

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



2015

Public sitting

held on Monday, 10 August 2015, at 9.30 a.m.,
at the International Tribunal for the Law of the Sea, Hamburg,

President Vladimir Golitsyn presiding

THE “ENRICA LEXIE” INCIDENT

(Italy v. India)

Verbatim Record

<i>Present:</i>	President	Vladimir Golitsyn
	Vice-President	Boualem Bouguetaia
	Judges	P. Chandrasekhara Rao
		Joseph Akl
		Rüdiger Wolfrum
		Tafsir Malick Ndiaye
		José Luís Jesus
		Jean-Pierre Cot
		Anthony Amos Lucky
		Stanislaw Pawlak
		Shunji Yanai
		James L. Kateka
		Albert J. Hoffmann
		Zhiguo Gao
		Jin-Hyun Paik
		Elsa Kelly
		David Attard
		Markiyana Kulyk
		Alonso Gómez-Robledo
		Tomas Heidar
	Judge <i>ad hoc</i>	Francesco Francioni
	Registrar	Philippe 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, First Counsellor, Deputy Head, Service for Legal Affairs, Diplomatic Disputes and International Agreements, Ministry of Foreign Affairs and International Cooperation,

Mr Mario Antonio Scino, Adv., State Attorney, Office of the Attorney General,

as Senior Advisers;

Sir Daniel Bethlehem QC, Member of the Bar of England and Wales, 20 Essex Street, London, United Kingdom,

Mr Paolo Busco, Member of the Rome Bar,

Mr Sudhanshu Swaroop, Member of the Bar of England and Wales, 20 Essex Street, London, United Kingdom,

Mr Attila Tanzi, Professor of International Law, University of Bologna,

Mr Guglielmo Verdirame, Professor of International Law, King's College, London; Member of the Bar of England and Wales; 20 Essex Street, London, United Kingdom,

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

as Counsel and Advocates;

Dr Ida Caracciolo, Professor of International Law, University of Naples 2; Member of the Rome Bar,

Mr Suhail Dutt, Senior Advocate, Member of the Delhi Bar, India,

Ms Callista Harris, Solicitor admitted in New South Wales; Associate, Freshfields Bruckhaus Deringer, Paris, France,

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, Associate, Freshfields Bruckhaus Deringer,

Mr Diljeet Titus, Advocate, Titus & Co., Advocates; Member of the Delhi Bar, India,

Dr Philippa Webb, Lecturer in Public International Law, King's College London; Member of the New York Bar,

as Counsel;

Ms Francesca Lionetti, Freshfields Bruckhaus Deringer,

as Legal Assistant.

India is represented by:

Ms Neeru Chadha, former Additional Secretary and Legal Advisor, Ministry of External Affairs,

as Agent;

H.E. Mr Vijay Gokhale, Ambassador of India to the Federal Republic of Germany, Berlin, Germany,

as Co-Agent;

Dr Vishnu Dutt Sharma, Director (Legal and Treaties), Ministry of External Affairs,

as Deputy Agent;

and

Mr P.S. Narasimha, Additional Solicitor General,

Mr Alain Pellet, Emeritus Professor, University Paris Ouest Nanterre La Défense; former Chairperson, International Law Commission; Member, Institut de droit international,

Mr Rodman R. Bundy, Eversheds LLP Singapore; Member of the New York Bar; former Member of the Paris Bar,

Mr Narinder Singh, Chairman, International Law Commission,

as Counsel and Advocates;

Mr Benjamin Samson, Ph.D. Candidate, Centre de droit international de Nanterre (CEDIN), University of Paris Ouest Nanterre la Défence, France,

Ms Laura Yvonne Zielinski, Eversheds Paris LLP; Member of the New York Bar,

Mr Ishaan George, Assistant Counsel to the Additional Solicitor General of India,

as Junior Counsel;

Mr M.A. Ganapathy, Joint Secretary (Internal Security-I), Ministry of Home Affairs,

Ms K. Nandini Singla, Joint Secretary (Europe West), Ministry of External Affairs,

Mr P.V. Rama Sastry, Inspector-General, National Investigation Agency,

Mr S. Senthil Kumar, Legal Officer, Ministry of External Affairs,

as Advisers.

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

3
4 At the outset I would like to note that Judge Vicente Marotta Rangel has tendered his
5 resignation as a Member of the Tribunal on 18 May 2015. His place is therefore
6 currently vacant.

7
8 On 21 July 2015, Italy submitted to the Tribunal a Request for the prescription of
9 provisional measures pending the constitution of an arbitral tribunal in a dispute with
10 India concerning the *Enrica Lexie* incident. The Request was made pursuant to
11 article 290, paragraph 5, of the United Nations Convention on the Law of the Sea.
12 The case was named *The "Enrica Lexie" Incident* and entered in the List of cases as
13 case no. 24.

14
15 I now call on the Registrar to summarize the procedure and to read out the
16 submissions of the Parties.

17
18 **THE REGISTRAR:** Thank you, Mr President.

19
20 *(Interpretation from French)* On 21 July 2015 a copy of the request for the
21 prescription of provisional measures was sent to the Government of India. By order
22 of 24 July 2015 the President fixed 10 August 2015 as the date for the opening of the
23 hearing. On 6 August 2015 India filed its statement in response to Italy's request.

24
25 I will now read out the submissions of the Parties.

26
27 *(Continued in English)* The Applicant requests the Tribunal to prescribe the following
28 provisional measures:

29
30 (a) India shall refrain from taking or enforcing any judicial or administrative
31 measures against Sergeant Massimiliano Latorre and Sergeant Salvatore
32 Girone in connection with the *Enrica Lexie* incident, and from exercising
33 any other form of jurisdiction over that incident; and

34
35 (b) India shall take all measures necessary to ensure that restrictions on
36 the liberty, security and movement of the Marines be immediately lifted to
37 enable Sergeant Girone to travel to and remain in Italy and Sergeant
38 Latorre to remain in Italy throughout the duration of the proceedings before
39 the Annex VII tribunal.

40
41 The Respondent requests:

42
43 [T]he Republic of India requests the International Tribunal for the Law of
44 the Sea to reject the submissions made by the Republic of Italy in its
45 Request for the prescription of provisional measures and to refuse
46 prescription of any provisional measures in the present case.

47
48 Mr President.

49
50 **THE PRESIDENT:** Thank you, Mr Registrar.

51

1 At today's hearing, both Parties will present the first round of their respective oral
2 arguments. Italy will make its arguments this morning until approximately 1 p.m. with
3 a break of 30 minutes at around 11.15 a.m. India will speak this afternoon from
4 3 p.m. until approximately 6.30 p.m. with a break of 30 minutes at around 4.30 p.m.

5
6 Further to a request by Italy, and as agreed by the Parties, part of the hearing will not
7 be open to the public. This will take place just after the morning break for a period of
8 30 minutes and I will provide more information when we reach 11.15.

9
10 Tomorrow will be the second round of oral arguments with Italy speaking from 10.00
11 to 11.30 a.m. and India speaking from 4.30 to 6 p.m.

12
13 I note the presence at the hearing of Agents, Co-Agents, Counsel and Advocates of
14 the Parties.

15
16 I now call on the Agent of Italy, Mr Francesco Azzarello, to introduce the delegation
17 of Italy.

18
19 **MR AZZARELLO:** Mr President, Members of the Tribunal, distinguished Agent and
20 members of the delegation of the Republic of India, it is a particular honour to appear
21 today before this Tribunal for the first time to represent the Italian Republic.

22
23 It is also a privilege to introduce the members of the Italian delegation. I do not
24 propose to introduce everyone by name but wish to note the presence here of
25 Minister Plenipotentiary Stefano Pontecorvo, the Diplomatic Adviser to the Minister
26 of Defence, First Counsellor Stefania Rosini, the Deputy Head of the Legal Service
27 at the Ministry of Foreign Affairs, and Avvocato Mario Antonio Scino, of the Attorney
28 General's Office. In addition to other members of the Italian delegation, whose
29 names and affiliations have been provided to the Tribunal, our submissions today will
30 be made by the following counsel: Sir Daniel Bethlehem QC, Professor Attila Tanzi,
31 Sir Michael Wood, Avvocato Paolo Busco, and Professor Guglielmo Verdirame.

32
33 Mr President, at your invitation, following the introductions of the Indian legal team,
34 I will return to make some opening submissions on behalf of Italy. I thank you,
35 Mr President.

36
37 **THE PRESIDENT:** Thank you, Mr Azzarello.

38
39 I now call on the Agent of India, Ms Neeru Chadha, to introduce the delegation of
40 India.

41
42 **MS CHADHA:** Mr President, Mr Vice-President, and distinguished Members of the
43 Tribunal, it is an honour and privilege for me to appear before this Tribunal as India's
44 Agent.

45
46 I will introduce those representing India in these proceedings. The Co-Agent,
47 Ambassador Vijay Gokhale, could not attend the hearing today due to some other
48 exigencies. Dr Vishnu Dutt Sharma, Director in the Legal and Treaties Division is the
49 Deputy Agent.

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

7
8 Mr Benjamin Samson; Ms Laura Zielinski; and Mr Ishaan George assist the Counsel.
9 Mr Ganapathy, Ms Nandini Singla, Mr P. V. Rama Sastry and Mr Senthil Kumar are
10 the Advisers.

11
12 I also wish to acknowledge our counterparts representing the Government of Italy
13 and convey our greetings to them.

14
15 **THE PRESIDENT:** Thank you, Ms Chadha.

16
17 I now request the Agent of Italy, Mr Azzarello, to begin his statement.

18
19 **MR AZZARELLO:** Mr President, Members of the Tribunal, allow me, before
20 introducing our case, to start by underlining that Italy and India have had historically
21 good relations and shared values. It is not uncommon that friends resort to
22 international arbitration . a peaceful mechanism provided for in the United Nations
23 Charter . to resolve a dispute when they have not been able to solve their
24 differences through negotiation.

25
26 Against this background, we were surprised at the tone of the Indian Written
27 Observations. It is in many respects an intemperate document. I do not of course
28 refer to the legal argument, which is fair game, and will be met by our response in
29 due course. I do not even refer to factual overstatement, which was perhaps to be
30 expected. I refer rather to wilful inaccuracies and a tone and an approach that
31 perhaps best exemplifies why our two States are now at the impasse at which we
32 find ourselves.

33
34 I limit myself to one example in illustration. It is only one example but it is egregious.
35 The two Italian marines who are caught up in this dispute have not been charged
36 with any crime. It is a matter of legal debate why that is the case, and I make no
37 comment on this, but the fact remains that they have not been charged with, let
38 alone convicted of, any crime, and indeed they have protested their innocence
39 throughout.

40
41 India, in its Written Statement, skates lightly over this technicality with a disdain for
42 due process in criminal proceedings. Its Statement opens with the observation that
43 the subject matter of this dispute

44
45 actually centres upon the murder by two Italian Marines embarked on the
46 *MV Enrica Lexie*, of two Indian unarmed fishermen embarked on the Indian
47 fishing vessel *St. Antony*.¹

48

¹ Written Observations of India, at para. 1.6.

1 It continues to say that:

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

6
7 Similar observations follow throughout the Written Statement.³ As I say,
8 Mr President, Members of the Tribunal, this cavalier attitude to due process is
9 chilling.

10
11 With this said, I will now introduce very briefly our case.

12
13 The dispute submitted to an Annex VII arbitral tribunal concerns an incident that
14 occurred on 15 February 2012, approximately 20.5 nautical miles off the coast of
15 India, involving the *MV Enrica Lexie*, an oil tanker flying the Italian flag, and India's
16 subsequent . unlawful . exercise of jurisdiction over the incident, over the vessel,
17 and over two marines of the Italian Navy, Chief Master Sergeant Massimiliano
18 Latorre and Sergeant Salvatore Girone. Sergeants Latorre and Girone were on
19 official duty on board the *Enrica Lexie* at the time of the incident.

