

Dissenting Opinion of Judge Lucky

1. I did not vote in favour of the operative paragraphs setting out the order of the Tribunal for reasons that may differ substantially from those in the Judgment/Order. However, I find it difficult to concur with some of the findings, specifically paragraphs 54, 67, 73, 106, 107, 129, 131 and 141. Therefore, I feel obliged to cast a negative vote on the said paragraphs. This opinion sets out the reasons for my disagreement.

2. At this stage of the proceedings, where an application has been made for provisional measures by Italy, the Tribunal does not deal with the merits of the case. That will necessitate assessment and findings on evidence. Nevertheless, brief accounts of the incident as presented by the States will be helpful.

Briefly, the description presented by Italy, the Applicant, is set out in paragraphs 3–11 as follows:

3. On 15 February 2012, the *Enrica Lexie*, an oil tanker (“the tanker”), flying the Italian flag with 6 Italian marines on board was en route from Sri Lanka to Djibouti. The tanker was approximately 20.5 nautical miles off the coast of Kerala, India, when an unidentified craft was detected on the radar approximately 2.8 nautical miles from the tanker. The craft was heading towards the tanker. As the craft drew closer, two marines of the Italian Navy, Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone, who were on official duty on board the *Enrica Lexie*, concluded that the craft was on a collision course with the tanker and that its *modus operandi* was consistent with a pirate attack (there had been several pirate attacks in the area). Despite visual and auditory warnings from the tanker and warning shots fired into the water, the craft continued to head towards the tanker. Sergeant Girone, looking through binoculars, saw what appeared to be persons carrying rifles as well as instruments for boarding ships. After apparent attempts to approach the tanker, the craft turned away and headed toward the open sea.

4. 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.

5. 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.

6. India, acting by ruse and by coercion involving 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.

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

8. 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.

9. 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.

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

11. 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.

Briefly, the version of the incident presented by India is set out in paragraphs 12 and 13 as follows:

12. On 15 February 2012 the *St. Antony*, a fishing vessel, registered in India and permitted to fish in the EEZ of India, was fishing in the EEZ of India, approximately 20.5 miles from the Indian sea coast off Kollam, Kerala. At about 4.30 p.m. (IST) two Italian marines on board the *Enrica Lexie*, namely Sergeant Latorre and Sergeant Girone, fired 20 rounds through their automatic weapons at the fishing vessel, the *St. Antony*, killing two fishermen. One was shot in the head and the other in the stomach. Mr Jelastine was at the helm of the boat and Mr Pink was at the bow. The act of firing endangered the safety of the other nine fishermen on board and caused damage to the gas cylinder and wheelhouse of the boat. The fishermen on board were unarmed. The investigations revealed that the firing was not supported by any reasonable belief of danger to life or property or even that the shots were fired in self-defence. In simple terms, two unarmed fishermen of India were killed through no fault of theirs. The two marines were arrested.

13. Since the arrest the marines have made applications for bail and challenged the jurisdiction of the Supreme Court of India. They claim that India does not have jurisdiction to conduct criminal investigations and to charge and try the marines for the capital offence of murder.

Difference in versions

14. In provisional measures proceedings, the Tribunal does not deal with the merits of the case. The Tribunal is dealing with the application for the measures set out hereunder. The main concern is whether there is a prima facie case, whether the matter is urgent and whether the status quo should be maintained, and if so, whether there will be irreparable damage. An additional concern is whether an arbitral tribunal, duly constituted, will have jurisdiction to hear and determine the matter.

15. The relevant article of the United Nations Convention on the Law of the Sea (“the Convention”) is set out below:

Article 290, paragraph 5

Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea or, with respect to activities in the Area, the Seabed Disputes Chamber, may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. 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.

