tribunal, this is not the case. Italy regrets the death of Valentine Jalestine and Ajeesh Pink and has expressed this view on many occasions. Italy has also provided their families with ex-gratia payments, on a without prejudice basis. It is regrettable that India's Counsel has attempted to portray this fact as an admission of responsibility on the part of the Italian marines.

Mr President, Members of the Tribunal, India has also suggested that the Tribunal should be careful about trusting Italy to comply with its orders, because Italy has a record of defaulting on its international obligations. Counsel for Italy has already shown how Italy has always honoured the obligations that it has undertaken in the context of this case.

Reliance on Judgment 238/2014 by the Italian Constitutional Court does not take India's arguments any further: the case is legally and factually distinguishable and of a totally different nature and order of magnitude.

The case before the Italian Constitutional Court concerned the right to have access to a judicial remedy for the victims of the most egregious war crimes and crimes against humanity committed during the Second World War. It was premised on the necessity to safeguard one specific constitutional bedrock: that of access to justice in the case of gross violations of human rights of a kind that constitute violations of *jus cogens* norms of international law.

This has to be read by taking into account the unique aggravated circumstances of the case. Germany had already admitted before the International Court of Justice that war crimes and crimes against humanity were committed and that no national judge was available to provide redress to victims of such crimes. In the *Enrica Lexie* incident, the two marines maintain their innocence and the question is which national judicial system has jurisdiction, both being willing to exercise it.

Mr President, Members of the Tribunal, there should be no doubt in the mind of the Tribunal that Italy will abide by any decision that the Tribunal will render. There should also be no doubt that Italy will abide by the undertaking – that I reaffirm in the context of my final submission – to return Sergeant Latorre and Sergeant Girone to India following the final determination of rights by the Annex VII tribunal, if this is required by the award of the tribunal.

Lastly, Mr President, Members of the Tribunal, Italy notes India's observations that the two marines are currently subject to bail constraints and its concern that Italy may not be ready to impose any similar form of control over them if the provisional measures requested by Italy are granted. Italy invites the Tribunal to make its order subject to the conditions that it deems appropriate in this regard.

Thank you, Mr President. That concludes my statement.

**MR PRESIDENT:** Thank you, Mr Azzarello.

I understand that this was the last statement made by Italy during this hearing. Article 75, paragraph 2, of the Rules of the Tribunal, provides that, at the conclusion of the last statement made by a Party at the hearing, an Agent, without recapitulation of the arguments, shall read the Party's final submissions. The written text of these submissions, signed by the Agent, shall be communicated to the Tribunal and a copy of it shall be transmitted to the other Party.

I now invite the Agent of Italy, Mr Azzarello to take the floor again to present the final submissions of Italy.

**MR AZZARELLO**: Thank you, Mr President. Thank you to the Tribunal.

Mr President, in accordance with article 75, paragraph 2, of the Rules of the Tribunal, I shall now read Italy's final submissions. They are as follows:

I will read them in English, then in French.

For the reasons given in its Request for the Prescription of Provisional Measures dated 21 July 2015 and in the course of the present hearing, Italy requests that the Tribunal prescribe the following provisional measures:

a) India shall refrain from taking or enforcing any judicial or administrative measures against Sergeant Massimiliano Latorre and Sergeant Salvatore Girone in connection with the Enrica Lexie Incident, and from exercising any other form of jurisdiction over the Enrica Lexie Incident; and

b) India shall take all measures necessary to ensure that restrictions on the liberty, security and movement of the marines be immediately lifted to enable Sergeant Girone to travel to and remain in Italy and Sergeant Latorre to remain in Italy throughout the duration of the proceedings before the Annex VII tribunal.

*(The agent of Italy reads the final submissions in French.)*

A copy of the written text of Italy's final submissions is now being communicated to the Tribunal and transmitted to the Agent of India.

Mr President, Members of the Tribunal, before I conclude let me express, on behalf of the Italian Government and on behalf of all the members of the Italian delegation, our profound thanks to you, Mr President, and to the Members of the Tribunal, for the efficient manner in which these proceedings have been prepared and conducted. We are very grateful to all concerned: to the Registrar and his staff, to the interpreters, to the translators and to all those who have worked so hard behind the scenes to make this hearing possible.

I would also like to thank our colleagues from India.

I thank you, Mr President.

**THE PRESIDENT:** Thank you, Mr Azzarello.

This concludes the oral arguments presented by Italy and this morning's sitting. We will continue the hearing in the afternoon at 4.30 p.m. to hear the second round of oral arguments of India.

The sitting is now closed.

*(Luncheon adjournment)*

**PUBLIC SITTING HELD ON 11 AUGUST 2015, 4.30 P.M.**

**Tribunal**

*Present:* *President* GOLITSYN; *Vice-President* BOUGUETAIA; *Judges* CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, PAIK, KELLY, ATTARD, KULYK, GÓMEZ-ROBLEDO *and* HEIDAR; *Judge* ad hoc FRANCIONI; *Registrar* GAUTIER.

**For Italy:** [See sitting of 10 August 2015, 10.00 a.m.]

**For India:** [See sitting of 10 August 2015, 10.00 a.m.]

**AUDIENCE PUBLIQUE TENUE LE 11 AOÛT 2015, 16 H 30**

**Tribunal**

*Présents :* M. GOLITSYN, *Président* ; M. BOUGUETAIA, *Vice-Président* ; MM. CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, PAIK, MME KELLY, MM. ATTARD, KULYK, GÓMEZ-ROBLEDO *et* HEIDAR *juges* ; FRANCIONI, juge *ad hoc* ; M. GAUTIER, *Greffier*.

**Pour l'Italie :** [Voir l'audience du 10 août 2015, 10 h 00]

**Pour l'Inde :** [Voir l'audience du 10 août 2015, 10 h 00]

**THE PRESIDENT:** Good afternoon. We will now hear the second round of oral arguments presented by India in the case concerning the *Enrica Lexie* incident.

I give the floor to Mr Narasimha to begin his statement.

**Second Round: India**

STATEMENT OF MR NARASIMHA
COUNSEL OF INDIA
[ITLOS/PV.15/C24/4/Rev.1, p. 1–4]

Mr President and Members of this honourable Tribunal, I will be making a short submission before you. I will be followed by Mr Bundy and thereafter by Professor Pellet.

I was surprised upon hearing the submission of Sir Daniel Bethlehem in his speech when he said: "The Indian Supreme Court's judgment requiring, exceptionally, the establishment of Special Court to try the marines was questionable as a matter of Indian constitutional law."

I am sorry to say, Mr President, that the Special Court which the Supreme Court directed to be constituted to try the marines could not have, for some inexplicable reason, suddenly become unconstitutional. With due respect to the opinion of Italy on the Special Courts, I submit that these courts are not *ad hoc*. The Special Courts are constituted in exercise of the same law which governs the courts for the rest of the country and the appointment of judges of the Special Court is the same as that of any other court. In fact, the Special Courts are selected and designated out of the existing judges of the regular judiciary so that they are dedicated to the hearing and deciding of cases having special circumstances, requiring urgent determination. In fact, the Special Court was constituted by appointing a judge of due authority and having due regard to the rights of the marines.

There cannot be anything further from the truth to raise non-existing grounds, and that too for a first time before this Tribunal, questioning the validity of the Special Courts. In fact, the honourable Tribunal may note that Italy has never questioned the constitutional validity of the establishment of the Special Court. A similar submission has been made by Professor Verdirame and that submission suffers from the same misconception about Special Courts.

Mr President, today submissions have been made about the alleged delay in informing the accused of the charges. I perceive that there is some amount of confusion as regards the stage at which the information regarding the charges is to be given. In the first place, our Constitution provides for protection against arrest and detention. I now quote the relevant text, article 22(1) of the Constitution, which says,

> No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds of such arrest nor shall be denied the right to consult, and to be defended by, a legal practitioner of his choice.

It is not the case of either India or Italy that the above constitutional requirement followed by the procedure under the Code of Criminal Procedure has not been followed. Professor Verdirame emphatically stated yesterday that "the due process requirement to inform a person of the charges brought against him or her promptly is not an abstract legal formality".