20
21 The marines' official duty was to protect the vessel from the risk of piracy attacks
22 during its voyage from Sri Lanka to Djibouti, which required it to pass through IMO-
23 designated high-risk international waters.

24
25 The incident was characterized by a series of violations of international law by the
26 Indian authorities. Italy contends that India has breached at least 12 separate
27 provisions of UNCLOS. These are serious violations of some of the most crucial
28 provisions of UNCLOS, including, *inter alia*, freedom of navigation, the duty to fulfil
29 good faith obligations under the Convention, the exclusive jurisdiction of the flag
30 State and the duty to cooperate in the repression of piracy.

31
32 India, acting by ruse and by coercion, including with coastguard ships and aircraft,
33 intercepted the *Enrica Lexie* in international waters and caused it to change its
34 course and put into port in Kochi, on the Kerala coast.

35
36 While in Kochi, Indian armed personnel, including coast guard, police and
37 commandos, boarded the vessel, undertook a coerced investigation of the ship and
38 interrogations of its crew. The ship's crew, including the marines, were compelled to
39 disembark, and Sergeants Latorre and Girone were arrested.

40
41 Sergeants Latorre and Girone have been subject to the custody of the Indian courts
42 ever since, without any charge having formally been issued. They are under Indian
43 Supreme Court bail constraints to this day, three and a half years later.

44
45 Sergeant Latorre, after suffering a brain stroke, assessed to be due to the stress of
46 these events, was granted a relaxation of the condition of bail to return to Italy for
47 medical treatment. He is not yet recovered.

48

² Written Observations of India, at para. 1.7.

³ See, for example, Written Observations of India, at paras. 1.14 and 3.77.

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

4
5 At the time of the incident, Italy promptly asserted its jurisdiction and the immunity of
6 its State officials. The exercise of jurisdiction on the part of India over the two
7 marines constitutes a continuing grave prejudice to Italy's rights.

8
9 Mr President, Members of the Tribunal, a correct and fair framework of legality needs
10 to be restored, from its foundations.

11
12 Italy has tried in these three and a half years, in good faith, to promote, at different
13 levels and directions, a friendly solution to the dispute. While engaging with Indian
14 officials, Italy has acted constructively, listening to all proposals. Informal and formal
15 contacts and concrete offers by Italy have been activated and made. Regrettably, all
16 this has been to no avail.

17
18 Mr President, Members of the Tribunal, frustration, stress, deteriorated and
19 deteriorating medical conditions affecting directly and indirectly the people involved
20 threaten grave prejudice to Italy's rights and mean that there is a need to address
21 urgently this situation. With humbleness, therefore, Italy was compelled to initiate
22 proceedings before an Annex VII tribunal on 26 June this year and now seeks
23 provisional measures from this Tribunal, the guardian of the principles, spirit and
24 norms of the UN Convention on the Law of the Sea.

25
26 Mr President, Members of the Tribunal, Italy has been compelled to take this step
27 because of the serious damage and irreparable harm to Italy's rights and interests if
28 immediate steps are not taken by India to remedy the situation that it alone has
29 caused.

30
31 In light of these developments, pursuant to article 290, paragraph 5, of the
32 Convention, Italy respectfully requests the International Tribunal for the Law of the
33 Sea to prescribe the following provisional measures: that India shall refrain from
34 taking or enforcing any judicial or administrative measures against Chief Master
35 Sergeant Massimiliano Latorre and Sergeant Salvatore Girone in connection with the
36 *Enrica Lexie* Incident, and from exercising any other form of jurisdiction over that
37 incident; that India shall take all measures necessary to ensure that restrictions on
38 the liberty, security and movement of the marines be immediately lifted to enable
39 Sergeant Girone to travel to and remain in Italy and Chief Master Sergeant Latorre to
40 remain in Italy throughout the duration of the proceedings before the Annex VII
41 tribunal.

42
43 Mr President, honourable Members of the Tribunal, this Request is made on the
44 ground that Italy will suffer serious and irreversible prejudice to its rights if,
45 notwithstanding the submission of the dispute to arbitration under Annex VII of
46 UNCLOS, India is able to continue exercising its jurisdiction over the *Enrica Lexie*
47 incident and the Italian marines, all the while subjecting the Italian marines to
48 restrictions on their liberty and movement.

49
50 Mr President, Members of the Tribunal, the structure of Italy's oral submissions today

1 will be as follows: I will shortly ask you to invite Sir Daniel Bethlehem to the podium.
2 He will set out the facts of the *Enrica Lexie* incident in more detail and will address
3 the subsequent dispute and the necessity for provisional measures. He will be
4 followed by Professor Attila Tanzi, who will address certain issues of jurisdiction
5 relevant to this Request. Sir Michael Wood will speak next. He will address the
6 requirements for provisional measures and the rights at issue in this case.

7
8 After the morning break, Avvocato Paolo Busco will address the Tribunal in closed
9 session on certain sensitive and confidential issues that have been addressed to the
10 Tribunal and to India in writing. He will be followed by Professor Guglielmo
11 Verdirame. He will begin in closed session with some brief observations but
12 thereafter continue in open session to address why the conditions required for the
13 prescription of provisional measures are satisfied in this case.

14
15 Finally, Sir Daniel will return briefly to the podium with some concluding
16 observations.

17
18 Thank you Mr President, honourable Members. May I now ask you, Mr President, to
19 call Sir Daniel Bethlehem to the podium.

20
21 **THE PRESIDENT:** Thank you, Mr Azzarello. I now give the floor to Sir Daniel
22 Bethlehem.

23
24 **MR BETHLEHEM:** Mr President, Members of the Tribunal, it is an honour for me to
25 appear before you representing the Italian Republic in these proceedings.

26
27 These proceedings concern Italy's Request for provisional measures. They do not
28 address the merits of Italy's claim nor any issue of jurisdiction that India may raise in
29 due course. You will need to satisfy yourselves that *prima facie* the Annex VII
30 tribunal to be constituted would have jurisdiction. We consider this issue to be
31 straightforward. Professor Tanzi, who will follow me, will address this aspect.

32
33 Although these proceedings are not concerned with the merits of the claim in issue
34 between the Parties, it is important that you have a sense of what this case is about
35 and why it is that Italy comes to you now to request the Tribunal to prescribe
36 provisional measures. This is the subject of my submissions. I will address, in
37 summary form, the facts of the dispute, India's coercion and Italy's assertion and
38 exercise of jurisdiction. I will then set out some salient developments following the
39 judgment of the Indian Supreme Court in this case in January 2013 and also deal
40 with more recent developments and issues of urgency that have brought us before
41 you today.

42
43 As a preliminary matter, though, before I turn to the facts of the dispute, I am
44 compelled to say something more about India's treatment of these issues in its
45 Written Statement.

46
47 You have already heard from Italy's Agent about the cavalier attitude that India has
48 taken to due process in criminal proceedings by its characterization of the Italian
49 marines as murderers. It is not simply that the marines have not yet been charged
50 with any crime and have not been judged; it is that they contest every key aspect of

1 the conduct that India alleges against them and maintain their innocence. The
2 incident did indeed appear to be a pirate attack. It is not established that they caused
3 the deaths of the two Indian fishermen. There is considerable evidential dispute. The
4 correct procedures on the *Enrica Lexie* were followed in response to the suspected
5 attack.
6

7 But the matter goes beyond the way in which India described the marines. India
8 objects to the description of the facts of the incident given by Italy in its Notification
9 instituting proceedings. Regrettably, in a number of important respects, the Indian
10 statement has a barely recognizable relationship with reality. It is not just oversight or
11 omission. It is wilful inaccuracy, and I will come to one or two examples of this during
12 the course of my presentation. This of course goes to the merits of the underlying
13 dispute, which is not before you. India addresses these matters simply for reasons of
14 prejudice.
15

16 With that said, Mr President, Members of the Tribunal, let me outline the basic facts
17 of the dispute to provide some context to what will follow.
18

19 The incident that sparked this dispute took place on 15 February 2012 about 20.5
20 nautical miles off the Indian coast of Kerala in an Indian Government-designated
21 high-risk area for piracy. It involved the Italian-flagged oil tanker, the *MV Enrica*
22 *Lexie*, and a suspected pirate attack. In the incident, it is alleged that two Indian
23 fishermen on board the fishing boat *St. Antony* were killed by gunfire from the *Enrica*
24 *Lexie*, the shots having been fired, it is alleged, by Chief Master Sergeant
25 Massimiliano Latorre and Sergeant Salvatore Girone. Sergeants Latorre and Girone
26 were two of a detachment of six Italian marines who were assigned to the *Enrica*
27 *Lexie* on official duties to protect the vessel from the threat of piracy in high-risk
28 waters.
29

30 The map now on the screen, which is at tab 3 of your JudgesqFolder, shows the
31 position of the *Enrica Lexie* at the time of the incident and the 12-nautical-mile limit of
32 India's territorial sea. The ship's position depicted on the map is taken from the
33 automatically generated Ship Security Alarm System of the *Enrica Lexie*, which was
34 activated when the apparent pirate attack was perceived, and is reflected on the
35 Message that was automatically generated at that point. This Alarm System
36 Message is at tab 4 of your JudgesqFolder.⁴ The coordinates indicated on the
37 Message were automatically generated when the alarm button was pressed. There
38 is no dispute that, as a matter of fact, the incident took place well beyond India's
39 territorial sea.
40

41 Mr President, Members of the Tribunal, two parallel developments that followed the
42 incident are material to this dispute. The first is that when they became aware of the
43 incident, the Indian authorities in Kerala employed coercion to cause the *Enrica*
44 *Lexie* to alter course from its journey between Sri Lanka and Djibouti, compelling her
45 to enter Indian territorial waters and put into the port of Kochi on the Kerala coast.
46 The Indian authorities also undertook coerced investigations on the vessel and

⁴ Ship Security Alarm System Message sent out by the *Enrica Lexie* on 15 February 2012, Annex 3 to Annex A.

1 interrogations of its crew, and arrested and detained Sergeants Latorre and Girone
2 on 19 February 2012. All of this is incontrovertibly established by Indian documents.
3

4 The second development is that, immediately Italy was informed of the deaths of the
5 two fishermen on board the *St. Antony*, it asserted its jurisdiction over the *Enrica*
6 *Lexie*, over the incident, and over the *Enrica Lexie* crew, including the Italian
7 marines, and the Office of the Prosecutor at the Military Tribunal in Rome initiated an
8 investigation into the incident. I will return to this aspect shortly.
9

10 I turn, first, to the issue of the coercion of the Indian authorities to cause the *Enrica*
11 *Lexie* to alter its course, to put into port at Kochi, to interrogate the crew, and
12 ultimately to arrest and detain Sergeants Latorre and Girone on 19 February 2012.
13 There are three Indian documents to which I would like to draw your attention to
14 illustrate the point.
15

16 The first document is at tab 5 of your JudgesqFolder.⁵ It is a Report of India's
17 National Maritime Search and Rescue Board dated 4 June 2012. If you turn to page
18 11, under the heading "Piracy", you will see a report of what is described as a
19

20 [f]iring incident by the *MV Enrica Lexie*.
21

22 Following the opening paragraph, which describes the alleged incident, the Report
23 goes on in the following terms, and I read from the second paragraph:
24

25 On receipt of information, ICGS [*Indian Coast Guard Ship*] Samar on patrol
26 off Vizhinjam coast was diverted and ICGS Lakshmibai was sailed from
27 Kochi at 1935 h on 15 Feb 12 (with 04 police personnel embarked) to the
28 most probable area for search and interdiction of the suspected merchant
29 vessel.
30

31 Further, Coast Guard Dornier ex-747 Sqn (CG) was launched for sea-air
32 coordinated search. MRCC (MB) [*The Maritime Rescue Coordination*
33 *Centre Mumbai*] was concurrently directed to analyze the AIS [*Automatic*
34 *Identification System*] and LRIT [*Long-Range Identification and Tracking*]
35 plot and correlate with available inputs to identify and track the suspected
36 merchant vessel.
37

38 After stating that suspicion attached to the *Enrica Lexie*, and that the *Enrica Lexie*
39 was
40

41 directed to alter course and proceed to Kochi anchorage,
42

43 the Report continues:
44

45 UKMTO [*the UK Maritime Trade Operations centre in Dubai which operates*
46 *an emergency incident response centre*] confirmed of having received a
47 message from MT *Enrica Lexie*. At 1950 h on 15 Feb 12, CG Dornier
48 located MT *Enrica Lexie* and vectored ICG ships for interception. CG
49 Dornier also directed the vessel to proceed to Kochi anchorage for

⁵ National Maritime Search and Rescue Board, Report, 4 June 2012, Annex 6 to Annex A, at pp. 11-13.