16. The above provision gives the Tribunal the jurisdiction to grant provisional measures pending the constitution of an arbitral tribunal. This depends on whether that tribunal would have jurisdiction and whether the urgency of the situation so requires.
17. The modification, revocation or affirmation of the order is the prerogative of the arbitral tribunal after it is constituted and is functional (see the *MOX Plant Case*). Therefore, it seems to me that the Tribunal has to determine whether the arbitral tribunal “would have jurisdiction” and whether or not the situation is “urgent” enough to necessitate granting the measures being sought.
18. Italy (the Applicant) seeks the following provisional measures in this case:
 - (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.

In summary, if the requested provisional measures are not granted forthwith then:

- “(a) there will be further and continuing breaches causing serious, irreversible and deepening prejudice to Italy’s rights at issue;
- (b) action is likely to be taken by India that would prejudice the carrying out of any decision on the merits which the Annex VII arbitral tribunal may render; and
- (c) irreparable harm to health and well-being will or is very likely to follow, with the consequence of serious and irreversible prejudice to Italy’s rights by virtue of the nexus between Italy and the Marines.”

19. In effect this is an application to stay proceedings in the Indian Supreme Court. The said proceedings have been challenged in different Indian courts *inter alia* on the question of jurisdiction.

20. The primary concern of a tribunal should be to determine whether the requirements for an order of provisional measures have been fulfilled.

Introduction

21. Neither side has called any witnesses or provided any factual evidence about the incident. In its written submissions, each side has set out its account of the incident. It is clear that the account of each side differs from that of the other. Out of an abundance of caution, I have to make it abundantly clear that I am not making any findings of fact; such will be the function of the Court at the trial on the merits.

22. Another important question is whether the Annex VII arbitral tribunal, to be established, will have jurisdiction.

23. Before granting provisional measures a court or tribunal has to consider the following:

Is there a dispute?

24. If there is a dispute (I think there is a dispute), then:

Have the parties reached a settlement? The answer is negative.

Have the parties exchanged views? It is not disputed that the Parties have done so.

25. Both States are Parties to the United Nations Convention on the Law of the Sea (the Convention). Arbitral proceedings under Annex VII of the Convention were initiated by Italy. An arbitral tribunal has not been constituted.

26. The chronology of events set out below provides useful information for consideration in determining the questions posed regarding jurisdiction, urgency, delay in instituting the present proceedings, abuse of process and whether local remedies have been exhausted.

The following is a chronology of events

27. The list set out in annexes to the application is quite comprehensive. I have listed significant dates so as to assist in arriving at a decision in this matter.

- (a) On 6 February 2012 six Italian marines were deployed on board the Italian ship the *M/V Enrica Lexie*, an oil tanker, as Vessel Protection Deployment officers.
- (b) On 15 February 2012 the incident described in the versions of India and Italy, set out above, took place.
- (c) On 15 February 2012 at 11.15 p.m. on the basis of a complaint by the owner of the *St. Antony*, FIR No. 02/2012 was registered under Section 302 of the Indian Penal Code and the FIR was submitted to the Chief Judicial Magistrate Court in Kollam. Kerala police started an investigation.
- (d) On 19 February 2012 during the investigation by the coast guard and police officers, Kerala police examined the crew members and identified and arrested Sergeants Latorre and Girone.
- (e) On 21 February 2012 the Director General of the Kerala police issued order No. T3-16/673/12, thus constituting a special investigating team.