I completely agree with him. He then concluded on the point by saying that India has sought to conceal this fact by using convoluted terms such as "framing of charges". Here the confusion becomes apparent. Informing of the charges when a person is arrested is one thing and framing of charges is another thing. I think there is substantial confusion with respect to these two incidents in the submissions that have been made.

It is nobody's case that these requirements have not been followed at the time of arrest and, even in the present case, both the Italian marines have undisputedly "been informed" of the charges made against them at all stages. I submit that we have gone past this stage, which

occurred at the time of arrest in 2012, when the accused were informed of the charges against them. Perhaps the submission made by Italy's Counsel pertains to the legal requirement of "filing of a charge-sheet", which is done in a court of law. This requirement is immediately after the investigation is complete and the agency finalizes and files its report. After it is filed, the accused gets an opportunity to be heard and thereafter, a court of law frames the charges. I have made my submissions about the alleged delay in non-filing of the charge-sheet and I do not wish to labour these arguments again.

It is baffling that two accused persons who claim to be unaware of the charges against them filed application after application stating that the NIA, the National Investigation Agency, be prevented from filing charge-sheets or that the jurisdiction of the NIA be taken away. While on the one hand they cite lofty principles of law, on the other hand they have maintained a stoic silence as regards the various applications and injunctions against the NIA. These inexplicable and contradicting claims by Italy establish that, though the Republic of Italy is before you today, neither of the marines have given up their claim before the Special Court or the Supreme Court.

Though I do not wish to flood the Tribunal with Indian legal terminology and meanings, I take exception to Italy's attempt at discrediting the Indian legal system, which system they have used continuously from 2012 onwards. This Tribunal is aware that the charge-sheet was filed in Kerala within 90 days, which is actually the statutory requirement under the Criminal Procedure Code. After the judgment of the Supreme Court on 18 January 2013, the Special Court was constituted and the case was entrusted to the NIA. The NIA submitted its report to the Government on 27 November 2013.

It is important to note that on 15 January 2014 the NIA received an application filed by Italy and the marines praying that the NIA should be restrained from investigating the case. I have already referred to the order dated 24 February 2014 when this question was referred to be decided by a Special Bench. This order, coupled with the subsequent order dated 28 March 2014, on which detailed submission have been already made, led to the suspension of criminal proceedings before the Special Court. The procedure is that it must be filed only in the designated court. As there was no designated court available, the charge-sheet could not be filed. I think, Mr President, that the confusion pertaining to the framing of charges and the filing of charge-sheets has led to some amount of misconception about the procedure and the rights that are supposed to have been affected.

Sir David Bethlehem referred to Section 161 CrPC (tab 33 – Italy's Judges documents). However, I wish to draw the attention of the Tribunal to another important section, that is Section 160, which precedes Section 161. This section grants power to the police officer to require the attendance of witnesses. Therefore, Section 161 is only an enabling provision and specifically provides a discretion to the police officer to determine whether a person should be personally called or that video recording could be taken. It is not a mandatory provision, as has been read out from 161 itself. That is why I submit that section is not mandatory and gives absolute discretion to the Agency to decide the manner in which the Agency may take a statement of a witness. Section 161 does not relate to witnesses. The question of examining a witness would arise when the trial begins. The statements which were to be recorded under Section 161 relate to statements to be taken at the time of investigation. That is the reason the judgment which has been cited has no relevance to the facts of this case. It relates to the statement that could be taken at the time of evidence which is recorded in a court of law.

I now come immediately, Mr President, to the issue of due process. A submission was made today that India has pre-judged the issue relating to the death of the fishermen and has concluded that the marines are responsible for the death of the fishermen. The presumption of innocence is fundamental to Indian criminal jurisprudence. Every fact needs to be proved by the prosecution "beyond reasonable doubt". Under our Constitution, interference with liberty

can only be by procedure established by law and that procedure, the Supreme Court has held, must be fair, just and reasonable. We have consistently been following this principle and there are a large number of provisions which the Supreme Court examined from time to time, held them to be unconstitutional and struck down. The procedure which subsists today is therefore the constitutionally recognized procedure, which is a reasonable, fair and just procedure.

These principles are the bedrock of the Indian Criminal Procedure Code and the judiciary does not countenance or tolerate even the smallest infraction of these principles by State action. These rights or freedoms being fundamental to an individual's existence, Indian Courts have zealously protected them. Sir Daniel Bethlehem made a statement that India, while relying on the 18 January 2013 judgment to contend that that the question of jurisdiction has been kept open, in the written statement as well as in the affidavit filed in the Supreme Court, opposed the Writ Petition as being barred by *res judicata*. He submits that this is a contradiction. In my respectful submission, there is actually no contradiction at all. The submission is just that the judgment dated 18 January 2013 is final and cannot be reopened, which also means that the right to question the jurisdiction of India is kept open. It is not the endeavour of the Supreme Court or of the Government of India to take away that right which the Supreme Court has granted to them in the earlier proceedings.

The reply to Professor Verdirame's submission that India has not decided jurisdiction after three and a half years is completely unfounded. I state that there is no ambiguity on this question on behalf of India. There is no ambiguity in the stand of India with respect to jurisdiction. It is the incorrect assertion by Italy and the marines that India has no jurisdiction and this issue has been agitated by them without finality.

I have now concluded my submissions, and I request you, Mr President, to permit Mr Bundy to make his submissions.

**THE PRESIDENT:** Thank you, Mr Narasimha.

I now give the floor to Mr Bundy to make his statement.

STATEMENT OF MR BUNDY
COUNSEL OF INDIA
[ITLOS/PV.15/C24/4/Rev.1, p. 4–9]

Mr President, Members of the Tribunal, it falls to me once again to address Italy's first request for provisional measures and how Italy has failed to sustain its burden of proof that a situation of urgency exists justifying the Tribunal enjoining India from exercising any further jurisdiction over the matter in order, allegedly, to prevent irreparable harm to Italy.

Yesterday, Sir Daniel Bethlehem advanced a number of assertions which, in his view, supported Italy's arguments in the first submission. These were repeated again this morning. Amongst these were the following:

Only in late May of this year did it become apparent that no diplomatic settlement of the dispute between India and Italy would be possible.[1] This so-called "political impasse" coincided with what Sir Daniel termed "acute and increasingly urgent concerns, of both a humanitarian and legal nature, that have brought us before you".[2]

As a consequence, Italy's requests for provisional measures, to quote my learned friend, "come on the cusp of potentially very serious complications in the dispute between Italy and India".[3] Finally, so the argument goes, there is "now" the prospect of imminent Indian criminal proceedings against the two marines unless India is enjoined from exercising jurisdiction. Thus, say our opponents, "the threat of irreversible prejudice to Italy's rights has … now crystallized sharply".[4]

These contentions are not correct and none of them is backed up by any evidence that is on the record in this case. As I explained yesterday afternoon, and will do so again now, the record in the case shows that there is absolutely no risk of real and imminent prejudice to Italy's rights justifying India being ordered to refrain from exercising any further jurisdiction over the dispute.

In order to demonstrate this, I would invite the Tribunal to examine the situation as it existed on the "critical date", that is on 26 June 2015. That was the date of Italy's Notification commencing Annex VII arbitration. That Notification requested that India agree exactly the same provisional measures that Italy now requests from your Tribunal. It follows that, as of 26 June 2015, Italy must have considered that a situation of urgency existed justifying the prescription of provisional measures. So the essential questions are: What was the situation on that date? Does it point to a situation of urgency or of imminent irreparable prejudice that will materialize before the Annex VII arbitral tribunal is constituted and is in a position to deal with the matter?

The answer is "no". To show why this is the case, we need to look at the facts, not mere assertions, as Counsel for Italy was prone to do. As the Special Chamber put it in the *Ghana/Côte d'Ivoire* case:

> The decision whether there exists imminent risk of irreparable prejudice can only be taken on a case-by-case basis in light of all relevant factors.[5]

Moreover, while this morning Sir Michael argued that there was nothing to prevent your Tribunal from prescribing provisional measures for the duration of the Annex VII

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[1] ITLOS/PV.15/C24/1, p. 14, lines 44-45.
[2] ITLOS/PV.15/C24/1, p. 15, lines 1-4.
[3] ITLOS/PV.15/C24/1, p. 16, lines 39-40.
[4] ITLOS/PV.15/C24/1, p. 15, lines 23-27.
[5] *Dispute concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire), Order of 25 April 2015*, para. 43.

arbitration proceedings, he failed to address the key point. As the Tribunal stated in the *Land Reclamation* case,

> The urgency of the situation must be assessed taking into account the period during which the Annex VII arbitral tribunal is not yet in a position to "modify, revoke or affirm those provisional measures".