1 investigation. ICGS Lakshmibai intercepted MT Enrica Lexie at about
2 2045 h on 15 Feb 12 and escorted the vessel till Kochi anchorage.
3

4 Before we leave this document, I would like to ask you to turn to the last page, page
5 15. You will see there a Maritime Shipping Notice No. 7 of 2012, which is headed
6 %Navigation off the Indian Coast . Transgressing of Fishing Nets Mistaking Fishing
7 Boats with Pirate Skiffs+. I do not propose to take you to this in any detail but would
8 invite you in your own time to have a look at paragraphs 3 and 4 of this Maritime
9 Shipping Notice.
10

11 I draw this to your attention to provide some balance to India's Written Statement,
12 which attempts to cast doubt on any appreciation that the incident involved was
13 apprehended to be a pirate attack.
14

15 Mr President, Members of the Tribunal, the second document that establishes India's
16 coercion is at tab 6 of your JudgesqFolder.⁶ It is the statement given in the Kerala
17 proceedings by the pilot of the Indian coast guard Dornier aircraft that intercepted the
18 *Enrica Lexie* and required it to divert its course. The handwritten statement of the
19 pilot is behind the typed version that Italy has produced. Mr President, Members of
20 the Tribunal, in the interests of time, let me highlight just two portions of the
21 statement for you. The first portion is towards the bottom of the typed part of the
22 page which is numbered 77 at the bottom and you will see there, four lines up from
23 the bottom, the statement:
24

25 We located the vessel ENRICA LEXIE in the Position 09°51.6+N and
26 075°37.5+E. We encircled the vessel and contacted it over VHF in channel
27 16 and 10.
28

29 If you turn over the page, you will see about halfway down the paragraph there, at
30 the point at which square brackets start, and I note that the square brackets are in
31 the original handwritten manuscript, it says as follows:
32

33 [We directed them . that is the Enrica Lexis . to amend the course and
34 proceed to Kochi harbour and informed to be in channel 16 and 10. We
35 contacted them continuously over VHF. The ship altered the course
36 towards Kochi and we shadowed it to Kochi anchorage until 22.30 hrs].⁷ At
37 21.25 hrs. we came into communication with ICGS Lakshmibai which was
38 also engaged in the searching operation. Lakshmibai contacted the vessel
39 over VHF at 21.30 hrs. Lakshmibai intercepted the vessel and escorted to
40 Kochi anchorage at 22.35 hrs.]
41

42 Mr President, Members of the Tribunal, there is now on the screen . and at tab 7 of
43 your JudgesqFolder . a map showing the position of the *Enrica Lexie* at the point
44 that it was intercepted and was diverted by the Indian coast guard Dornier aircraft,
45 the coordinates being taken from the pilot's witness statement. This is some 36
46 nautical miles off the Indian coast.
47

⁶ Statement by Commandant Alok Negi, Coast Guard Air Enclave Kochi, 19 February 2012, Annex 7 to Annex A.

⁷ The [square brackets] are found in the original manuscript version of this statement.

1 The last of the documents to which I would like to take you is the Boarding Officer's
2 Report which describes the boarding of the *Enrica Lexie* by armed Indian police and
3 coast guard personnel on 16. 17 February 2015. This is at tab 8 of your Judges'q
4 Folder.⁸ It is a detailed document, which I do not propose to take you through in full. I
5 would, however, like you to look at parts of it.

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

10
11 An armed contingent of at least 36 personnel boarded the *Enrica Lexie* in the early
12 morning of 16 February 2012.

13
14 The Master and crew of the vessel were polite but initially refused to divulge any
15 information claiming that the issue was *sub-judice* to Italian laws and no details could
16 be shared with Indian agencies.

17
18 However, and this is the language of the Indian Report at paragraph 10,

19
20 continued interrogation by the boarding team

21
22 resulted in the Master handing over information and documentation.

23
24 Again using the language of the Report, at paragraph 11,

25
26 continuous pressure was maintained on the crew and Master.

27
28 The vessel was eventually ordered to put into port, at which point, in the early hours
29 of 17 February 2012, the Master and crew, including the marines, were compelled to
30 disembark.

31
32 As is clear from this Report, following its interception and compelled alteration of
33 course to Kochi, there followed an unrelenting period of about 16 hours during which
34 the *Enrica Lexie* and its crew of 30 were subject to coerced detention by 36 or more
35 armed Indian personnel, and what the Boarding Officer's Report describes as
36 "continued interrogation" and "continuous pressure".

37
38 Mr President, Members of the Tribunal, there is more to be said about these events
39 but this will suffice for present purposes to illustrate that this was not a light-touch
40 exercise of jurisdiction by India. The *Enrica Lexie* was intercepted in international
41 waters by an Indian coast guard aircraft and armed Indian coast guard boats. It was
42 ordered to put into port at Kochi. Armed Indian personnel interrogated the crew and
43 the marines, applying continuous pressure to force them to hand over information
44 and materials, which India has subsequently sought to introduce into its domestic
45 court proceedings. This was an exercise of coercive power over an Italian-flagged
46 vessel, and over Italian marines on official duties, in respect of an incident that took
47 place beyond India's territorial jurisdiction.

48

⁸ Boarding Officer's Report MV *Enrica Lexie*, 16-17 February 2012, Annex 9 to Annex A.

1 Mr President, Members of the Tribunal, I turn now to the issue of Italy's prompt
2 assertion of jurisdiction and the opening of a criminal investigation by the Office of
3 the Prosecutor at the Military Tribunal in Rome.
4

5 Immediately Italy was informed of the deaths of the two fishermen on board the *St.*
6 *Antony*, it asserted its jurisdiction over the *Enrica Lexie*, the incident and the crew of
7 the *Enrica Lexie*, including the two marines, and the Office of the Prosecutor at the
8 Military Tribunal in Rome initiated an investigation into the incident. I illustrate this
9 point by reference to a number of documents.
10

11 The first document that illustrates this is the Boarding Officer's Report to which I took
12 you a moment ago. You will recall that, in that Report, the Boarding Officer recorded
13 that the crew had indicated that the issue was *sub-judice* to Italian laws (paragraph 9
14 of the Boarding Officer's Report). I do not propose to take you back to this document
15 but only recall that already on 16 February 2012, less than 24 hours after the
16 incident, the Master and crew of the *Enrica Lexie* had been in contact with the Italian
17 authorities and had been informed that the incident was subject to Italian
18 prosecutorial investigation.
19

20 The next document is Italy's Note Verbale to India of 16 February 2012, which you
21 will find at tab 9 of your JudgesqFolder, which was transmitted, again, within 24
22 hours of the incident.⁹ In the interests of time, I need not take you to the document
23 directly but draw your attention to its third paragraph, which states that
24

25 ō the Italian Navy detachment is exclusively answerable to the Italian
26 judicial Authorities.
27

28 This Note Verbale of 16 February 2012 was followed up by a further Note Verbale
29 the next day, 17 February 2012, in which Italy again asserted that
30

31 the Italian judicial Authorities are the sole competent judicial Authorities for
32 the case in question.¹⁰
33

34 The next document to which I would like to take you is a communication from the
35 Military Prosecutor in Rome dated 17 February 2012. It is at tab 10 of your Judgesq
36 Folder.¹¹ It requires that certain specified information is provided to the Office of the
37 Prosecutor with the maximum urgency by way of preliminary investigation.
38

39 The opening of a full criminal investigation into the incident by the Office of the
40 Prosecutor of the Military Tribunal in Rome is addressed directly in a communication
41 from the Office of the Prosecutor to the Head of the Cabinet at the Italian Ministry of
42 Defence a few days later, on 24 February 2012. This document is at tab 11 of your
43 JudgesqFolder.¹² It is brief and reads as follows:

⁹ Note Verbale 67/438, 16 February 2012, Annex 10 to Annex A.

¹⁰ Note Verbale 69/456, 17 February 2012, Annex 12 to Annex A.

¹¹ 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.

¹² 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.

1

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

10

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

18

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

27

28 Mr President, Members of the Tribunal, I return briefly to the chronology of the
29 incident. Italy, together with Sergeants Latorre and Girone, challenged India's
30 assertion of jurisdiction over the incident, over the *Enrica Lexie* and over the
31 marines, in a petition before the Kerala High Court. The petition was addressed in a
32 judgment of the Kerala High Court of 29 May 2012.¹³ In this judgment, the Kerala
33 High Court rejected the petition, finding that India had jurisdiction over the incident,
34 the vessel and the marines, and that a criminal trial of Sergeants Latorre and Girone
35 should proceed.

36

37 The Kerala High Court judgment was appealed to the Indian Supreme Court. The
38 Supreme Court handed down its judgment on 18 January 2013.¹⁴ In that judgment,
39 while leaving open the relevance and application of article 100 of UNCLOS on the
40 suppression of piracy, the Indian Supreme Court held that the State of Kerala had no
41 jurisdiction to investigate the incident. The Indian Supreme Court also held, however,
42 the Union of India did have jurisdiction to investigate and try the marines, concluding
43 that the incident came within India's territorial jurisdiction.¹⁵ The Supreme Court went
44 on to direct the Indian Government to set up a Special Court . an exceptional court .
45 to try the marines. The reason for this was that there is in India no federal criminal
46 court empowered to address such issues. While the Supreme Court indicated that

¹³ Judgment of the High Court of Kerala, 29 May 2012, annex 17 to annex A.

¹⁴ Republic of Italy & Ors v. Union of India & Ors, Supreme Court of India Judgment of 18 January 2013, annex 19 to annex A.

¹⁵ 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.

1 issues of jurisdiction could, in its words, be ~~re-~~agitated before the Special Court, it
2 was not evident what this included, it being clear that the Supreme Court had spoken
3 on questions of jurisdiction going to such matters as the exclusive jurisdiction of the
4 flag State of a vessel exercising high seas freedom of navigation rights. The Indian
5 Supreme Court also failed to address the status of the marines, as Italian State
6 officials exercising official functions.

7
8 Mr President, Members of the Tribunal, there are two aspects of the developments
9 since the judgment of the Indian Supreme Court that I would like to draw briefly to
10 your attention as they go to the heart of why we are before you at this point. These
11 are developments on the legal front, in the Indian court proceedings, and
12 developments on the diplomatic front, concerning engagements between Italy and
13 India in an attempt to resolve the dispute by way of a negotiated settlement. These
14 issues are closely intertwined. Before I turn to these aspects, however, there is
15 something that must be said about certain comments in India's Written Statement.

16
17 At various places in its Written Statement, India, in terms, calls into question Italy's
18 good faith and says that Italy cannot be trusted to keep its word. We will come to
19 *India's* word in this dispute in the merits proceedings. For the moment, I would like to
20 address briefly the two matters that India cites to call into question Italy's good faith:
21 first, Italy's alleged failure to make the remaining four marines available for interview
22 and, second, the apparent decision not to return Sergeants Latorre and Girone to
23 India after leave had been given to travel to Italy.