- (f) On 23 February 2012 Court Writ Petition No.4542 of 2012 was filed before the High Court of Kerala under Article 226 of the Constitution of India, challenging the jurisdiction of the State of Kerala to conduct a criminal investigation.
- (g) On 24 February, the Deputy Attorney of the Prosecution Office, Rome, in a communication advised the Ministry of Defence, Head of Cabinet, that “this office has opened a criminal proceeding under number 9463/2012 (RGNR-General Registrar for the entry of Criminal Notices) against Sergeants Latorre and Girone – for the crime of murder, in reference to the events occurred in international waters in the Indian ocean on the 15 February 2012.”
 In my opinion, the end result is that there are parallel criminal proceedings, in Italy and India. It may also be deemed competitive jurisdiction that has resulted in this application (Case 24).
- (h) On 19 April 2012 a Writ Petition was filed under Article 32 of the Constitution of India with the Supreme Court challenging the legality of the investigation and the alleged violations of Articles 14 and 21 of the Constitution of India.
- (i) On 18 May 2012 Kerala police filed a charge sheet (police report) against the accused, the above mentioned marines (Sergeants Latorre and Girone), under sections 302, 307 and 427, read with section 34 of the Indian Penal Code, and under section 3 of the SUA Act of 2001.
- (j) On 22 May 2012 the accused filed an application for bail (No.351/7/12) before the High Court of Kerala. Bail was granted on 30 May.
- (k) On 25 May 2012 Kerala police filed a charge sheet (police report) against the accused (Sgts. Latorre and Girone) under sections 302, 307 and 427, read with section 34 of the Indian Penal Code, and under section 3 of the SUA Act of 2002.
- (l) On 22 May 2012 the accused, Sgts. Latorre and Girone, filed an application for bail before the High Court of Kerala. (It is noted that bail was granted on 30 May 2012.)
- (m) On 25 May 2012 the case was committed to the Sessions Court for a criminal trial.

28. After several hearings in the High Court of Kerala for special leave to appeal the decision of the High Court of Kerala and a finding by the Supreme Court of India that the State of Kerala had no jurisdiction to investigate the case, the Union of India was directed to set up a Special Court to determine the question of jurisdiction. A series of diplomatic and ministerial negotiations ensued, as well as applications to the Supreme Court and for a stay of proceedings. Nevertheless, Italy filed this application for provisional measures, pending the constitution of an Annex VII arbitral tribunal. A hearing before the Supreme Court is scheduled for 26 August 2015.

Abuse of Process

29. Articles 290, 294 and 295 of the Convention provide for the preservation of the rights of the parties to the dispute if the arbitral tribunal to be constituted would have *prima facie* jurisdiction and if the urgency of the situation requires an order for provisional measures. The said articles must be construed as a whole and in the context of the chain of events set out in the chronology of events in paragraph 22 above. It seems apparent to me that Italy engaged the judicial system of India with several applications: for bail and conditions of bail, in respect of jurisdiction and for a stay of investigation and a stay of judicial proceedings. All these applications were addressed by the Supreme Court during the past three and a half years. In July this year Italy filed this case for provisional measures notwithstanding that the Supreme Court of India is considering the matter and a Special Court has been established to hear and determine issues relating to jurisdiction and related matters. I find that an abuse of process is evident.

Jurisdiction

30. It is my view that the question in this case can be divided into the jurisdiction of the International Tribunal for the Law of the Sea (the Tribunal): to accept the application in this case; and to determine whether the Annex VII tribunal, to be constituted, will have jurisdiction to determine the case on the merits.

31. Immediately after being informed of the incident, Italy promptly asserted that it had jurisdiction.

32. India has *de facto* exercised jurisdiction from the time the *Enrica* was ordered to proceed to the Port of Kochi, where the investigation commenced. The vessel was boarded by armed Indian police and coast guard personnel, the ship and crew were detained. The crew was asked to hand over information and materials, which India subsequently sought to introduce into its domestic court proceedings (ITLOS/PV15/c24/1 lines 1–5 and 38–46). The crew was interrogated. The two marines were subsequently arrested and informed of the charge.

33. The questions are *whether* the arbitral tribunal will have jurisdiction, whether the matter is admissible and whether the Tribunal can grant/order the provisional or mandatory injunctive relief. The question of parallel jurisdiction will be considered later in this opinion in deciding which of the two States has jurisdiction to hear and determine the matter.