Thus, the limited temporal duration of provisional measures that an applicant requests from this Tribunal before an Annex VII tribunal is constituted is a relevant factor for assessing whether there genuinely is a situation of urgency within the meaning of article 290, paragraph 5, of the Convention.

So, what was the factual position on the eve of Italy's Notification?

First, the trial of the two marines before the Special Court that had been established pursuant to the Supreme Court's Order of 18 January 2013 was in abeyance. That was a direct result of the fact that the marines had filed an application in March 2014 requesting, amongst other things, India's Supreme Court to rule that the Special Court was without jurisdiction – the famous Writ No. 236. It was in response to that application that the Supreme Court, on 28 March 2014, ordered the Special Court proceedings stayed, and that remains the case.

Second, as my colleague, the Additional Solicitor General, just discussed, the NIA had not been able to submit its investigation report of the incident to the prosecutor or the Special Court because the Italian marines had also challenged the NIA's authority to carry out the investigation. That made it impossible for the prosecutor to formulate charges against the marines. As a consequence of those two factors, the notion that there is a prospect of imminent criminal proceedings against the two marines is fundamentally misguided. There is not.

Third, on 26 June of this year the marines' Writ No. 236 was still pending, with a hearing scheduled for 13 July. Recall, if you would, Mr President and Members of the Tribunal, that in their petition the marines had asked the Supreme Court to decide the key questions of jurisdiction and immunity. They wanted the Supreme Court to exercise jurisdiction over those questions and they voluntarily submitted to the Supreme Court's jurisdiction to decide those issues. Prior to 26 June there was no request for an Annex VII tribunal to decide those issues, and there was no hint that the marines would subsequently change their mind and ask the Supreme Court to defer consideration of their own petition.

Fourth, again, looking at the situation as of 26 June, Sergeant Latorre was in Italy pursuant to a previous order of the Supreme Court relaxing his bail conditions. As for Sergeant Girone, on 26 June 2015 it had been twenty-eight months, more than two years, since he had last asked the Supreme Court for leave to travel to Italy, it being recalled that Sergeant Girone had unilaterally withdrawn a petition for the relaxation of his bail in December 2014, before the Supreme Court could even rule on the application. How Italy can posit a situation of urgency regarding Sergeant Girone as of 26 June, when he had not pursued an application for relaxation of bail for over two years, is inexplicable.

It follows, fifthly, that there is absolutely no evidence to show that it was only in May 2015 that it became clear that a diplomatic solution could not be reached, or that, as Sir Daniel asserted:

> At this point – that is May 2015 – the Indian Government indicated to Italy that it had no latitude to pursue a negotiated settlement given the engagement of the Indian Supreme Court.[6]

[6] ITLOS/PV.15/C24/1, p. 14, lines 45-47.

Where is the evidence of that statement? It is not on the file. Pure assertion. My colleague has not pointed to any document that supports this claim that somehow it was only in May of this year that settlement became impossible.

Sir Daniel's arguments in this respect are pure assertion. He has not pointed to any document that supports his claim. The only thing he produced this morning, under Italy's tab 36, is an extract from a blog in which India's External Affairs Minister was asked about relations with the European Union. In answering, the Minister stated that India had repeatedly told Italy that it should join India in the judicial process taking place in India and that was *sub judice* before the Indian courts, but that Italy had not done so. That was nothing new. It had been India's consistent position over the previous three years. While Sir Daniel speculated about unreported and undocumented back-channel discussions – I was not sure if he was giving testimony or simply referring to materials that are not on the record – the fact of the matter is that the last Note Verbale that is on the record that Italy sent to India on this matter was dated 18 April 2014, 14 months earlier. Even at that time, in the spring of 2014, it was apparent that a diplomatic impasse had been reached. In short, there was absolutely nothing new in May 2015.

It follows that Sir Daniel's contention that the Parties were on the cusp of potentially serious complications is completely unfounded. Equally misguided is the argument that there were acute and increasingly urgent concerns of both a humanitarian and legal nature at that time. There were none, as I have just explained.

Notwithstanding this, our opponents appear to attach great importance to the fact that, on 4 July this year – that is, after Italy had already announced its intention to seek provisional measures – the marines petitioned the Supreme Court to defer consideration of their Writ No. 236. However, that application in no way changes the equation with respect to the question of urgency or the risk of irreparable harm. If anything, it shows that there will be no "undue burden" on Italy if the proceedings before the Indian Supreme Court, which the marines have themselves petitioned to decide the questions of jurisdiction and immunity, are permitted to continue.

Let me put the point as succinctly as I can: a party cannot claim irreparable prejudice or undue burden if it voluntarily submits to the jurisdiction of one court (in this case, India's Supreme Court) and asks that court to decide the essential questions in dispute – jurisdiction and immunity – and then later turns around and argues that actually those questions should be heard and decided by another court or tribunal, the Annex VII arbitral tribunal and that the first court, the Supreme Court, should be enjoined from proceeding further. Whether that is viewed as a question of estoppel or as consequence of the principle that a State cannot blow hot and cold at the same time makes little difference. Italy's request that the Annex VII arbitral tribunal decide these issues does not trump the earlier request of the marines that the Supreme Court take that decision. By the same token, Professor Verdirame's argument that the issue of jurisdiction would be decided before the Annex VII tribunal can consider the issue if the Supreme Court is allowed to proceed flies in the face of what Italy's marines asked the Supreme Court to do.

Counsel for Italy simply ignores these facts. He asserted this morning that India had not decided if, after all, it has jurisdiction, and he argued that this delay is due to India's own legal system. Those contentions are untenable. Need I remind this Tribunal that jurisdiction would have been decided by the Special Court but for the applications of Italy and the marines challenging the jurisdiction of the Special Court and but for the marines' application that the Supreme Court defer consideration of its petition for the Supreme Court to decide the questions of jurisdiction and immunity. If Italy and the marines had not submitted those applications the question of jurisdiction would already be decided by now. It was not India's fault.

It follows that, if there are any complications as a result of Italy's and the marines' flip-flops, as Sir Daniel seems to believe, they are of the marines' own making. That, Mr President and Members of the Tribunal, India submits, scarcely justifies India's courts from being enjoined from being able to continue to exercise the very jurisdiction that the marines asked them to do.

In the light of the facts on the record, the timing of Italy's Annex VII Notification and its Request for provisional measures is entirely arbitrary. Nothing changed in May 2015 that created any situation of urgency.

This morning Professor Verdirame cited *The "Camouco" Case* for the proposition that, in prompt release cases, the Tribunal found that the Convention "does not require the flag State to file an application at any particular time after the detention of a vessel or its crew".[7] My colleague argued that the same principle should apply here.

But the two situations are entirely different and are governed by different provisions of the Convention. The Convention provides a measure of discretion to the flag State in deciding when to file a prompt release application. However, when it comes to a request for provisional measures, the prescription of such measures does not depend on the appreciation solely of the applicant State. It depends on an objective showing that a situation of urgency exists within the meaning of article 290(5) of the Convention. If a State delays filing a request for provisional measures when it could have done so earlier, it casts serious doubts over its claim that there is a real and imminent risk of irreparable prejudice. In this case, as I have demonstrated, there was no situation of urgency when Italy announced its intention to seek provisional measures in its notification of 26 June.

Let me say a few additional words about the question of due process. India firmly rejects the accusation that has been harped on by Counsel for Italy that there has been a failure of due process in the Indian judicial process. Not once over three years have Italy or the marines complained to the Supreme Court that they were not being accorded due process. To the contrary, India's Supreme Court has shown great patience with Italy's numerous petitions and has repeatedly indicated that Italy's and the marines' right to argue the issues before the competent court is preserved.

Notwithstanding this, Professor Verdirame contends that the Indian judicial process has failed in three respects.