24
25 On the first of these issues, the availability of the other four marines for interview,
26 with the greatest respect to our colleagues on the other side of the room, India ought
27 to know its own law better than it states it to the Tribunal. As a matter of Indian law,
28 the making available of witnesses for interview by video-conferencing satisfies the
29 requirement to appear. This is what took place. There are those sitting not a million
30 miles away from the Additional Solicitor General in Delhi who would well be able to
31 speak to these issues. Italy fully satisfied the commitments that it had undertaken.

32
33 On the issue of the apparent Italian Government decision not to return Sergeants
34 Latorre and Girone to India after a leave of absence in Italy, the reality is that the
35 marines did in fact return to India by the deadline stipulated. This is recorded
36 explicitly in the Indian Supreme Court Order of 2 April 2013 that India annexed to its
37 Written Statement.¹⁶ There was no breach of any undertaking. What there was in this
38 episode were measures taken by the Indian Government to restrict the movement of
39 the Italian Ambassador in Delhi in blatant violation of the Vienna Convention on
40 Diplomatic Relations. This dispute was a hair's breadth away from becoming a
41 dispute before the International Court of Justice addressing India's violation of the
42 sacred canons of international law of diplomacy that rank alongside those
43 concerning the law of the sea and freedom of navigation. Again, Italy fully satisfied
44 the commitments that it had undertaken.

45
46 Mr President, Members of the Tribunal, with that aside, let me turn briefly to the
47 litigation. diplomatic engagement narrative.

48

¹⁶ Written Observations of India, annex 20, at para. 2.

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

12
13 Given the lack of movement in India, and the proposal that the marines should
14 petition again to the Indian Supreme Court, the marines did just that in March 2014
15 by a writ petition under article 32 of the Indian Constitution. By this petition, the
16 marines challenged India's jurisdiction, and the jurisdiction of the Indian courts, and
17 asserted their immunity. This article 32 writ petition is of considerable importance as
18 the Indian Supreme Court is due to hear a deferment application in respect of this
19 petition on 26 August, in just over two weeks' time. This deferment application was
20 brought by the marines expressly with reference to the commencement of the Annex
21 VII arbitration proceedings. I will say more about this in a moment.

22
23 Mr President, Members of the Tribunal, following the assumption to office in early
24 2014 of Prime Minister Renzi's Government in Rome and Prime Minister Modi's
25 Government in Delhi, renewed efforts were made at the highest level to resolve the
26 dispute in a negotiated manner that would be sensitive to the interests of all those
27 engaged. In mid-2014, the Italian Government sought to engage the Indian
28 Government about negotiations on a possible diplomatic solution, on the basis of
29 detailed proposals that Italy had developed and that it stated expressly in
30 correspondence to India would be sensitive to the Indian Supreme Court's
31 engagement on the matter. Italy was carefully minded of the involvement of the
32 Indian Supreme Court on the matter, even though it disputed India's jurisdiction, and
33 Italy sought to formulate proposals for a settlement that would have been taken to
34 the Indian Supreme Court by both Governments as a reflection of their agreement
35 not just on issues of law but also with regard to the interests of all those engaged by
36 the incident. Italy has throughout sought to assert and vindicate its rights under
37 international law in a manner that was respectful of India.

38
39 This Italian initiative to engage the Indian Government on a possible settlement took
40 place both on a visible track, in correspondence to the Indian Ministry of External
41 Affairs, and, separately, behind the scenes, between the most senior representatives
42 of Prime Minister Renzi and Prime Minister Modi.

43
44 It was only in late May of this year that it became clear beyond doubt that a
45 negotiated settlement would not be possible. At this point, the Indian Government
46 indicated to Italy that it had no latitude to pursue a negotiated settlement given the
47 engagement of the Indian Supreme Court. This impasse is a matter of regret as Italy
48 was and remains convinced that a negotiated settlement was possible.

49

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

5
6 Mr President, Members of the Tribunal, the humanitarian considerations will be
7 addressed in the oral submissions of my colleagues Mr Busco and Professor
8 Verdirame. I will say no more of these aspects other than to emphasize that they are
9 not static considerations. Any delay in having regard to them risks potentially
10 irreversible harm.

11
12 I turn then, almost finally, to the pressing legal considerations that have brought us
13 here today.

14
15 While there was still a possibility of a political settlement, it was in the interests of
16 both the Italian and the Indian Governments to afford space to their discussions. The
17 delays in the Indian court proceedings provided some negotiating space.

18
19 There is no longer any prospect of a negotiated settlement. Quite apart from the
20 critical humanitarian considerations that have compelled us here today, the failure of
21 the political track has brought the dispute to a turning point. India's assertion of
22 jurisdiction over the *Enrica Lexie* incident and over the Italian marines now threatens
23 to crystallize into a more egregious and manifest violation of Italy's rights. There is
24 now, but for the international proceedings that Italy has commenced, the prospect of
25 imminent Indian criminal proceedings against Italian State officials in respect of a
26 maritime incident over which Italy has exclusive jurisdiction. The threat of irreversible
27 prejudice to Italy's rights has thus now crystallized sharply.

28
29 In the notification commencing Annex VII proceedings, Italy requested provisional
30 measures from India. Following the notification, the marines brought two applications
31 before the Indian Supreme Court, on 4 July 2015, expressly rooted in the
32 commencement of the Annex VII proceedings. The first application was by Sergeant
33 Latorre for leave to extend his stay in Italy . which the Supreme Court had granted
34 following Sergeant Latorre's stroke on 31 August 2014. In that application, Sergeant
35 Latorre applied for leave to remain in Italy during the pendency of the Annex VII
36 proceedings. The urgent reason dictating the application was that Sergeant Latorre's
37 leave to remain in Italy was set to expire 11 days later, and Italy wanted to avoid
38 unnecessary mental anguish to Sergeant Latorre, whose health remains a source of
39 real concern, and an unnecessary escalation of the dispute with India over the issue
40 of Sergeant Latorre's wellbeing.

41
42 In the second application, Sergeants Latorre and Girone applied for a deferment of
43 the article 32 writ petition, on which I addressed you earlier, this being the petition
44 that the marines brought in March 2014 to challenge India's jurisdiction. This
45 deferment application was also put expressly in terms of the period of the pendency
46 of the Annex VII proceedings.

47
48 Mr President, Members of the Tribunal, the purpose of these applications before the
49 Indian Supreme Court was not simply to achieve the narrow ends requested in the
50 applications; it was also to afford the Indian Government an opportunity to register its

1 support for the request that the Indian domestic proceedings should be stayed
2 pending the adjudication by the Annex VII tribunal of the rights in dispute between
3 Italy and India. It was to afford India an opportunity to give effect to the provisional
4 measures requested by Italy in its notification. It was also to afford an opportunity for
5 India and the Indian Supreme Court to put in place appropriate arrangements that
6 would adjourn further issues about the marines being continued to be subject to
7 Indian jurisdiction until such time as the international law issues of jurisdiction and
8 immunity had been authoritatively determined.

9
10 I should add that the article 32 writ petition deferment application was intended as a
11 constructive device that would put on hold the Indian domestic proceedings to keep
12 open the possibility of a judicial dialogue between the Annex VII tribunal and the
13 Indian Supreme Court in due course.

14
15 Mr President, Members of the Tribunal, the Indian Government refused to support
16 the application by Sergeant Latorre in the terms requested for leave to remain in Italy
17 during the pendency of the Annex VII proceedings. It was prepared only to support a
18 six-month extension of his leave to remain in Italy on humanitarian grounds,
19 expressly rejecting any reference to the Annex VII proceedings. The consequence of
20 the court's order is that Sergeant Latorre remains under the jurisdiction and control
21 of the Indian Supreme Court. India makes much of the fact that he has been granted
22 leave to remain in Italy until mid-January 2016. What it fails to acknowledge,
23 however, is that, unless this Tribunal grants the provisional measures requested by
24 Italy, Sergeant Latorre will have to re-apply to the Indian Supreme Court in a few
25 months' time for leave to remain in Italy and to do so in circumstances in which the
26 Indian Government has already made clear that it would not support any application
27 for leave that was rooted in the pendency of the Annex VII arbitration proceedings.
28 India therefore remains intent on exercising its jurisdiction over Sergeant Latorre
29 even during the pendency of the international proceedings that will address India's
30 entitlement to exercise jurisdiction.

31
32 As regards the article 32 writ petition deferment application, the Indian Supreme
33 Court adjourned that hearing until 26 August to allow the Indian Government to
34 submit an affidavit presenting India's views. That affidavit is due to be submitted
35 today, by 1.00 p.m. Hamburg time. We look forward to seeing what the Indian
36 Government has to say. Whatever it says, the issue will fall to be determined by the
37 Indian Supreme Court on 26 August.

38
39 These provisional measures proceedings come on the cusp of potentially very
40 severe complications in the dispute between Italy and India. These proceedings
41 afford the Tribunal an opportunity to move this dispute onto a calmer and more
42 stable trajectory that would allow for a determination of the rights of the Parties and
43 would remove any risk of irreversible prejudice to either State's rights and interests.

44
45 Mr President, Members of the Court, there is one further issue that I must address.
46 At the point at which Sergeant Latorre applied to extend his leave to remain in Italy
47 and the marines applied for a deferment of the article 32 writ petition proceedings,
48 careful consideration was given to whether an application by Sergeant Girone should
49 also be made for leave to travel to Italy on the grounds of the commencement of the
50 Annex VII proceedings and for humanitarian reasons. The decision was taken not to

1 make such an application. The reason for this was that such an application had
2 previously been made in December 2014. It was, however, at the time, forcefully
3 opposed by the Government of India in the proceedings before the Supreme Court,
4 and the Chief Justice of India expressed himself to be opposed to the application.
5 Italy had every reason to believe that the position of the Indian Government and of
6 the Indian Supreme Court had not changed.

7
8 This is another issue on which the Indian Written Statement is economical with the
9 reality. The application by Sergeant Girone in December 2014 was withdrawn,
10 before the judgment of the Court was issued, when it became clear in the hearing
11 that the Indian Government, through its representatives in court, opposed it heavily
12 and that, in the face of such opposition, the court would reject it. This episode set us
13 on the path on which we now find ourselves; and, I add, in the face of the false
14 umbrage that India expresses in its Written Statement about Italy's use of the word
15 "hostage" to describe Sergeant Girone, this is the language that Indian officials have
16 used to Italy. We have it on record and we would be content in due course to cross-
17 examine Indian officials on the subject.

18
19 Mr President, Members of the Tribunal, Italy commenced Annex VII proceedings as
20 soon as it became evident that there was no prospect of a political settlement. Italy
21 left no stone unturned in its attempt to engage the Indian Government on a
22 settlement proposal that would have been sensitive to the interests of all those
23 engaged. These efforts were to no avail.

24
25 This impasse in the political dialogue has crystallized the dispute over India's
26 exercise of jurisdiction in a manner that now threatens to aggravate the situation. It
27 has also coincided with increasingly acute humanitarian considerations in respect of
28 the two marines. These are the reasons why we are now before you requesting
29 provisional measures.

30
31 Mr President, that concludes this first part of my submissions this morning. May I
32 invite you to call upon Professor Tanzi.

33
34 **THE PRESIDENT:** Thank you, Sir Daniel. I now call upon Professor Tanzi.

35
36 **MR TANZI:** Mr President, Members of the Tribunal, it is a great privilege for me to be
37 appearing for the first time before you and, especially, to do so on behalf of my
38 country.

39
40 Mr President, in order for this Tribunal to entertain its jurisdiction over the present
41 Request for provisional measures, firstly, there must be a title of jurisdiction
42 permitting the Italian application; secondly, the Tribunal is to be satisfied *prima facie*
43 that the Annex VII tribunal vested with the merits of the case has jurisdiction over the
44 claims submitted to it. Contrary to the allegations advanced by the Indian
45 Government in their Written Observations, Mr President, those requirements have
46 been plainly satisfied by Italy.