34. In order to arrive at a decision whether or not to grant the reliefs sought, it seems to me that the Tribunal is being asked to act as a Court of Judicial Review of the Indian Administrative and Judicial System and to decide whether there is an abuse of the due process of law. If the Tribunal finds that the matter is urgent and the marines are subject to an abuse of process, then the reliefs sought should be granted. However, it seems to me that the application is not urgent and local remedies are still pending.

35. A crucial question must be whether or not the dispute between the Parties falls within the ambit of the Convention. Firstly let me say at the outset that the Convention does not contemplate or provide for situations like the instant case wherein the offence of murder is committed involving victims and accused from different ships in the EEZ of one of the States. Article 2, paragraph 3, deals with sovereignty over the territorial sea. The offence did not occur in the territorial sea. Article 27 provides for “Criminal jurisdiction on board a foreign ship . . . *passing through the territorial sea* to arrest any person or to conduct any investigation in connection with any crime *committed on board the ship during its passage*” (emphasis mine). The alleged offence occurred in the EEZ during passage through the EEZ and on board two ships. Article 33 covers infringement of the customs, fiscal, immigration or sanitary laws in the contiguous zone. In these circumstances this article cannot be applicable. Article 56, paragraph 2, provides that:

In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

36. This article must be construed as a whole encompassing the other paragraphs, for example article 56, paragraph 1(a), providing for “sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources”. The circumstances in this application are not related to the foregoing. Article 58 provides for and specifies the “Rights and duties of other States in the exclusive economic zone”. Article 87 speaks of freedom on the high seas. Article 87, paragraph 1(a), speaks of freedom of navigation. The said article, like the other articles, is silent on the commission of criminal offences. Article 92 specifies the status of ships and article 94 the duties of a flag State; these are not applicable.

37. There is a view that article 97 is applicable; I cannot agree, even under a wide and generous interpretation of the provision. Article 97, paragraph 1, reads:

In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national.

38. The governing words in this provision are “collision” and “any other *incident of navigation* concerning the ship on the high seas”. The allegations in this application do not relate to any “collision” or incident of “navigation”. Consequently the contention that “incident” can also mean allegation of murder is incorrect. Article 100 in my view is also not applicable.

39. Before determining which State has jurisdiction, the forum for any trial of the marines is of paramount importance.

The Forum

40. It is not disputed that the incident occurred on 15 February 2012 at approximately 20.5 nm off the coast of India. It is not disputed that both States are claiming jurisdiction. It is not disputed that the *Enrica Lexie* is an oil tanker, registered in Italy, and was flying the flag of Italy at the time of the incident. It is also not disputed that the *St. Antony* is a fishing vessel that was registered in India.

Where did the actual incident take place?

41. The incident occurred in the EEZ of India. However, this is a case of alleged murder or the unlawful killing of two fishermen on board a fishing vessel, the *St. Antony*, registered in India and permitted to fish in the said EEZ. The shots were allegedly fired from the *Enrica Lexie*, a tanker ship, flying the Italian flag and registered in Italy. The fishermen died on the *St. Antony*, death occurred on the boat. Therefore in my view the alleged murder took place on the *St. Antony*, not on the *Enrica Lexie*.

42. The factors that I have gleaned are from the Judgment of the United States Supreme Court in *United States v Cotroni* [1989] 1 SCR 1469:

- Where was the impact of the offence felt or likely to be felt?
The answer to this question seems to be in India.
- Which jurisdiction has the greater interest in prosecuting the offence?
The answer seems to be India.
- Which police force played a major role in the development of the case?
It is the Indian police force and investigating officers and the relevant Court.
- Which jurisdiction has laid the charges?
It appears to me that Italy has laid charges. However India has been prevented from doing so by the applications to the Indian Supreme and High Courts.
- Which jurisdiction is ready to proceed to trial?
It seems to me that India is prepared to proceed to trial. The case was sent to the Sessions.
- Where is the evidence located?
The evidence seems to be in India.

Arbitration

43. I do not think it is legally correct to find that India has consented to the jurisdiction of the Annex VII tribunal. Paragraph 3 of article 287 of the Convention, dealing with the choice of procedure, provides that:

A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII.