First, he complained again this morning that no formal charges have been brought against the marines, an accusation that was also made by Italy's distinguished Agent and Sir Daniel Bethlehem yesterday.[8] Again, I emphasize that this is entirely misleading, as I hope we have explained. As the learned Additional Solicitor General has explained, no formal charges could be framed until the prosecutor had examined the facts of the case; but the prosecutor had not been able to do this because Italy and the marines had blocked the submission of the NIA's report by challenging its right to conduct the investigation before the Supreme Court. Professor Verdirame labelled it "absurd" that the reasons the marines have not yet been charged is because they and Italy have not been cooperative and they also emphasized that a person has a right to remain silent;[9] but Italy and the marines have not remained silent. They have petitioned the Supreme Court to block the NIA investigation, which is precisely the reason why charges have not been able to be brought. India fails to see how responsibility for that situation can be laid at its door.

Second, Counsel raised objections about the manner in which India wants to try the case through the Special Court.[10] My colleague, Mr Narasimha, rebutted that charge a few

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[7] *"Camouco" (Panama* v. *France), Prompt release, Judgment, ITLOS Reports 2000,* p. 10, para. 54.
[8] ITLOS/PV.15/C24/1, p. 39, line 14.
[9] ITLOS/PV.15/C24/1, p. 40, lines 27-28.
[10] ITLOS/PV.15/C24/1, p. 40, lines 37-41.

moments ago. The Special Court was set up as a result of Italy's own application submitting that the Kerala courts were without jurisdiction and that the Supreme Court should take any other measures it deemed appropriate. As has been explained, the manner in which the Special Court was established was fully in conformity with Indian law and was not an exceptional procedure. It operated under the same rules as other Indian courts. Italy and the marines have the opportunity, which has been expressly preserved, to challenge the Special Court's jurisdiction, which they have done. How have they done it? By introducing Writ 236 before the Supreme Court; but having introduced that application, Italy now acts totally inconsistently by arguing that India's courts should be enjoined from acting on the marines' own petition. It is entirely disingenuous.

Third, Professor Verdirame insinuated that the two marines had been deprived of the presumption of innocence.[11] Again, my colleague addressed that point. It is not true, and Counsel cannot point to a single order or ruling of the Supreme Court that has compromised the rights of the accused or prejudged the matter. India's courts have no more compromised the presumption of innocence than did the Prosecution Office of the Military Tribunal of Rome when it announced in 2012 that it was opening criminal proceedings against the two marines for the crime of murder.

Professor Verdirame also asserted that if a trial takes place before the Special Court, Italy would suffer "fatal" prejudice because any trial would be a *fait accompli* depriving the Annex VII tribunal of any effect if it decides in Italy's favour.[12] I already responded to that allegation yesterday when I recalled that fact that India fully respects the provisions of Annex VII, including the stipulation that awards are final and binding and shall be complied with. The fact of the matter is that India has not once reneged on any of its commitments made to Italy; but the same cannot be said of Italy, which has *twice* taken a stance that was directly contrary to solemn undertakings it had made to India.

The last point I wish to address concerns Sir Daniel's argument yesterday that India will suffer no prejudice if Italy's provisional measures are granted because India can always come back to request the Annex VII arbitral tribunal to modify or revoke the measures.[13]

This is no more, I suggest, than an unsubtle attempt to reverse the burden of proof by placing it on India. It is Italy that bears the burden of demonstrating to the satisfaction of this Tribunal that its requests for provisional measures meet the requirements of article 290(5) of the Convention. I have shown that with respect to its first request, Italy has not met that burden. There is no urgency that merits upholding Italy's request, and no real and imminent risk of irreparable harm.

Mr President, distinguished Members of the Tribunal, that concludes my presentation. Once again, I thank the Tribunal for its attention, and would ask the floor to be given to Professor Pellet to continue India's second round.

**THE PRESIDENT:** Thank you, Mr Bundy.

I now give the floor to Mr Alain Pellet.

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[11] ITLOS/PV.15/C24/1, p. 41, lines 19-21.
[12] ITLOS/PV.15/C24/1, p. 35, lines 35-37.
[13] ITLOS/PV.15/C24/1, p. 46, lines 20-26.

EXPOSÉ DE M. PELLET
CONSEIL DE L'INDE
[TIDM/PV.15/A24/4/Rev.1, F, p. 10–20]

Monsieur le Président, Madame et Messieurs les juges,

Avant que notre agente lise les conclusions de l'Inde, il me revient de vous présenter nos observations sur les questions liées à la compétence du tribunal de l'annexe VII qui doit être constitué et, par ricochet, de votre propre Tribunal ainsi que sur la seconde mesure provisoire que l'Italie vous demande de prescrire. A cette occasion, je présenterai quelques remarques plus générales qui tiendront lieu de propos conclusifs, en essayant de résumer nos positions sur certains points saillants de la procédure entamée par l'Italie.

Monsieur le Président, d'abord quelques mots sur la compétence *prima facie* du tribunal de l'annexe VII – qui est une condition de votre propre compétence pour vous prononcer sur la requête italienne du 21 juillet.

Le professeur Tanzi s'est donné hier beaucoup de mal pour montrer qu'il existait un différend entre l'Inde et l'Italie. Ceci, je le lui concède bien volontiers, mais un différend sur quoi ? Pour mes contradicteurs, je cite M. Tanzi : « Notamment sur les articles 2 alinéa 3, 27, 33, 56, 58, 87, 89, 92, 94, 97, 100 et 300 de la Convention »[1] .

Rien que cela ! (qui n'est d'ailleurs que la reprise du catalogue figurant successivement et à l'identique dans la Notification et dans la Requête italiennes[2]). Mais il ne suffit pas de citer une série de dispositions d'un traité en vrac pour prouver l'existence du fameux *bonus fumi juris*, Monsieur le Président, encore faut-il qu'elles aient une réelle pertinence au regard du différend qu'il s'agit de régler et je dirais même « une pertinence prédominante ». Étant donné le nombre des dispositions que l'Italie prétend invoquer, il est difficile de les passer toutes en revue – j'essaie tout de même « au galop » (et en priant les interprètes de bien vouloir m'en excuser) :

- article 2, paragraph 3 : « Souveraineté sur la mer territoriale » – la fusillade a eu lieu dans la zone économique exclusive ;
- article 27 : « Juridiction pénale à bord d'un navire étranger » (dans la mer territoriale également) ;
- article 33 : « Zone contiguë » – aucune des Parties ne s'appuie sur cette disposition ;
- articles 56 et 58 : « Droits des Etats côtiers et des autres Etats dans la zone économique exclusive » – je vais y revenir dans un instant ; mais, pour prendre note : ce qui est important dans notre affaire c'est le silence de ces articles sur les questions liées tant à l'utilisation militaire de la zone qu'à celle de la juridiction pénale s'agissant des crimes qui y sont commis ;
- articles 87 et 89 : même remarque s'agissant cette fois de la haute mer ;
- article 92 : « Les navires naviguent sous le pavillon d'un seul Etat et sont soumis, sauf dans les cas exceptionnels expressément prévus par des traités internationaux ou par la Convention, à sa juridiction exclusive en haute mer » – les navires oui – mais ici il s'agit non du navire, mais de personnes accusées de meurtres ;
- article 94 : « Obligations de l'Etat du pavillon » : aucune de ces obligations, la liste est longue, (qui concernent la sécurité et la gestion des navires) et la compétence du capitaine, des officiers et de l'équipage n'est en litige entre les Parties ; les deux marines n'étaient pas membres de l'équipage ;

[1] TIDM/PV.15/A24/1 (traduction non vérifiée), p. 18.
[2] Notification, par. 29; et demande, par. 29.

- article 97 : « Juridiction pénale en matière d'abordage ou d'autres incidents de navigation » ; je me permets, Madame et Messieurs du Tribunal, de vous renvoyer à ce que j'ai dit hier à ce sujet[3] ;
- article 100: « Obligation de coopérer à la répression de la piraterie » : en quoi le jugement de marines accusés d'avoir tué deux pêcheurs s'apparente-t-il, de près ou de loin, à un manquement à cette obligation ? (et je rappelle les formidables succès de l'Inde dans la lutte contre la piraterie au large de ses côtes)[4] ; et puis
- l'inévitable article 300 sur la bonne foi, dont je souligne que *(Read in English)* "It is not in itself a source of obligation where none would otherwise exist."[5] – *(Poursuit en français)* dixit la CIJ.