47
48 As to the title for jurisdiction of the present proceedings, suffice to recall that both
49 disputing Parties have consented to the Annex VII jurisdiction of the tribunal currently
50 under constitution. Italy and India are both Parties to UNCLOS and mutually bound

1 by it since 29 July 1995. However, India, differently from Italy, has made no
2 declaration accepting any of the means of dispute settlement listed in article 287,
3 paragraph 1. Consequently, lacking agreement between the Parties on such other
4 means of dispute settlement, they have consented under article 287, paragraph 5, to
5 submit to an Annex VII arbitration procedure any dispute concerning the
6 interpretation or application of the Convention. Furthermore, in conformity with article
7 290, paragraphs 1 and 5, Italy duly submitted the present dispute to Annex VII
8 arbitration on 26 June this year. The constitution of the Annex VII tribunal is currently
9 pending.

10
11 Mr President, turning now to the second requirement, according to article 290,
12 paragraphs 1 and 5, this Tribunal needs to consider . *prima facie* . whether the
13 Annex VII tribunal under constitution has jurisdiction over the merits of the case.

14
15 As it has been authoritatively stressed, the assessment of *prima facie* jurisdiction is
16 a question

17
18 not whether there is conclusive proof of jurisdiction, but rather whether
19 jurisdiction is not so obviously excluded.¹⁷

20
21 Mr President, Members of the Tribunal, Italy considers that the law and the facts of
22 the present case manifestly show that the Annex VII tribunal under constitution will
23 have more than simply *prima facie* jurisdiction over the merits of this dispute.

24
25 This Tribunal, in *Arctic Sunrise* . drawing on its six precedents most consistent on
26 the point in issue¹⁸ . concluded in the sense of the existence of *prima facie*
27 jurisdiction (paragraph 71) after stressing that:

28
29 the Tribunal is not called upon to establish *definitively* the existence of the
30 rights claimed by the Netherlands (paragraph 69, emphasis added).

31
32 It also felt the need to determine that:

33
34 the provisions of the Convention invoked by the Netherlands appear to
35 afford a basis on which the jurisdiction of the arbitral tribunal might be
36 founded (paragraph 70).

37
38 Such statements, Mr President, confirm the consistent case law of this Tribunal to
39 the effect that it is to be content that the submissions on the merits of the case by the
40 requesting party fall within the scope of the jurisdiction of the Tribunal which is to

¹⁷ 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.

¹⁸ *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.

1 pass judgment on them. Sir Michael Wood will illustrate after me the rights invoked
2 by Italy in its Notification and Request. However, permit me to anticipate that each
3 and all of such rights fall squarely within the scope of the law applicable to the merits
4 of the present case. Indeed, all the Italian submissions are deeply rooted in
5 UNCLOS, namely in Parts II (Territorial Sea and Contiguous Zone), V (Exclusive
6 Economic Zone) and VII (High Seas), notably with reference to articles 2(3), 27, 33,
7 56, 58, 87, 89, 92, 94, 97, 100 and 300 of the Convention.¹⁹

8
9 Mr President, the unilateral assertion of one's own claims would certainly not be
10 sufficient, as such, to fulfil the basic jurisdictional requirement of the existence of
11 a dispute between the Parties. In *Georgia v. Russian Federation*, building on
12 established international case law, its own, amongst others, precedents, the
13 International Court of Justice stressed that the existence of a dispute

14
15 is a matter for objective determination by the Court,²⁰

16
17 In doing so it recalled the famous *dictum* in *Mavrommatis* whereby

18
19 [a] dispute is a disagreement on a point of law or fact.²¹

20
21 The general jurisdictional requirement of the existence of a dispute is enshrined in
22 UNCLOS, in article 288 and it underpins the whole of Part XV of the Convention
23 (Settlement of Disputes).

24
25 As to the means for assessing the existence of a dispute, it is noteworthy that the
26 ICJ, in the same *Georgia v. Russian Federation* case, also felt the need to stress
27 that

28
29 the existence of a dispute may be inferred from the failure of a State to
30 respond to a claim in circumstances where a response is called for.²²

31
32 The Court went on to state:

33
34 [w]hile the existence of a dispute and the undertaking of negotiations are
35 distinct as a matter of principle, the negotiations may help demonstrate the
36 existence of the dispute and delineate its subject-matter.²³

37
38 Indeed, Mr President, the Italian protests and claims and requests for consultations
39 over the *Enrica Lexie* incident, repeatedly addressed to India ever since its
40 occurrence, represent a reaction to India's persistent assertion of jurisdiction over

¹⁹ See Notification, para. 29.

²⁰ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, ICJ Reports 2011*, p. 70, at p. 84, para. 30.

²¹ *The Mavrommatis Palestine Concessions, Judgment, 1924, PCIJ, Series A, No. 2*, p. 6, at p. 11.

²² *Application of the International Convention on the Elimination of All Forms of Racial Discrimination Georgia v. Russian Federation), Preliminary Objections, Judgment, ICJ Reports 2011*, p. 70, at p. 84, para. 30.

²³ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, ICJ Reports 2011*, p. 70, at p. 84, para. 30.

1 the incident and over the two Italian marines which is clearly one of firm and
2 repeated objection to its legality.

3
4 The combination of such juxtaposed conducts and attitudes unquestionably reveals
5 a disagreement between Italy and India which amounts to a dispute over the
6 interpretation and application of the Convention and the international rules invoked
7 by Italy in the present proceedings. The assertion advanced by the Indian
8 Government in their Written Observations that

9
10 the subject-matter of the dispute does not fall within the ambit of the
11 Convention²⁴

12
13 only corroborates the evidence of the existence of such a dispute.

14
15 As evidenced in the Notes Verbales annexed to its Notification and Request,²⁵ and
16 as has been further illustrated this morning by Sir Daniel, Italy has not limited itself to
17 lodging complaints, but has conducted itself constructively with a view to reaching an
18 amiable solution to the controversy. It is clear, Mr President, that through such
19 conduct Italy has fulfilled the requirement whereby, before resorting to an
20 international adjudicative body, the applicant is to prove that it has pursued in a
21 meaningful manner a negotiated settlement of the dispute to no avail. Such a
22 general rule is specified in article 283 UNCLOS on the Obligation to exchange views.

23
24 The assessment that good-faith attempts at amiable settlement are definitely to no
25 avail requires caution on the part of the claimant. However, as stated by the
26 International Court of Justice in the *North Sea Continental Shelf* case, building on
27 established case law, the jurisdictional requirement in point is deemed to have been
28 fulfilled

29
30 when either of [the Parties] insists upon its own position without
31 contemplating any modification of it.²⁶

32
33 This, Mr President, is precisely the situation which has emerged from the facts
34 eloquently described this morning by Sir Daniel. Those are the facts which,
35 cumulatively taken, have made Italy draw, in May this year, the conclusion that
36 a negotiated settlement could no longer be achieved. Such circumstances are
37 precisely of the kind envisaged by this Tribunal when stating in *MOX Plant* that

38
39 a State Party is not obliged to continue with an exchange of views when it
40 concludes that the possibilities of reaching agreement have been
41 exhausted.²⁷

42

²⁴ Written Observations of India, para. 3.5.

²⁵ 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.

²⁶ *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands)*, Judgment, ICJ Reports 1969, p. 3, at p. 47, para. 85.

²⁷ *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 95, at p. 107, para. 60.

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

3
4 **MR PRESIDENT:** Thank you, Mr Tanzi. I now give the floor to Sir Michael Wood.

5
6 **MR WOOD:** Mr President, Members of the Tribunal, it is an honour to appear
7 before you, and to do so on behalf of the Italian Republic.

8
9 I shall first recall, briefly, the requirements for provisional measures, as set out in
10 UNCLOS and in your case law. Then I shall describe the rights claimed by Italy in this
11 case and the link between those rights and the provisional measures sought.²⁸
12 Thereafter, Professor Verdirame will deal with the urgency requirement, after you
13 have heard from Avvocato Busco.

14
15 The requirements for the prescription of provisional measures under article 290,
16 paragraph 5, of UNCLOS are well-established. It can be seen from India's Written
17 Observations that, despite the rhetoric, there is a fair measure of agreement between
18 the Parties on what these requirements are. In particular, we agree that the purpose
19 of provisional measures is

20 to preserve the respective rights of the parties to the dispute *in*, pending
21 the final decision.²⁹

22
23 In this connection, a court or tribunal prescribing provisional measures will wish to be
24 careful not to impose what the Special Chamber in the *Ghana/Côte d'Ivoire* case
25 referred to as an *undue burden*. an *undue* burden, since in the nature of
26 provisional measures there will inevitably be some burden on the State against
27 which they are prescribed. As Professor Verdirame will show later this morning, that
28 would most certainly not be the case with the measures sought by Italy. What we
29 propose would indeed preserve the respective rights of both Parties, pending the
30 award of the arbitral tribunal, and that is notwithstanding India's wholly unconvincing
31 attempt to suggest that they would prejudice the final award.

32
33 In reviewing the requirements for provisional measures, I shall focus on the
34 differences between the Parties as they emerge from India's Written Observations.

35
36 The first requirement is straightforward. It is that two weeks must have elapsed
37 between the date of the request for provisional measures and the reference to this
38 Tribunal. That requirement has plainly been met. The request was made in Italy's
39 Notification and Statement of Claim which was transmitted to India on 26 June.

40
41 The second requirement is that the Law of the Sea Tribunal may only prescribe
42 provisional measures under article 290, paragraph 5, if it considers that *prima facie*
43 the arbitral tribunal to be constituted would have jurisdiction. Professor Tanzi has
44 shown that this is the case.

45
46

²⁸ *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Provisional
Measures, Order of 25 April 2015, para. 63.

²⁹ UNCLOS, article 290(1).

1 I would, however, like to make three points in light of India's Written Observations.
2 First, the *prima facie* test embodies a rather low-threshold, to borrow Judge Paik's
3 expression in the *M/V "Louisa"* case.³⁰

4
5 Second, what has to be determined is that there is *prima facie* jurisdiction over the
6 case, that is over at least some of the matters raised in the Statement of Claim; it is
7 not necessary for the Tribunal to reach this conclusion over each and every one of
8 the claims made.³¹ India focuses on one or two of Italy's arguments, and
9 conveniently overlooks the wide range of matters covered by the Statement of Claim.

10
11 Third, India's argument seems to confuse the *prima facie* jurisdiction requirement
12 with the separate requirement that the rights claimed be at least plausible. When
13 considering *prima facie* jurisdiction, India asserts that

14
15 the subject-matter of the dispute does not fall within the ambit of the
16 Convention.³²

17
18 India seems to be arguing that there is no dispute between the Parties

19
20 concerning the interpretation or application of [the] Convention.³³

21
22 In this context, it focuses on Italy's claims under article 97 and in respect of the
23 immunity of its State officials.³⁴ This argument, with respect, is misconceived. As
24 Professor Tanzi has just pointed out, it is clear from India's Written Observations that
25 there is a dispute concerning the interpretation and application of the provisions of
26 the Convention; it sets out its position on the interpretation and application of
27 article 97,³⁵ which is in opposition to that of Italy. It even invokes its declaration under
28 article 310 of the Convention. These are clearly matters for the merits. The same is
29 true in respect of all the other provisions of UNCLOS cited by Italy in its Statement of
30 Claim.

31
32 Mr President, at its heart the dispute before the arbitral tribunal is about the
33 jurisdictional provisions of UNCLOS, about whether . under the Convention . it is
34 Italy or India that has the right to institute proceedings arising out of the incident of
35 15 February 2012; it is about freedom of navigation; and it is about whether, by
36 asserting jurisdiction over the two Italian State officials, the marines, in respect of
37 acts performed in an official capacity, India is violating the immunity from foreign
38 criminal jurisdiction which they enjoy under international law. It is not appropriate at
39 this provisional measures stage to enter into these questions of interpretation and
40 application of UNCLOS, which clearly belong to the merits, tempting though it is to do
41 so, in light of India's unfounded positions.
42

³⁰ *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.