44. The article specifies that the party is “*deemed*” to have “*accepted arbitration*.” This cannot mean the party has consented to arbitration. If the party has not exercised its right to make a declaration, it must accept arbitration. There are several factors to be considered before the question of jurisdiction can be determined. Article 290, paragraph 1, of the Convention provides that:

[i]f a dispute has been duly submitted to a court or tribunal which considers that *prima facie* it has jurisdiction under this Part or Part XI, section 5, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the rights of the parties to the dispute . . . pending the final decision.

45. It follows that there must be a dispute that has been submitted. The question is whether the court or tribunal has, or in this case whether the Annex VII tribunal will have, jurisdiction to hear and determine the matter. In my opinion, there are two salient questions to be examined. Firstly, is there a sufficient reason or evidence to find that there is a *prima facie* case? Perhaps it will be convenient to specify the meaning of *prima facie*. In law it means that there is sufficient evidence to prove a claim. The standard of proof in such an application is relatively low (see the “*Louisa*” Case). However, in my opinion the threshold should not be reduced to meet the case of an applicant.

46. Secondly, as I alluded to earlier, neither side has led any evidence. What is before the tribunal is some documentary evidence, i.e. the chronology of events, the medical dossier and the fact that the matter is currently engaging the attention of the Supreme Court of India. The question relating to

jurisdiction is intrinsically linked to admissibility and, more importantly, urgency. Article 290, paragraph 5, sets out the relevant law; it reads in part:

Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea . . . may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted *would have jurisdiction* and that the *urgency* of the situation so requires (emphasis mine).

47. The words to be addressed are firstly “*prima facie*”, and secondly “would have jurisdiction” and “urgency”. Jurisprudence of some national and international bodies provides that

Provisional measures (which are similar to injunctive relief in most national Courts) are discretionary in nature and are only granted in exceptional and urgent circumstances specifically to guarantee, even temporarily, the rights of the applicant party (see the Separate Opinion of Judge Mensah in the *MOX Plant Case*). When there is a request for provisional measures the Tribunal will not and should not deal with the merits of the case; to do so would be to usurp the function of the arbitral tribunal. Further, in an application for provisional measures which is heard *inter partes*, the parties would not have had the time nor would they, as in this case, have been able to provide *all* the evidence to prove or to refute the allegations.

(See *Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, *Provisional Measures (Separate Opinion of Judge Lucky)*)

The degree of proof

48. The burden of proof required in a case for provisional measures is relatively low. The Tribunal is being asked to make mandatory orders, *inter alia*,

to grant the measures set out above. Therefore, several factors have to be considered: the balance of convenience or inconvenience to each side; whether in light of the status quo the decision would cause prejudice; and, whether there will be serious, irreversible harm to the marines and by extension Italy. In view of the foregoing factors, could and should the matter be deemed urgent? Nevertheless, the question to be posed and answered when considering the factors individually and/or together is whether the decision will be fair to both sides.

Urgency

49. Perhaps at this juncture it will be convenient to deal with the question of “urgency”, which is a requirement for prescribing provisional measures. This is of particular significance in the special circumstances of this case. The view expressed here is supportive of my reason for not recommending the measure in the concluding paragraphs of the judgment.

Is there a *prima facie* case?

50. In my view the merits of the application have to be considered, but not determined or seemingly determined. The evidence must disclose that there would be serious harm to the Applicant and that the rights of the Applicant would be prejudiced. The possibility or probability of such harm cannot be based on speculation because this is insufficient. The Applicant must show a very strong probability upon the facts that serious harm will accrue to it in the future. The degree of probability of future harm does not have to meet an absolute standard; what is to be aimed at is justice between the parties having regard to the circumstances. I mean no disrespect to either Party because in such applications time constraints are relevant: the full “pre-trial” processes have not occurred, the defence to the Statement of Claim has not been served and neither side’s case has been “proved” as at a final hearing on the merits. As I suggested earlier, I do not find that the evidential requirements for provisional measures have been met.