Monsieur le Président, je ne conteste pas que notre affaire ait un rapport avec la mer – parce que c'est en mer qu'a eu lieu la fusillade du 15 octobre 2012, mais il s'agit là d'un élément fortuit : le seul problème juridique est de savoir quel Etat (voire quels Etats, car il pourrait y avoir des juridictions concurrentes) a ou ont compétence pour juger cette fusillade qui a provoqué la mort de deux pêcheurs indiens. Et sur cela, la Convention de Montego Bay est muette. Pour preuve : les déclarations interprétatives contradictoires qu'ont faites les Parties à propos des droits de l'Etat côtier en matière d'usage militaire de la zone économique exclusive.

Comme je l'ai dit hier, l'Inde a déclaré que :

> *(Read in English)*
> that the provisions of the Convention do not authorize other States to carry out in the exclusive economic zone and on the continental shelf military exercises or manoeuvres, *in particular those involving the use of weapons or explosives without the consent of the coastal State.*[6]

*(Poursuit en français)* De son côté, l'Italie a également fait une déclaration à ce sujet – et en sens parfaitement opposé puisque, selon elle : « Les droits de l'Etat côtier dans une telle zone ne comportent pas celui d'être notifié des exercices ou des manœuvres militaires ou les autoriser »[7].

Il ne me parait pas utile à ce stade de discuter au fond la question de savoir si l'une ou l'autre interprétation est « la bonne » ; il suffit de constater que :

- huit autres Etats parties à la Convention ont formulé des déclarations comparables à celle de l'Inde, deux autres, l'Allemagne et les Pays-Bas, se sont alignés sur la position italienne ;
- et ces déclarations ne se sont heurtées à aucune objection formelle de la part d'un Etat autre que l'Italie;
- mais surtout, le seul fait que deux catégories de déclarations totalement inconciliables aient pu être faites tend à montrer que, décidément, cette question ne relève pas de la Convention et échappe à l'obligation d'un règlement obligatoire des différends pouvant surgir à cet égard au titre de la partie XV de la Convention. Le tribunal de l'annexe VII devra en décider

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[3] TIDM/PV.15/A24/2, p. 3 et p. 13.

[4] Ibid, p. 16

[5] *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment [of 20 December 1988], I.C.J. Reports 1988,* p. 105, para. 94.

[6] Declaration by the Republic of India upon ratifying the United Nations Convention on the Law of the Sea of 10 December 1982, 29 June 1995 (https://treaties.un.org/Pages/ ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en&clang =_en#EndDec) – emphasis added.

[7] Déclaration de la République italienne lors de la signature de la Convention des Nations Unies sur le droit de la mer du 10 décembre 1982, 7 décembre 1984 (https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&lang=fr&clang=_fr).

mais, *prima facie*, cela fait naître des doutes sérieux sur sa compétence en la présente affaire.

J'ajoute, Monsieur le Président, que les deux gouvernements ont tenu, en 2011 et 2012, des consultations en vue de conclure un accord éventuel sur les détachements de protection des navires. Ces négociations n'ont pu aboutir et il se trouve que c'est le 7 février 2012 – huit jours avant la fusillade – que le Ministère indien des affaires étrangères a notifié à l'ambassade d'Italie à Delhi l'échec des pourparlers.

Un mot encore au sujet de l'épuisement – plus exactement du non-épuisement – des recours internes. Je dirais seulement, en rapport avec ce qu'en a dit Sir Michael hier et ce matin[8], que :

Premièrement, on ne peut raisonnablement soutenir, comme l'a fait mon contradicteur et néanmoins ami, qu'il n'y a aucune possibilité de succès (« *no prospect of success* ») : la justice indienne est indépendante et impartiale et on ne saurait trop rappeler que la Cour suprême a très expressément et clairement indiqué que la Cour spéciale dont elle a demandé la création pourra se prononcer sur la question de la compétence des juridictions indiennes pour juger MM. Girone et Lattorre[9] ;

Cette Cour a été créée et aurait sans doute déjà statué depuis longtemps n'étaient les obstacles en tous genres que les accusés et l'Italie ont soulevés pour l'empêcher de se prononcer – Rodman Bundy et moi ne disons pas autre chose, l'un et l'autre : la Cour spéciale peut juger les accusés « avec diligence » (« *expeditiously* »), c'est dans son mandat, et tel est d'ailleurs la raison même pour laquelle elle a été créée[10]. Elle peut aussi, avec la même diligence, considérer que, pas davantage qu'aucune autre juridiction indienne, elle n'a compétence en la matière[11]. Seul l'activisme procédural efficace des accusés et de l'Italie l'en empêche.

Troisièmement, pour les raisons que j'ai dites hier, l'Italie agit bien et de manière prépondérante pour la protection des droits de ses ressortissants et donc au titre de la protection diplomatique ; du reste, l'insistance mise par nos contradicteurs sur, par exemple, le respect du *due process* ne peut se justifier que dans la perspective de la protection diplomatique.

Quatrièmement, c'est à tort que l'Italie invoque au bénéfice de MM. Girone et Latorre des immunités fonctionnelles : les actes dont ils sont accusés n'entrent évidemment pas dans le cadre de leurs fonctions officielles ; et je me permets d'attirer à nouveau votre attention, Madame et Messieurs les juges, sur la jurisprudence italienne en la matière. Comme je l'ai rappelé hier, dans son arrêt du 22 octobre 2014, la Cour constitutionnelle italienne a fermement rappelé que l'immunité de l'Etat ou de ses représentants ne peut être invoquée *(Read in English)* "Only when it is connected – substantially and not just formally – to the sovereign functions of the foreign State.", *(Poursuit en français)* c'est-à-dire lorsqu'il agit dans l'exercice de ses fonctions gouvernementales et cette décision de la Cour constitutionnelle est loin d'être une espèce isolée, Monsieur le Président : je n'en veux pour preuve que l'arrêt de la Cour de Cassation italienne du 29 novembre 2012, dans l'affaire « *Abou Omar* », qui est assez connue, dans lequel cette juridiction suprême également a écarté l'argument fondé sur les immunités d'agents secrets et de militaires, en relevant qu'un enlèvement ne pouvait être considéré comme relevant de l'exercice des fonctions officielles[12] ; des meurtres non plus, Monsieur le Président ;

Cinquièmement, quant à l'affaire du *Navire « Louisa »* dont l'Italie fait dans cas, je note que le Tribunal a, dans cette affaire-là, considéré qu'« il conviendrait d'examiner la question

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[8] TIDM/PV.15/A24/1 (traduction non vérifiée), p. 29, 10 et 11.

[9] Cour suprême de l'Inde, arrêt, 18 janvier 2013 (notification, annexe 19).

[10] TIDM/PV.15/A24/2, p. 8.

[11] TIDM/PV.15/A24/2, p. 20.

[12] Cour de cassation italienne, arrêt du 29 novembre 2012, Adler et autres (affaire « Abu Omar »), n° 46340/2012 ; ILDC 1960 (IT 2012). Voir : http://www.academia.edu/3854342/Criminal_Proceedings_v_Adler_and_ors_Abu_Omar_case_Final_Appeal_Judgment_No_46340_2012_ILDC_1960_IT_2012_

de l'épuisement des recours internes à un stade ultérieur de la procédure »[13] ; mais il ne me semble pas que, ce faisant, le Tribunal ait posé une règle impérative de droit procédural.

Sixièmement et enfin, il n'est au demeurant pas exact, contrairement à ce qu'a affirmé Sir Michael, que l'article 295 s'applique exclusivement dans le cadre de la protection diplomatique (« *in the context of diplomatic protection* » a-t-il dit) : il ne dit rien de cela et vise simplement les cas où le droit internationale exige l'épuisement des recours internes ; tel est le cas lorsque, comme dans notre affaire, un Etat s'est soumis volontairement aux juridictions d'un autre Etat – tel est le sens du principe *electa una via* dont j'ai également rappelé également hier l'existence et la pertinence dans notre espèce[14].