³¹ 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.

³² Written Observations of India, para. 3.5.

³³ UNCLOS, article 288(1).

³⁴ Written Observations of India, paras. 1.8, 1.11, 3.5.

³⁵ Written Observations of India, paras. 1.8, 3.5.

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

7
8 Fourth, there must be a link between the rights claimed and the provisional measures
9 sought. Article 290, paragraph 5, has to be read together with article 290,
10 paragraph 1,³⁶ and the measures must be considered

11 appropriate under the circumstances to preserve the respective rights of
12 the parties to the dispute.³⁷

13
14 I shall return to this requirement.

15
16 And fifth, the urgency of the situation must be such that provisional measures ought
17 to be prescribed by this Tribunal before the arbitral tribunal is constituted and is itself
18 in a position to act on a provisional measures request.³⁸ As the Tribunal made clear
19 in *Land Reclamation*, the key date is when the arbitral tribunal is itself in a position to
20 act. As of today, we do not know when the Annex VII tribunal will be constituted, or
21 when it will be in a position to act, but that will inevitably be some time after it is
22 formed; it will have to convene, and put in place rules of procedure and other
23 administrative arrangements, such as a registry; and of course it would need to
24 conduct the necessary written and oral proceedings before it could make an order, so
25 we are looking at months, not weeks. That is precisely why the framers of the
26 Convention had the foresight to provide for the procedure before the Hamburg
27 Tribunal. That is why your Tribunal has been ready to prescribe provisional measures
28 even when the constitution of the Annex VII tribunal was expected to be much sooner
29 than it is in the present case.

30
31 I turn now to another point about urgency. It is rather misleading to say, as India does
32 in its Written Observations, that

33 the [Law of the Sea] Tribunal is not called upon to prescribe provisional
34 measures that will remain in place until the substance of the dispute is
35 finally decided by the Annex VII arbitral tribunal; only until the Annex VII
36 Tribunal is in a position to address the matter if requested to do so.³⁹

37
38 Mr President, that is not what article 290 says, nor does India's assertion reflect the
39 practice of this Tribunal. When the Law of the Sea Tribunal acts under paragraph 5 of
40 article 290, the measures it prescribes may in principle last through to the arbitral
41 tribunal's final award on the merits.
42
43
44

³⁶ *"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.

³⁷ UNCLOS, article 290(1).

³⁸ 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.

³⁹ Written Observations of India, para. 3.17.

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

6
7 I now turn to look in a little more detail at the issue of plausibility of the rights claimed,
8 and the test adopted in your case-law, most recently in the Order of the Special
9 Chamber in *Ghana/Côte d'Ivoire*:

10
11 a court called upon to rule on a request for provisional measures does not
12 need, at this stage of the proceedings, to settle the parties' claims in
13 respect of the rights and obligations in dispute and is not called upon to
14 determine definitively whether the rights which they each wish to see
15 protected exist.⁴⁰

16
17 The Chamber continued:

18
19 the Special Chamber need not therefore concern itself with the competing
20 claims of the Parties, and that it need only satisfy itself that the rights which
21 Côte d'Ivoire claims on the merits and seeks to protect are at least
22 plausible.⁴¹

23
24 The rights claimed by Italy are set out in our Notification and Statement of Claim at
25 paragraph 29, which is also at tab 20 in the folders.

26
27 Before turning to paragraph 29, I first want to make the point that the rights claimed
28 by Italy are rights of Italy, rights which have been directly infringed by India. At issue
29 in this case are Italy's right to freedom of navigation, Italy's right to jurisdiction over
30 the incident, Italy's right that its State officials, its military personnel, be treated in
31 accordance with international law. This is not a case of diplomatic protection, as
32 India would seemingly have you believe.

33
34 Paragraph 29 at tab 20 begins by indicating the provisions of UNCLOS that, in our
35 submission, India has and is violating, and Professor Tanzi has already recalled
36 these. It is Part II, Part V and Part VII (on the high seas). We have referred to a
37 whole series of articles which Professor Tanzi read out.

38
39 Paragraph 29 sets out at subparagraphs (a) to (h), in a non-exhaustive fashion, the
40 ways in which India has breached these provisions. This is reflected in the relief
41 sought, which is set out at paragraphs 33 and 34 of the Notification. I note in passing
42 that these violations of UNCLOS are not minor or technical. They go to the heart of
43 the modern international law of the sea. They concern core principles such as
44 freedom of navigation and the exclusive jurisdiction of the flag State.

45

⁴⁰ *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Provisional Measures, Order of 25 April 2015, para. 57.

⁴¹ *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Provisional Measures, Order of 25 April 2015, para. 58.

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

3
4 The breach of an international obligation by an act of a State having a
5 continuing character extends over the entire period during which the act
6 continues and remains not in conformity with the international obligation.⁴²

7
8 It will be recalled that one of the examples of a continuing wrongful act, given by the
9 International Law Commission in its commentary to this provision, is ~~un~~unlawful
10 detention of a foreign official.⁴³

11
12 Some of the violations described in our Statement of Claim are indeed completed,
13 even though their effects may continue.⁴⁴ These include interfering with freedom of
14 navigation by forcing the *Enrica Lexie* to enter Indian territorial waters, ordering her
15 to proceed to Kochi port, and arresting and detaining the vessel and crew.⁴⁵

16
17 The continuing breaches include the ongoing measures taken against the two
18 marines, in violation of various provisions of UNCLOS, including articles 27, 56(2),
19 92 and 97. You will find these at subparagraphs (a) and (e).⁴⁶ They also include the
20 failure to cooperate in the repression of piracy, as required by article 100. That is at
21 subparagraph (f).⁴⁷ In addition, by flagrantly ignoring the immunity to which Italy is
22 entitled in respect of its State officials, its military personnel, India has violated and
23 continues to violate articles 2(3), 56(2) and 58(2) of UNCLOS and customary
24 international law. That you will find at subparagraph (g).⁴⁸

25
26 It is, of course, particularly in relation to these continuing breaches that we seek
27 provisional measures.

28
29 There is ample material in our Notification, which will of course be developed in the
30 Memorial, to show that the rights claimed by Italy are plausible. Indeed, they are far
31 more than plausible. We have summarized this material in paragraph 35 of the
32 Request for provisional measures. At this stage, I need only recall some basic facts.
33 The incident took place approximately 20.5 nautical miles from India's baselines, well
34 beyond India's territorial sea. The two marines were on board an Italian-flagged
35 vessel and were acting in exercise of their official duties as laid down by Italian law.
36 Italy exercised its jurisdiction over the case without hesitation or delay, and so
37 informed the Indian authorities before the marines were arrested by India.
38 Notwithstanding this, India, after intercepting the *Enrica Lexie* in international waters
39 and bringing her into India's waters and port, has exercised, and continues to
40 exercise, jurisdiction over the incident and over the marines, in flagrant violation of
41 numerous provisions of UNCLOS. Based on these facts, the rights asserted by Italy
42 are not merely plausible; they are, in our submission, manifest.

42 *Yearbook of the International Law Commission*, 2001, Vol II(2), p. 59.

43 Commentary (3) to article 14, *Yearbook of the International Law Commission*, 2001, Vol II(2), p. 60.

44 Commentary (5) to article 14, *Yearbook of the International Law Commission*, 2001, Vol II(2), p. 60.

45 Notification, para. 29(a), (b), (c) and (d).

46 Notification, paras. 29(a) and (e); 33(a), (c) and (d); and 34.

47 Notification, para. 29(f); 33(b); 34.

48 Notification, para. 29(g); 33(d); 34.

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

4
5 The measures sought in our Request are set out at paragraph 57. They were read
6 out this morning by the Registrar and by the Agent of Italy and I do not need to
7 repeat them now.

8
9 The link between the measures sought and the rights claimed by Italy is obvious
10 from a comparison of what is in the Request and the relief sought in the Notification.

11
12 The request that India refrain from taking or enforcing measures against the marines
13 is directly linked to the claims in the Notification that India must cease to exercise
14 jurisdiction over the marines,⁴⁹ and that India's exercise of jurisdiction is in violation
15 of their immunity.⁵⁰ I do not think I need repeat that the prejudice caused to the
16 marines, officials of the Italian State, is a direct infringement of the rights of Italy. It is
17 likewise directly linked to our claims that Italy has exclusive jurisdiction over the
18 marines,⁵¹ and that India must cease to exercise any measure of jurisdiction over the
19 marines, including any measure of restraint.⁵² It is likewise directly linked to our claim
20 that India is violating its obligation to cooperate in the repression of piracy.⁵³

21
22 Mr President, Members of the Tribunal, before concluding, I ought to address briefly
23 India's reference in its Written Observations to article 295 of UNCLOS, on
24 exhaustion of local remedies.⁵⁴ I make three quick points. First, the invocation of the
25 exhaustion of local remedies rule is not a matter for a provisional measures hearing.
26 It would require a detailed examination of the facts relating to the merits, and would
27 be an issue for the merits, as is clear from your decision in *M/V Louisa*.⁵⁵ For
28 example, if the rule were found to apply, which we would strongly dispute, we would
29 say that local remedies have been exhausted. There is no requirement to exhaust
30 remedies that have no prospect of success, remedies that would not be effective.
31 But for you to reach that conclusion would require close examination of the legal
32 proceedings that have taken place in India and of such avenues as might
33 theoretically still be available. That is clearly not appropriate or possible at the
34 provisional measures stage.

35
36 Second, and in any event, the local remedies rule does not apply here. Article 295
37 provides that local remedies are to be exhausted where this is required by
38 international law; that is, in the context of diplomatic protection. But, as I have
39 already said, in the present case Italy is asserting direct injury to its own rights.

40
41 Third, and closely related, the local remedies rule would only be relevant where a
42 State espouses the claim of a private citizen. It does not apply where the individual

⁴⁹ Notification, para. 33(a).

⁵⁰ Notification, para. 33(b).

⁵¹ Notification, para. 33(c).

⁵² Notification, para. 33(d).

⁵³ Notification, para. 33(e).

⁵⁴ Written Observations of India, para. 3.5.

⁵⁵ *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.

1 injured was a State official engaged in official business.

2
3 Mr President, that concludes what I have to say this morning. I would request that,
4 after the break, you invite Mr Paolo Busco to the podium. As previously agreed, we
5 hope that part of the hearing will be in camera.

6
7 I thank you, Mr President.

8
9 **THE PRESIDENT:** Thank you, Sir Michael.

10
11 We have now reached the time when the Tribunal will withdraw for a break of 30
12 minutes.

13
14 Before withdrawing, however, I wish to inform the public that, in accordance with
15 article 26 of the Tribunal's Statute and article 74 of its Rules, Italy has requested that
16 part of the hearing be held in camera in order to present arguments dealing with
17 some confidential information.

18
19 Thus, further to the agreement reached between the Parties, an in camera sitting will
20 be held. This will take place directly after the break. Only the Tribunal, the Parties's
21 representatives and teams and the Registry staff will be able to attend this part of the
22 sitting. The general public is requested to remain outside of the courtroom until the
23 public sitting resumes. This part of the sitting will not be broadcast on the internet.

24
25 The estimated duration of the sitting in camera will be 30 minutes. After that the
26 hearing will continue in public and the public will be invited to return to the courtroom.

27
28 It is now 11.05. The hearing will resume in camera at 11.35. The public will be
29 admitted again to the hearing after 30 minutes of the hearing in camera.

30
31 *(Short adjournment)*

32
33 **IN CAMERA PROCEEDINGS**

34
35 **Part of the hearing not public in accordance with article 26 of the Statute**
36 **and article 74 of the Rules of the Tribunal,**
37 **pursuant to an agreement between the Parties**

38
39 *(Members of the public were re-admitted)*

40
41 **THE PRESIDENT:** We now resume the public part of today's sitting. I give the floor
42 to Mr Guglielmo Verdirame, to continue the oral arguments of Italy.