51. For the avoidance of doubt, and to support my view that an Annex VII tribunal will not have jurisdiction to deal with this case, I have searched and can

find no provision in the articles of the Convention to support the submission that a case of murder in the EEZ involving accused from one State and victims from another can be tried by an international tribunal. This is a matter for the domestic court of the relevant forum (see paragraph 45). Municipal or domestic courts have the experience to hear and determine criminal cases.

52. The procedure in the Indian judicial system is that when a report of a criminal offence is made an investigation begins. Charges are not preferred until the report of the investigating team is submitted to the relevant body.

53. The chronology of events pertaining to this incident, set out in paragraph 27 (above), fortifies my view that the due process commenced from the date of arrest and continued until the said marines began to make a series of applications: for bail, to leave India for specific reasons and later to stay proceedings. In my view the Court was lenient and reasonable in these circumstances. An accused charged with murder is not entitled to bail.

54. At this stage, I have to mention that the crime of murder is not aailable offence. I have not seen the reasons for granting bail. It seems as though the charges were not framed by the relevant court. Nevertheless, Italy made a successful application to have the process “stayed” at a hearing by the Supreme Court of India. It seems to me, having read the chronology of events in respect of the judicial proceedings before the Indian Courts, that from the date of arrest the sergeants and Italy availed themselves of due process in the Indian judicial system, thereby delaying the preferment of criminal charges and preventing a trial before a Special Court in India.

55. Before proceeding, I think reference to the factual background (the factual matrix) in this matter is important. The question of where the incident occurred is significant. Whether it occurred in the contiguous zone is not relevant. The fact is that the incident occurred in the EEZ of India. In addition, although this is said to be international waters, India was entitled to pursue the *Enrica Lexie* because bullets had allegedly been fired by marines from the *Enrica Lexie* and had killed two fishermen on board the *St. Antony*. Secondly, it is my view that the actual killing occurred on board the *St. Antony*, a fishing vessel registered in India. It is not disputed that the said marines from the *Enrica Lexie* fired the shots. The question whether they thought it was a pirate attack or whether the shots were fired into the water and

not at the *St. Antony* killing two fishermen and injuring others is a matter of fact to be determined when the case on the merits is heard.

In the circumstances is the matter urgent?

56. It is not disputed that three and a half years have passed since the marines were arrested. However, as there was parallel jurisdiction, during this period no application for provisional measures was filed because Italy insisted that the marines should be tried in Italy. An application was not made to India to extradite the marines to face trial in Italy. Instead, Italy made an application for bail and filed an application in the Indian Supreme Court to determine whether India has jurisdiction.

57. In my opinion, Italy has itself to blame for the delay, as it used, in my humble and respectful opinion, the due process of the law and the rather lenient and flexible approach in the Indian courts was beneficial to the Applicant's judicial process. It is also not disputed that diplomatic and political negotiations between the States were also taking place with a view to arriving at an amicable settlement. It is my view that there is a clear separation of powers between the independent judiciary of a country and the political directorate. It is accepted that the legal system governed by international law is not superior to the legal system governed by municipal law because each system or order is superior in its own sphere (G. Fitzmaurice, *The General Principles of International Law* 92 *HR 1957 II*, pp. 5, 70–80. Borchard, *The Relations between International Law and Municipal Law*, 27 *Virginia Law Review* 1940, p. 137; see also *infra* the references to the “*Hoshinmaru*” and “*Tomimaru*” cases, the “*Louisa*” Case and the “*Virginia G*” Case).

58. For the reasons set out I am of the view that the matter is not urgent. In any event it will be beneficial to the marines if the case is heard and determined by the Supreme Court of India, where a special court comprising sitting judges of the Supreme Court is ready to proceed once the applications to stay proceedings and the question of jurisdiction are determined by the said Court.