Nous maintenons, Monsieur le Président, que l'Italie n'a pas établi la compétence *prima facie* du tribunal de l'annexe VII qui doit être constitué. Elle n'a pas non plus établi que les conditions indispensables au prononcé des mesures conservatoires qu'elle vous demande de prescrire sont réunies.

Monsieur le Président, cela me conduit, si vous le voulez bien, à formuler maintenant quelques remarques sur la seconde mesure conservatoire demandée par l'Italie – celle aux termes de laquelle le Tribunal est appelé à prescrire que l'Inde renonce à tout contrôle judiciaire et autorise M. Girone à se rendre en Italie et M. Latorre à y rester, jusqu'à la fin de la procédure devant le tribunal de l'annexe VII. À l'occasion, je me permettrai d'élargir mon propos à d'autres aspects de la requête italienne.

J'ai montré hier que la seconde mesure conservatoire revient à vous demander de priver l'Inde de toute possibilité d'exercer les droits que l'Italie lui conteste.

En premier lieu, cette demande correspond très exactement à la demande au fond que l'Italie formule sous la lettre *d*) des conclusions figurant à la fin de sa Notification d'arbitrage[15], si bien que si vous prescriviez cette seconde mesure préliminaire, le tribunal arbitral ne pourrait que constater qu'il n'y a plus lieu à statuer – et c'est assurément ce qui s'appelle préjuger le fond ! Et ce serait d'autant plus choquant que le tribunal de céans n'est pas juge du fond dans cette affaire : au fond, vous « préjugeriez » alors même que le jugement final ne vous appartient pas.

Et ce serait irrémédiable, car si M. Girone est autorisé à repartir en Italie et à y rester, il y a de très fortes probabilités qu'il ne retourne pas en Inde pour y être jugé à la suite d'une sentence arbitrale du tribunal de l'annexe VII qui donnerait complètement ou partiellement raison à l'Inde en décidant qu'elle a, exclusivement ou conjointement avec l'Italie, compétence pour juger les accusés. Certes, on peut hésiter à cet égard entre deux aphorismes concurrents : « jamais deux sans trois » ou « le pire n'est pas toujours sûr ». J'aimerais à vrai dire pencher pour un troisième : « faute avouée est à demi pardonnée » ; malheureusement, il n'est pas applicable : loin de reconnaître avoir manqué au moins par deux fois à sa parole, l'Italie s'est enferrée hier et ce matin dans une défense improbable.

Certes, nous disent nos contradicteurs – je paraphrase, Monsieur le Président –, l'Italie s'était engagée à assurer la *présence* des quatre marines autres que les deux accusés si celle-ci était requise par un tribunal ou un organisme d'enquête ; mais une participation à une vidéoconférence, c'est une présence[16] ; ce n'est pas une vérité, Monsieur le Président, c'est une pirouette ! Et la leçon de droit indien que Sir Daniel a voulu nous donner ce matin n'y change rien : certes, l'article 161 du Code de procédure pénale indien envisage la possibilité de recueillir des témoignages par vidéoconférence, mais ceci est à l'initiative de l'officier de police chargé de l'enquête auquel l'article 160 du même code confère expressément le pouvoir

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[13] *Navire « Louisa » (Saint-Vincent-et-les Grenadines c. Royaume d'Espagne), mesures conservatoires, ordonnance du 23 décembre 2010, TIDM Recueil 2010*, p. 69, par. 68.
[14] TIDM/PV.15/A24/2, p. 21.
[15] Notification, par. 33.
[16] TIDM/PV.15/A24/1 (traduction non vérifiée), p. 14.

d'exiger la présence de témoins (« *to require attendance of witnesses* ») même s'il peut, en effet, discrétionnairement, se contenter d'une vidéoconférence ; mais c'est à lui d'en décider – pas au témoin.

Ou bien encore – je paraphrase encore, mais, je crois sans déformer l'argumentation de nos amis de l'autre côté de la barre – alors ils disent : « Vous vous plaigniez que MM. Girone et Latorre n'aient pas regagné Delhi alors qu'ils y sont revenus au terme de leur escapade électorale de quatre mois[17] » (est-ce qu'ils voté d'ailleurs ? en tout cas, ils ont eu le temps de déposer leur bulletin de vote). Ceci dit, oui, c'est vrai, il sont revenus à Delhi, mais ce n'est *pas* le problème. Il est que l'Italie avait annoncé dans une note verbale tout à fait officielle, au mépris de l'engagement formel pris par son ambassadeur en Inde[18], que je cite de nouveau : « … les deux fusiliers marins, maître Latorre and maître Girone, ne rentreront pas en Inde à l'expiration de la permission qui leur a été accordée. » « Ils ne rentreront pas »[19]. Ils sont revenus, mais il a fallu la réaction outrée de la Cour suprême pour qu'il en soit ainsi.

Alors, à ce stade, on nous dit – je paraphrase toujours : « Justement, quelle horreur ! L'ordonnance du 14 mars 2013, confirmée par celle du 18 mars[20], est contraire au sacro-saint principe des immunités diplomatiques. » Ceci aussi est complètement hors sujet, Monsieur le Président, car cela ne change rien au fait que le représentant de l'Italie avait parjuré sa promesse – mais nos contradicteurs excellent à utiliser ces arguments hors sujet mais « atmosphériques » – par « *pure prejudice* » m'a glissé mon complice et ami Rodman Bundy à cet égard hier –, alors mieux vaut ne pas laisser le doute préjudiciable s'installer dans les esprits, et donc, en style télégraphique, seulement quelques pistes montrant qu'il ne faut pas se laisser abuser par les apparences.

La promesse du retour des marines avait été faite à la Cour suprême ; celle-ci était dans son rôle en utilisant les moyens à sa disposition pour la faire respecter ; en se portant garant devant elle, l'ambassadeur d'Italie avait, implicitement mais nécessairement, renoncé à lui opposer ses immunités sur ce point précis. Même en admettant que l'interdiction temporaire faite à l'ambassadeur italien de quitter le territoire indien fût illicite « en soi » au regard du droit international, cette interdiction se justifierait en tant que contre-mesure au sens de l'article 22 des Articles de la CDI sur la Responsabilité de l'Etat pour fait internationalement illicite de 2011, et elle est pleinement conforme aux exigences des articles 49 et suivants de ces mêmes Articles. Au surplus, je l'ai déjà dit, l'immunité de l'Etat ou de ses représentants ne peut être invoquée que si les actes en cause relèvent de la fonction gouvernementale[21] ; se parjurer ne fait pas partie de ces fonctions.

Je dis tout ceci, Monsieur le Président, parce que l'Italie attache à cet épisode une importance qu'il n'a aucunement – en tout cas dans le cadre de l'affaire qui nous occupe. C'est une façon de détourner l'attention de ce qui est central dans celle-ci.

Et pour revenir à l'incident, lui pertinent, c'est-à-dire au refus initial de l'Italie de renvoyer MM. Latorre et Girone à Delhi, dont l'ordonnance de la Cour suprême du 14 mars 2013 n'est qu'un élément collatéral, le fait est que, combiné avec la non-présence des quatre autres marines lors de l'enquête de la NIA, il est de nature à susciter, pour le moins, la plus grande méfiance de la part de l'Inde.

Mais, comme je l'ai également dit hier[22], ce n'est pas tout : il résulte de la jurisprudence des deux cours suprêmes italiennes – la Cour constitutionnelle et la Cour de cassation – qu'elles font prévaloir les principes déduits de la Constitution, et en particulier, des articles 2, relatif

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[17] Cf. *ibid.*

[18] Cour suprême de l'Inde, ordonnance du 22 février 2013 (observations écrites, annexe 16).

[19] Note verbale 89/635 du 11 mars 2013 (notification, annexe 20).

[20] TIDM/PV.15/A24/1 (traduction non vérifiée), p. 14, 15 et 47.

[21] Voir supra, par. 6.