43
44 **MR VERDIRAME:** Mr President, Members of the Tribunal, Sir Michael Wood
45 addressed you earlier on the plausibility of Italy's rights and on the appropriateness
46 of Italy's requested measures in the light of those rights. I shall now elaborate on
47 appropriateness by focusing on the consequences if the measures are not granted,
48 in particular on the prejudice that Italy's rights would suffer, and on the question
49 whether the requested measures would place an undue burden on India. I shall

1 show throughout that the prescription of the measures requested by Italy is justified
2 by reasons of urgency.⁵⁶

3
4 In the Notification, Italy requested India to refrain from exercising any jurisdiction
5 over the *Enrica Lexie* incident while the dispute under UNCLOS is pending. I shall
6 refer to this request as Italy's First Request. In the Notification, Italy also requested
7 India to take all measures necessary to ensure that restrictions on the liberty,
8 security and movement of the marines are immediately lifted.⁵⁷ I shall refer to this
9 request as Italy's Second Request. I shall examine each request by reference to
10 both consequences and urgency.

11
12 As regards Italy's First Request, Mr President, it is important to keep the nature of
13 the dispute at the front of our considerations. This is at heart a dispute between two
14 States on the interpretation and application of rules governing the exercise of
15 jurisdiction under the UN Convention on the Law of the Sea.

16
17 Whether India can exercise jurisdiction over the *Enrica Lexie* incident under
18 UNCLOS is in dispute; whether India can detain the marines or subject them to bail
19 conditions in connection to the *Enrica Lexie* incident is in dispute; whether India is
20 within its rights in deciding if and when Sergeant Latorre should return to India and if
21 and when Sergeant Girone should be released and returned to Italy is in dispute;
22 and, of course, whether India can put the marines on trial is disputed between the
23 Parties.

24
25 It is for the Annex VII tribunal to determine if India can lawfully exercise *any* of these
26 rights. The rights of the Parties can only be established once the Tribunal delivers its
27 award. Pending that determination, any exercise of jurisdiction by India will prejudice
28 the very rights which Italy is seeking to vindicate through the Annex VII proceedings.

29
30 As the International Court of Justice observed, in the context of provisional measures
31 the key concern is

32
33 to preserve by such measures the rights which may subsequently be
34 adjudged by the Court to belong either to the Applicant or to the
35 Respondent.⁵⁸

36
37 Italy's key concern is precisely that: to preserve the rights which the Annex VII
38 tribunal has not yet adjudged. Italy cannot preserve those rights if India continues to
39 exercise jurisdiction.

40
41 It is also important to recall here that the rights of jurisdiction which Italy is seeking to
42 preserve are not abstractions. As Sir Daniel has shown, and contrary to India's
43 assertions in the Written Observations, Italy attempted to exercise jurisdiction
44 promptly after the incident.

56 Request, para. 37.

57 Request, para. 5; Notification, paras. 31-32.

58 *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.*

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

4
5 If a trial does take place, the effective implementation of an award by the Annex VII
6 tribunal in favour of Italy would suffer fatal prejudice. Italy's attempt to exercise its
7 jurisdiction at that point . by resuming the investigation that it launched promptly
8 after the incident or by prosecuting and trying the marines . would be met with
9 formidable and almost certainly insurmountable difficulties.

10
11 For all intents and purposes, therefore, the criminal trial, which India now insists
12 should commence as soon as possible, would be a *fait accompli*, depriving the
13 Annex VII tribunal of any effect if it decides in Italy's favour. The trial of the marines
14 and any steps towards it thus clearly constitute actions which, in terms of *Arctic*
15 *Sunrise*, are capable of prejudicing

16
17 the carrying out of any decision on the merits which the arbitral tribunal
18 may render.⁵⁹

19
20 India seeks to argue that it would stand to suffer greater prejudice than Italy if the
21 Request were granted, and describes Italy's request as a request for prejudgment.

22
23 On the question of the balancing of competing risks on each side, the Special
24 Chamber in the recent Order on Provisional Measures in *Ghana/Côte d'Ivoire*
25 proceeded on the basis that the provisional measures should not place an undue
26 burden+on the country against which they are ordered. In the present case, India
27 cannot plausibly claim that it would be placed under any such undue burden+.

28
29 If India perseveres in the exercise of jurisdiction, even proceeding to a criminal trial
30 while the dispute is still pending, all risk of irreparable prejudice would be on Italy's
31 side. India contends that its rights will not be preserved unless it can continue to
32 exercise jurisdiction.⁶⁰ However, preservation of rights cannot be interpreted to mean
33 that one State will continue to exercise jurisdiction when the issue in dispute is
34 precisely who has jurisdiction. In the particular facts of this case, India cannot claim
35 that it will suffer prejudice or be placed under any undue burden if it is not allowed to
36 proceed to a trial, the outcome of which India has made a point of announcing in its
37 Written Observations. Mr President, Members of the Tribunal, the essence of this
38 Request is to suspend any action in relation to the exercise of jurisdiction. We
39 accordingly invite you to make an order in the terms we specified in the Request,⁶¹
40 but, if you are so minded to do, in terms addressed to both sides.

41
42 Mr President, Members of the Tribunal, I would now like to turn to the reasons that
43 make the First Request urgent.

44
45 Italy's case in respect of the First Measure meets the requirement of urgency, judged
46 by reference to each of the critical time frames discussed earlier by Sir Michael: the

⁵⁹ "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.

⁶⁰ Written Observations of India, paras. 3.54, 3.57, 3.82.

⁶¹ Request, para. 5

1 time when the Annex VII tribunal is in a position to act and the pendency of the
2 proceedings.

3
4 In circumstances where irreparable harm is being suffered by Italy through each and
5 every exercise of jurisdiction, urgency is demonstrated by the fact that the exercise
6 of jurisdiction is ongoing. Here we know for a fact that that is so. As Sir Daniel
7 Bethlehem has drawn to your attention, a hearing is scheduled to take place before
8 the Indian Supreme Court on August 26 to address the article 32 Writ Petition
9 deferment application that is rooted in the commencement of the Annex VII
10 proceedings. The Additional Solicitor General for India is required to submit the
11 Indian Government's views on that application today. And, of course, both marines
12 are still under the bail conditions of the Indian Supreme Court. These exercises of
13 jurisdiction are certain and ongoing.

14
15 We also know that, based on India's Written Observations, India is determined to
16 pursue the exercise of jurisdiction throughout the next few weeks and months and
17 throughout the pendency of the Annex VII proceedings. While no timetable has been
18 set for the criminal trial, India has left no doubt that it wants to proceed to the trial
19 and would have already done so were it not for what it calls the abuse of process by
20 Italy and the marines in the Indian domestic proceedings. India blames Italy for the
21 delay, on the one hand, but relies on delay on the other to reassure the Tribunal that
22 there is no urgency.

23
24 Mr President, Members of the Tribunal, the jurisdictional dispute between Italy and
25 India is for the Annex VII tribunal to determine. In advance of that, India insists on
26 carrying on with an exercise of jurisdiction that is tainted with violations of due
27 process and with the prejudgment of the guilt of the marines running through India's
28 Written Observations.⁶² In these circumstances, the requirement of urgency is amply
29 satisfied by reference both to the period before the Annex VII tribunal will be in
30 a position to act and to the pendency of Annex VII proceedings.

31
32 Mr President, Members of the Tribunal, I will now come to Italy's Second Request,
33 which is that India should lift all measures restricting the liberty, security and
34 movement of the marines, and refrain from exercising any such jurisdiction, while the
35 dispute is pending.

36
37 It cannot be in contention that India is limiting the rights of liberty and movement of
38 both marines. The hearing before the Supreme Court of India on 13 July 2015
39 showed unequivocally that India regards the marines as on bail and subject to its
40 jurisdiction. Sergeant Girone is not allowed to leave Delhi and is subjected to a form
41 of detention that is more limiting in many ways than house arrest for he is
42 thousands of miles away from his home and family. Sergeant Latorre is in Italy at
43 present but, unless provisional measures are ordered by the Tribunal, he will remain
44 subject to Indian jurisdiction, to the requirement of having to constantly re-apply to
45 the Indian Supreme Court for extensions of his leave to remain in Italy, and to the
46 risk that the Indian Supreme Court, or indeed the Special Court that has been
47 established to conduct the criminal trial of the marines, would revise the current bail
48 conditions or revoke bail altogether.

⁶² Written Observations of India, paras. 1.6, 1.11, 1.14, 3.77.

1
2 The lifting of the bail measures is appropriate and necessary on three separate and
3 discrete grounds. I have already covered one of these in camera and I shall now
4 address the other two.

5
6 I can deal with the first one briefly. If the Tribunal agrees that India should not
7 exercise the very rights that form the object of this dispute, all restrictions placed on
8 the marines through the exercise of that jurisdiction should be set aside while
9 proceedings are pending. The Second Request therefore follows, as a necessary
10 consequence, from the first one.

11
12 The second ground on which Italy is requesting the lifting of all restrictions on the
13 liberty and movement of the marines is that these restrictions are contrary to
14 international standards of due process applicable under the law of the sea.

15
16 To develop this second ground, we must begin by recalling the *Camouco* and *Monte*
17 *Confurco* decisions. The issue in those cases was whether the Master of the vessel
18 was in a state that could be properly characterised as ~~detention~~, having been
19 placed under court supervision and having had his passport taken away from him.
20 The Tribunal held in those two cases that the circumstances did amount to detention
21 and ordered his release.⁶³ The conditions imposed on Sergeant Gironé are far
22 stricter than those in *Monte Confurco* and *Camouco*, and Sergeant Latorre is at risk
23 of being placed under similarly strict conditions unless the Tribunal orders that this
24 particular exercise of Indian jurisdiction be suspended.

25
26 As in *Camouco* and *Monte Confurco*, we are faced here with a special category of
27 unlawful detention, namely detention which the law of the sea specifically
28 characterises as unlawful, in this particular case by virtue of the fact that the
29 detention is not premised on a permissible exercise of jurisdiction and violates
30 immunity.

31
32 The restrictions on the liberty and movement of the marines further breach the law of
33 the sea because they violate international standards of due process which, as this
34 Tribunal has held on several occasions, must inform the operation of the law of the
35 sea.

36
37 Mr President, Members of the Tribunal, at tab 24 of the JudgesqFolder you will find
38 a passage from the *Juno Trader* case. The Tribunal held in that case:

39
40 The obligation of prompt release of vessels and crews includes elementary
41 considerations of humanity and due process of law.⁶⁴

42
43 There was no dissent from this passage. At least three of the judges writing separate
44 opinions endorsed it explicitly, also by reference to human rights.⁶⁵

⁶³ “*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.

⁶⁴ “*Juno Trader*” (*Saint Vincent and the Grenadines v. Guinea-Bissau*), *Prompt Release, Judgment, ITLOS Reports 2004*, p. 17, at pp. 38-39, para. 77.

1
2 Due process of law must be engaged even more critically in this case, where there is
3 a clear dispute under UNCLOS concerning the exercise of jurisdiction.

4
5 At tab 25 of your folder, you will find another reference to due process in the context
6 of prompt release proceedings. In *Tomimaru*, the Tribunal observed that domestic
7 proceedings

8
9 ~~was~~ *inconsistent with international standards of due process of law* could
10 breach article 292 of the Convention.⁶⁶

11
12 Due process is not mentioned expressly in article 292 of the Convention, but, in both
13 of these cases, the Tribunal found that it applied to the exercise of domestic
14 jurisdiction.