59. It seems to me that in the light of the fact that the matter is currently before a special court of the Supreme Court of India, only the Supreme Court can order a “stay of judicial proceedings” (see the Judgment of the Supreme Court of Ghana in the *ARA Libertad Case*, Civil Motion No.15/10/13 (20 June 2013). ITLOS had ordered the release of the *ARA Libertad*. However, it was by

motion to abridge time that the motion was heard by the Supreme Court of Ghana and the order of Judge Frimpong was overturned; consequently, the Libertad was legally released). The separation of powers is important. A ministry of government or an administrative body may not act contrary to the order of a court.

60. I do not think that the Convention envisaged and provided for a case where murder involving two or more States takes place in the EEZ or the high seas. The Convention is silent on this issue. Therefore, the domestic or municipal law will apply, more so because the domestic courts are versed in the determination of such matters.

61. I have to be quite emphatic in the circumstances. The matter is by no means urgent. Italy should not have come to this Tribunal at this time, not after three and a half years. Rather, it chose to seek relief in the Indian judicial system with applications for bail and applications to limit bail restrictions so that the marines could return to Italy to vote in the elections and for health reasons. All these applications were allowed by the Indian Supreme Court, which set up a Special Court to hear and determine the matter inclusive of questions of jurisdiction. A hearing is fixed for 26 August 2015.

62. Respectfully, I must say that the Supreme Court is rather accommodating, lenient and benevolent in this matter. The marine currently in India is housed at the residence of the Italian Ambassador; he is on bail notwithstanding that in India persons held on a charge of murder are not entitled to bail. In other words, murder is not aailable offence. This fortifies my view that the matter cannot be deemed urgent. The integrity of the Indian criminal justice system and the Supreme Court must be respected.

63. If the requests of Italy are granted, this would be an affront to the dignity and integrity of the Indian Supreme Court and by extension to the Italian court system where the criminal proceedings are in progress. It is my view that questions of jurisdiction ought to be determined by the Indian Supreme Court, which has conduct of the matter. In fact a hearing with respect to the application of the two marines will be held on 26 August 2015.

64. For purposes of completeness, I will consider whether the articles cited by counsel for Italy apply to this application and whether the following statement of the Second Solicitor General at the end of his oral submission was a commitment that the matter will not be “taken up”. Counsel for India in his opening statement said

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.

65. This in my opinion is accomplished by the fact that the Supreme Court has stayed proceedings. *It would be going too far* to say that until the arbitral 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 predominant words are highlighted. This is a comment and it would be mind-boggling and incredible to find that by these words the Second Solicitor General was conceding anything or agreeing with the request. The meaning ascribed to the words is apparent and the meaning is obvious. For reasons alluded to earlier I do not think that any of the articles of the Convention cited by Italy are relevant to this application.

Exhaustion of local remedies

66. It seems to me that prior to the filing of this application for provisional measures Italy had resorted to the Indian Courts for relief. As I alluded to above, there were several applications to the High Court in Kerala and to the Supreme Court over the past three years. In fact, a matter is currently pending before the Supreme Court on the question of jurisdiction. The Supreme Court has ruled that the incident is to be dealt with by a Special Court, appointed under the Constitution of India. This court will most probably consider the question of jurisdiction and the matter as a whole. Therefore, for the foregoing and other reasons that can be gleaned in this opinion I do not think there has been exhaustion of local remedies.

67. Having read the written submissions, considered the documents submitted, and heard the oral submissions, I find that *prima facie* the Annex VII arbitral tribunal to be constituted would not have jurisdiction, the matter is not urgent, local remedies have not been exhausted and an abuse of process is evident.

68. For the above reasons I will dismiss the application and I will not grant the provisional measures requested.

69. I have to add that I have read in draft the dissenting opinion of Judge P. Chandrasekhara Rao. I agree with the views expressed therein.

(signed) A. A. Lucky