[22] Voir TIDM/PV.15/A24/2, p. 39 à 41.

aux droits inviolables de l'homme, et 24, sur le droit au juge, sur les obligations internationales de l'Italie, y compris lorsqu'elles résultent d'un arrêt de la Cour internationale de Justice. Il n'y a guère de doute que cette jurisprudence s'appliquerait en l'espèce si le tribunal de l'annexe VII en venait à faire droit à la demande figurant au paragraphe 33.d) de la Notification italienne. Et d'autant plus que l'Italie – en tout cas, les juges italiens – mais ils font partie de l'Etat, pourrai(en)t aussi invoquer l'article 26 de sa Constitution aux termes duquel, et je cite : « L'extradition d'un citoyen ne peut être accordée que dans les cas où elle est expressément prévue par les conventions internationales ». Or, Monsieur le Président, il n'y a pas de traité d'extradition entre l'Inde et l'Italie.

En bref, Monsieur le Président, si le tribunal de céans prescrivait la seconde mesure conservatoire qui lui est demandée, l'Inde n'aurait strictement plus aucun moyen d'exercer la compétence, qu'elle soit exclusive ou conjointe, je le répète, que la sentence à venir lui aurait reconnue.

Ceci me conduit aux trois remarques conclusives faites par Sir Daniel Bethlehem hier matin et dont je n'ai pu dire que quelques mots hier après-midi.

Premièrement, a-t-il dit, l'Italie répète l'engagement qu'elle a déjà pris devant la Cour suprême de l'Inde en ce qui concerne le Sergent Latorre de le renvoyer en Inde si le tribunal de l'annexe VII le décide et étend cet engagement aux deux marines[23] ; l'agent de l'Italie a répété cet engagement ce matin. Monsieur le Président, ce serait une excellente chose et je ne mets pas en doute la bonne foi de nos contradicteurs – malheureusement, dans le domaine qui nous intéresse, ils ne peuvent pas prévaloir sur les positions bien arrêtées des cours suprêmes de l'Italie. L'Italie a une vision dualiste des choses : ses cours suprêmes ne sont pas sensibles au respect de la chose jugée internationale – j'y ai suffisamment insisté.

Deuxièmement, Sir Daniel a proposé une sorte de marché (je ne sais pas s'il s'adresse à l'Inde ou au Tribunal ?) : l'Italie, a-t-il rappelé, a versé (en roupies indiennes) une garantie d'environ 300 000 euros pour chacun des *marines* concernés ; et il a fait une offre assez extraordinaire, je lis :

> *(Read in English)*
> Italy would be prepared to transform that surety through some appropriate arrangement into a surety given to India in accordance with the stipulations of an order of this Tribunal. The amount of the surety that Italy is currently maintaining in India, and is now offering to continue as a bond pursuant to an order of this Tribunal, overshadows that required by the Tribunal in *Arctic Sunrise*, in which the amount stipulated was in respect of the release of the vessel and 30 crew members.[24]

*(Poursuit en français)* En commentant cette étrange proposition, je donnerai, du même coup, la réponse de l'Inde à la question posée ce matin par Monsieur le juge Jean-Pierre Cot. Toutefois, Monsieur le Président, nous sommes défendeurs dans cette affaire et, puisque l'Italie – comme c'était son droit – n'y a pas répondu ce matin, nous apprécierions vivement d'avoir la possibilité de commenter éventuellement, fût-ce très brièvement, ce qu'elle aura à dire à ce sujet.

Sous cette réserve, nous considérons en premier lieu que la comparaison avec l'*« Arctic Sunrise »* n'est pas pertinente. Dans cette affaire, il s'agissait d'assurer la prompte mainlevée du bateau de Greenpeace et des 30 membres de son équipage – auxquels la Fédération de Russie

[23] Voir TIDM/PV.15/A24/1 (traduction non vérifiée), p. 49 et 50.
[24] *Ibid.*

reprochait certes de n'avoir pas respecté ses lois et règlements, mais qui n'étaient accusés d'aucun crime de sang, contrairement à MM. Girone et Latorre.

Et cela fait une grande différence : les meurtres ne sont pas des infractions « indemnisables » – des « *compensable offences* » - selon la section 302 du Code pénal indien – et je ne peux m'empêcher, Monsieur le Président, de trouver très troublante, assez dérangeante, l'offre de Sir Daniel, que je ressens comme une sorte de proposition tendant à acheter l'impunité des deux *marines* accusés de meurtre. En outre, cette proposition est un trompe-l'œil et ne serait pour l'Inde qu'un marché de dupes : cela reviendrait tout bonnement à, je dirais, « expatrier » la caution déjà versée – pas si élevée que cela compte tenu des circonstances de l'espèce – qui a été versée en Inde à titre de garantie, conformément à l'ordonnance de la Cour suprême de ce pays du 30 mai 2012[25]. En tout cas, Monsieur le Président, j'ai pour instruction de dire que l'Inde est opposée à cette transaction de la manière la plus ferme.

J'en viens à la troisième et dernière remarque faite hier par Sir Daniel. Après vous avoir appelés à prescrire les deux mesures demandées par l'Italie, mon contradicteur et ami a ajouté, qu'ensuite, et je le lis :

> *(Read in English)*
> If circumstances change, or if India for any other reason wishes to contest the measures that are prescribed, its right to do so before the Annex VII tribunal in due course is safeguarded and indeed expressly envisaged by article 290(5) of UNCLOS, which would allow India to apply to modify or revoke the provisional measures prescribed.[26]

*(Poursuit en français)* Je ne m'arrêterai pas longtemps à cette autre suggestion – ne fût-ce que parce que, sans y faire expressément référence, j'y ai répondu hier indirectement en faisant remarquer que cela revient à faire du tribunal de l'annexe VII une sorte de juridiction d'appel du tribunal de céans[27]. Ce n'est pas le but de l'article 290, paragraphe 5 de la Convention sur le droit de la mer, dont l'objectif est de faire face aux situations d'extrême urgence pour lesquelles la prescription de mesures conservatoires ne peut pas attendre la constitution d'un tribunal arbitral.

Monsieur le Président, je pause là pour une minute pour dire que nous n'acceptons pas les propositions de Sir Daniel, mais que l'Inde est prête à faire une offre différente. J'ai reçu instruction d'indiquer que l'Inde est prête à garantir que le jugement de la Cour spéciale pourrait être rendu dans les quatre mois suivant la date du commencement des audiences si l'Italie coopère et retire ses objections à la procédure devant la Cour suprême de l'Inde.

Ceci dit, j'en reviens à l'extrême urgence rendue nécessaire par l'article 290 5) de la Convention, ceci à l'évidence, Monsieur le Président, nous ne sommes pas dans une telle situation d'extrême urgence. Il n'y a, à vrai dire, ni urgence aggravée ni urgence tout court, tant il est vrai qu'au terme de ces deux jours de plaidoiries, on ne voit vraiment pas ce qui pourrait bien la justifier. S'agissant de la première mesure, maître Bundy a montré qu'il n'y avait aucun risque d'atteinte imminente - imminente - au droit d'exercer sa juridiction pour juger (apparemment plutôt pour ne pas juger) les deux accusés, que revendique l'Italie – et surement pas qu'il soit porté atteinte à ce droit dans les trois mois qui risquent d'être nécessaires pour constituer le tribunal de l'annexe VII – sauf si les Parties s'accordaient pour choisir un autre mode de règlement. Et à cet égard aussi, l'offre de l'Inde que je viens de faire est sans doute pertinente.

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[25] Observations écrites, annexe 11.
[26] *Ibid.*
[27] Voir TIDM/PV.15/A24/2, p. 39.

Il en va de même pour la seconde mesure conservatoire que l'Italie souhaite vous voir prescrire. M. Latorre est soigné en Italie, son état de santé semble s'améliorer et il n'y a aucune raison de penser que, si c'était nécessaire, la Cour suprême indienne ne lui accorderait pas une prolongation de l'autorisation, déjà renouvelée à quatre reprises, de rester en Italie. Quant à M. Girone, je veux bien croire qu'il a le mal du pays, mais je crois sincèrement qu'il n'est pas très à plaindre. J'ai donné hier quelques informations sur la vie qu'il mène à Delhi et les visites familiales et nombreuses qu'il reçoit très librement[28] et il peut recourir (et recourt largement apparemment) aux moyens de communication modernes – Skype, Twitter, Facebook, etc.

Avant d'en terminer, Monsieur le Président, permettez-moi de faire quelques observations rapides de nature plus générale.

La première nous ramènera aux origines même de l'affaire et à la note verbale du 16 février 2012, c'est-à-dire au lendemain de la fusillade, qui est reproduite à l'onglet 9 du dossier des juges qu'a préparé l'Italie. Dans cette note, l'ambassade d'Italie annonce *(Read in English)*: "The Italian Navy team has photographic evidence of the pirate vessel during the attack."[29] *(Poursuit en français)* Nous n'avons jamais reçu ces preuves photographiques ; elles n'ont pas été produites durant la présente procédure et ceci me paraît assez significatif.

Ma deuxième observation sera pour constater que, ce matin, l'Italie n'est pas revenue sur le fait que les marines ont tenté de fabriquer des éléments de preuve attestant la soi-disant attaque par un bateau pirate, notamment en dictant ce qu'il devait dire au capitaine du navire[30]. Loin de contester ce comportement, l'Italie a même annexé l'un de ces éléments à la Notification du 26 juin[31]. Je parle du *logbook* du capitaine de l'*Enrica Lexie.*

En troisième lieu, je souhaite rectifier le tableau très sombre qu'essaient de peindre nos contradicteurs : sur les 36 mois qui se sont écoulés depuis « l'incident du *St Antony* » – délai dont vous savez ce qu'il doit à leurs manœuvres dilatoires et à celles de l'Italie elle-même –, les deux accusés ont passé en tout et pour tout quarante-trois jours en prison ; et, pour ce qui est de M. Latorre, il a séjourné en Italie à peu près la moitié de ce temps ; j'ajoute que contrairement à ce que l'Italie et ses conseils aiment à répéter (toujours ce souci de créer une atmosphère préjudiciable...), les *marines* ne sont pas détenus, incarcérés : ils sont en liberté, je dirais très légèrement surveillée.

Enfin, je crois devoir rappeler combien il est important de relativiser les choses – et d'abord, en n'oubliant pas les très lourdes charges pesant contre les deux marines, ce qui n'a pas empêché qu'ils bénéficient d'un traitement de faveur fort exceptionnel ; ensuite, en n'oubliant pas non plus les souffrances que la fusillade du 15 octobre 2012 a causées aux pêcheurs du *St Antony* (dont deux sont morts – ce sont eux les véritables victimes dans cette affaire !), à leurs familles et à la communauté villageoise à laquelle ils appartenaient. Encore une fois, Monsieur le Président, Madame et Messieurs les juges, je ne cherche pas à faire pleurer dans les chaumières – et d'ailleurs on ne peut pas dire que nos contradicteurs se soient beaucoup apitoyés sur le sort des victimes de la fusillade, y compris ce matin[32]. Cela étant, Monsieur le Président, il ne faut tout de même pas se tromper de victimes !

Monsieur le Président, Madame et Messieurs le juges, je vous remercie très vivement pour votre attention très patiente. Et je vous prie, Monsieur le Président, de bien vouloir donner

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[28] Voir TIDM/PV.15/A24/2, p. 37.

[29] Note Verbale 67/438, 16 February 2012 (N, Annex 10, and Judges' folder produced by Italy, tab 9).

[30] TIDM/PV.15/A24/2, p. 14 et déposition de M. Vitelli Umberto, Capitaine de l'*Enrica Lexie*, 15 juin 2013 (observations écrites, annexe 27) ; déposition de M. Sahil Gupta, membre de l'équipage de l'*Enrica Lexie*, 26 juin 2013 (observations écrites, annexe 29) et déposition de M. Victor James Mandley Samson, membre de l'équipage de l'*Enrica Lexie*, 24 juillet 2013 (observations écrites, annexe 33).

[31] Journal de bord de l'*Enrica Lexie* (notification, annexe 14)

[32] TIDM/PV.15/A24/3, p. 21.

la parole à Mme Chadha, l'agente de la République de l'Inde, pour la lecture de nos conclusions finales.

Je vous remercie.

**MR PRESIDENT:** Thank you, Mr Pellet.

I understand that this was the last statement made by India during this hearing. Article 75, paragraph 2, of the Rules of the Tribunal provides that at the conclusion of the last statement made by a Party at the hearing, its Agent, without recapitulation of the arguments, shall read the Party's final submissions. The written text of these submissions, signed by the Agent, shall be communicated to the Tribunal and a copy of it shall be transmitted to the other Party.

I now invite the Agent of India, Ms Chadha, to take the floor to present the final submissions of India.

STATEMENT OF MS CHADHA
AGENT OF INDIA
[ITLOS/PV.15/C24/4/Rev.1, p. 19–]

Thank you, Mr President. I shall now read the final submissions of the Republic of India. These remain unchanged from those in our Written Observations.

For the reasons explained by India in the Written Observations and during the oral hearings, the Republic of India requests the International Tribunal for the Law of the Sea to reject the submissions made by the Republic of Italy in its Request for the prescription of provisional measures and refuse the prescription of any provisional measure in the present case.

Mr President, in accordance with rule 75 of the Rules of Procedure, a copy of the written text of the submissions is being communicated to the Registrar of the Tribunal.

Mr President, with your permission, I would like to convey our thanks to all those who have helped in these proceedings. First, I wish to thank the Registrar, Mr Philippe Gautier, and the members of the Registry for their cooperation and professionalism and for working so efficiently to ensure the smooth running of these proceedings.

I especially thank the interpreters, who have certainly not had an easy time, keeping pace with those of us who speak so fast.

I also thank all those who have worked long hours to produce promptly the verbatim records of the public sessions.

We thank our friends from Italy for their cooperation in the course of the proceedings.

I would take this opportunity also to thank our Counsel who, despite the short notice, readily rushed back from their respective vacations to help us prepare for this case. I also want to thank other members of the Indian team who have spent long hours preparing for these proceedings.

Before concluding, I would like to thank you Mr President and all the Members of this distinguished Tribunal for giving us a patient hearing.

**THE PRESIDENT:** Thank you, Ms Chadha.

**Closure of the Oral Proceedings**
[ITLOS/PV.15/C24/4/Rev.1, p. 20–21; TIDM/PV.15/A24/4/Rev.1, p. 21–22]

**THE PRESIDENT:** This brings us to the end of the hearing. On behalf of the Tribunal I would like to take this opportunity to express our appreciation for the high quality of the presentations of the representatives of both Italy and India.

I would like also to take this opportunity to thank both the Agent of Italy and the Agent of India for their exemplary spirit of cooperation.

The Registrar will now address questions in relation to documentation.

**LE GREFFIER :** Monsieur le Président, conformément à l'article 86, paragraphe 4 du Règlement du Tribunal, les Parties peuvent, sous le contrôle du Tribunal, corriger le compte rendu de leurs plaidoiries ou déclarations, sans pouvoir toutefois en modifier le sens et la portée. Ces corrections concernent la version vérifiée (*checked version*) du compte rendu dans la langue officielle utilisée pas la partie concernée. Les corrections devront être transmises au Greffe le plus tôt possible et au plus tard le lundi 17 août 2015 à midi, heure de Hambourg.

Je vous remercie, Monsieur le Président.

**THE PRESIDENT:** Thank you, Mr Registrar.

The Tribunal will now withdraw to deliberate. The date for the reading of the Order in this case is tentatively set to 24 August 2015. The Agents of the Parties will be informed reasonably in advance of any change to this date.

In accordance with the usual practice, I request the Agents to kindly remain at the disposal of the Tribunal in order to provide any further assistance and information that it may need in its deliberations prior to the delivery of the order.

The sitting is closed.

*(The sitting closed at 5.54 p.m.)*

These texts are drawn up pursuant to article 86 of the Rules of the International Tribunal for the Law of the Sea and constitute the minutes of the public sittings held in *The "Enrica Lexie" Incident (Italy* v. *India), Provisional Measures.*

Ces textes sont rédigés en vertu d'article 86 du Règlement du Tribunal international du droit de la mer et constituent le procès-verbal des audiences publiques de *L'incident de l'« Enrica Lexie » (Italie c. Inde), mesures conservatoires.*

Le 5 juillet 2016
5 July 2016

Le Président
Vladimir Golitsyn
President

Le Greffier
Philippe Gautier
Registrar