15
16 In *Louisa*, which is at tab 26 of your folder, even though the Tribunal found that it
17 lacked jurisdiction, it emphasised as follows:

18
19 The Tribunal holds the view that States are required to fulfil their obligations
20 under international law, in particular human rights law, and that
21 considerations of due process of law must be applied in all
22 circumstances.⁶⁷

23
24 The other important case in the Tribunal's jurisprudence is *Arctic Sunrise*. In the
25 provisional measures proceedings in that case, the Tribunal ordered the release of
26 individuals placed in detention, also in the light of due process considerations. I will
27 return to this case later, but before doing so I would like to reflect on the crucial
28 aspects of the present situation in terms of due process.

29
30 There are at least three dimensions in which international standards of due process
31 are critically engaged here.

32
33 First, there is the obligation to formulate charges promptly. Mr President, Members of
34 the Tribunal, this is a basic standard of due process and procedural fairness,
35 encapsulated in articles 9(2) and 14(3)(a) of the International Covenant on Civil and
36 Political Rights, to which both Italy and India are parties.

37
38 Two cases of the Human Rights Committee illustrate the importance and the
39 functioning of this standard. At tab 27 of your folder, you will find *Campbell v.*
40 *Jamaica*. The author of this individual communication had been detained before
41 being formally charged with murder for three months. The Human Rights Committee

⁶⁵ *"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.*

⁶⁶ *"Tomimaru" (Japan v. Russian Federation), Prompt Release, Judgment, ITLOS Reports 2005-2007, p. 74, at p. 96, paras. 76 and 79.*

⁶⁷ *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain), Judgment, ITLOS Reports 2013, p. 4, at p. 46, para. 155.*

1 concludes at the end of that passage that the delay does not meet the requirements
2 of article 9, paragraph 2.⁶⁸

3
4 Another relevant decision is *Grant v. Jamaica*, at tab 28 of your folder. At the
5 beginning of the passage, the Human Rights Committee

6
7 observes that the State party is not absolved from its obligation under
8 article 9, paragraph 2, of the Covenant to inform someone of the reasons of
9 his arrest and of the charges against him, because of the arresting officer's
10 opinion that the arrested person is aware of them.

11
12 The author of this communication had been detained for seven days before being
13 charged with murder and the Committee concludes that there was a violation of the
14 basic standard of due process in article 9, paragraph 2, of the Covenant.⁶⁹ It is
15 confirmed in other cases, delay in bringing charges, and I quote from *Kelly v.*
16 *Jamaica*, "should not exceed a few days."⁷⁰

17
18 Mr President, Members of the Tribunal, one thousand two hundred and sixty-nine
19 (1269) days have gone by since the marines were first arrested by the police in the
20 Indian State of Kerala, and the marines have not yet been charged formally in a
21 legally valid way. India cannot rely on the charge sheet issued by the State of Kerala
22 for the purposes of fulfilling its obligation to charge promptly, in circumstances where
23 its own Supreme Court found, two years and eight months ago, that the Kerala
24 Police . and I quote from the Supreme Court judgment . did not have jurisdiction to
25 investigate into the complaint+and that the State of Kerala had no jurisdiction %
26 investigate and, thereafter, to try the offence+.⁷¹

27
28 The Kerala charge sheet is consequently *ultra vires* and India cannot rely on it as a
29 formal charge in this case.

30
31 Mr President, Members of the Tribunal, the due process requirement to inform a
32 person of the charges brought against him or her promptly is not an abstract legal
33 formality. It is a fundamental check on the exercise of State power. It is also a basic
34 safeguard, designed to create some measure of certainty, and thus to minimise
35 anguish and distress of individuals who are innocent. In this regard I refer you to
36 Italy's submissions in camera.

37
38 India seeks to conceal this fundamental failure of due process behind convoluted
39 expressions in its Written Observations. It refers to the present situation as one of
40 "non-framing of charges"⁷² and it also refers to the "criminal case being ripe for the
41 framing of charges+."⁷³

68 *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.

69 *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.

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

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

72 Written Observations of India, para. 1.17.

73 Written Observations of India, para. 2.13.

1 Three and a half years and we are still nearly at the point where the criminal case is
2 ~~time~~ for the framing of charges+but no valid charges.

3
4 The facts in this respect are so unequivocal that the Chief Justice of the Indian
5 Supreme Court remarked at a hearing in December 2014: ~~Even~~ the charge sheet
6 has not been filed.⁷⁴
7

8 India is also running the absurd argument that the reason why the marines have not
9 yet been charged is because they and Italy have not been cooperative. Mr President,
10 in some legal systems a person has the right to remain silent upon arrest. But that
11 does not exempt a State from its obligation to formulate charges promptly.
12

13 The criminal system in every country deals with individuals who are entirely
14 uncooperative (which anyway was not the case here). That does not mean that the
15 State can place them in indefinite custody without charges. The State must still
16 charge them, and must do so promptly, and it must do so properly.
17

18 The second critical due process dimension in this case concerns the manner in
19 which India wants to try the marines. Even from a domestic point of view, the
20 exercise of criminal jurisdiction by India over the *Enrica Lexie* incident and over the
21 marines was so exceptional and so fraught with legal difficulties that there was no
22 way of dealing with it under ordinary legislation. So the Supreme Court directed the
23 Government to set up an *ad hoc* Special Court to try the marines. This is in clear
24 breach of another fundamental standard of due process, encapsulated in article
25 14(1) of the International Covenant on Civil and Political Rights, which provides that
26

27 everyone shall be entitled to a fair and public hearing by a competent,
28 independent and impartial tribunal established by law.
29

30 A tribunal designated *ad hoc* and *ex post facto*, without foundation in Indian
31 legislation, to try two specific individuals manifestly fails to fulfil this requirement.
32

33 Again, India seeks to resort to euphemisms to conceal this violation of clearly
34 applicable international standards of due process, describing the Special Court as an
35 ~~exclusive court~~.⁷⁵ Far from placing the marines in a privileged position, India's
36 decision to try them in an exclusive *ad hoc* court has produced more problems and
37 greater uncertainty. The marines cannot be blamed for seeking to defend
38 themselves as best they can in these unique ~~exclusive~~+circumstances, not provided
39 for under Indian law. Without charges, without a court established by law, without a
40 clear legal framework governing the procedure, and against the background, now
41 made explicit in the Indian Written Submission, that the outcome of the trial is a
42 foregone conclusion, in these circumstances the marines are simply doing their best
43 to exercise their fundamental right of defence.
44

45 Thirdly, we have seen that the marines' right to defend themselves has been
46 attacked in its most basic dimension: the presumption of innocence. There can be
47 few more blatant breaches of due process than a State declaring, in no uncertain

⁷⁴ Request, para. 49 and fn. 28.

⁷⁵ Written Observations of India, para. 1.19.

1 terms, in the solemnity of inter-State proceedings in front of this Tribunal, the guilt of
2 two individuals, before the trial has taken place and before charges have been
3 formally brought. We must not forget that the marines have maintained their
4 innocence throughout.

5
6 Each of these three relevant and applicable standards of international due process
7 vitiates the exercise of jurisdiction by India, quite aside from that exercise of
8 jurisdiction not being founded in UNCLOS. It also shows the acute and irreparable
9 prejudice that Italy would suffer if the measures restricting the marines' liberty are not
10 lifted promptly. These acute concerns are relevant to both prejudice and due
11 process.

12
13 Mr President, Members of the Tribunal, let me now turn to *Arctic Sunrise*. In the part
14 of the Order dealing with reasons, the Tribunal drew attention to a passage in the
15 Written Statement of the Netherlands which is particularly relevant here.⁷⁶ The
16 Netherlands argued in that passage, which is referred to by the Tribunal under its
17 reasons, that

18
19 the crew would continue to be deprived of their right to liberty and security
20 as well as their right to leave the territory and maritime areas under the
21 jurisdiction of the Russian Federation

22
23 adding that

24
25 [t]he settlement of such disputes between two states should not infringe
26 upon the enjoyment of individual rights and freedoms of the crew of the
27 vessels concerned.

28
29 This passage, to which the Tribunal referred in giving its reasons for the Order,
30 concluded:

31
32 every day spent in detention is irreversible.

33
34 Italy relies on similar arguments. The present Request also rests on stronger
35 grounds than the successful Dutch request in *Arctic Sunrise*. This is so for at least
36 four reasons.

37
38 First, the violations of applicable standards of due process are more severe in this
39 case. The crew members in *Arctic Sunrise* had been charged, and their detention
40 had not gone on for nearly as long as in this case.

41
42 Secondly, the marines are agents of the Italian State, who were engaged in official
43 activities clearly and closely connected with the prevention and repression of piracy.
44 That is another important distinguishing factor from *Arctic Sunrise*.

45
46 India seeks to rely on immunity to argue that this is a factor that distinguishes both
47 *Arctic Sunrise* in its favour. Mr President, Members of the Tribunal, that argument is
48 clearly misplaced. The opposite is true. The existence of immunities in this case

⁷⁶ "*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.

1 makes the prescription of Italy's Second Measure both more appropriate and more
2 urgent than in *Arctic Sunrise*. As noted by the International Court of Justice in the
3 Advisory Opinion on the Immunity of the Special Rapporteur,⁷⁷ immunities must be
4 addressed *in limine litis*, but the Indian Supreme Court was silent on immunities in its
5 January 2013 Judgment. The Second Request would certainly not prejudice the
6 question of immunities, but it would prevent the irreparable prejudice that would
7 inevitably result from a continued breach of immunities.

8
9 The third factor that distinguishes this case from *Arctic Sunrise* is that India cannot
10 claim that its exercise of jurisdiction in the Exclusive Economic Zone comes under
11 one of the cases expressly contemplated under articles 56 or 60 of the Convention.

12
13 The fourth factor is the medical circumstances discussed *in camera*. These four
14 factors distinguish *Arctic Sunrise* and strengthen our reliance on that precedent.

15
16 To conclude on the issue of prejudice suffered by Italy, the circumstances of this
17 case make the nature of prejudice which Italy would suffer if the Second Measure is
18 not granted more acute and extreme than in *Arctic Sunrise*. Failure to grant this
19 measure would entail a significant departure from that decision and from the
20 jurisprudence of this Tribunal.

21
22 Mr President, Members of the Tribunal, I will now turn to the question of undue
23 burden in relation to the Second Request. India alleges that Italy would not comply
24 with an award in India's favour so that India would, on balance, be placed under
25 greater risk if the marines are both in Italy.

26
27 Mr President, Members of the Tribunal, this is an allegation that Italy rejects in the
28 most vigorous terms. Italy and India are each committed to the Convention and to
29 the dispute settlement obligations under it. They have a long history of friendly
30 relations between them. The fact is that, notwithstanding the political resonance of
31 this case in Italy, Italy complied with its undertakings before the Indian Supreme
32 Court. In the course of this dispute, it was India which resorted to a glaring breach of
33 international law when it prevented the Italian Ambassador from leaving Indian
34 territory. In these circumstances, it would be entirely inappropriate to proceed on the
35 basis that Italy is in bad faith and would not observe its obligation under the
36 Convention to comply with the award of the Annex VII tribunal, whatever that award
37 says.

38
39 Let me now turn to the issue of urgency in relation to the Second Request. Urgency
40 here inheres in the nature of the prejudice to Italy's rights. If the Annex VII tribunal
41 finds that India has no jurisdiction, it would follow that the measures restricting the
42 liberty and movement of the marines were unlawful throughout. The marines, and in
43 consequence Italy, would have suffered irreparable damage.

44
45 Italy is not calling into question the principle that States have a right, or a power, to
46 arrest, detain, prosecute and punish individuals, but that power is not absolute.
47 There are limitations to it under UNCLOS: a State cannot assert a power to

⁷⁷ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, ICJ Reports 1999*, p. 62, at p. 88, para. 63.

1 prosecute and punish in respect of alleged offences over which it has no jurisdiction
2 under the Convention. A State has, similarly, no such power *vis-à-vis* individuals who
3 are entitled to immunity from its jurisdiction. In exercising this power, States must
4 respect due process throughout; as this Tribunal said, ~~in~~ all circumstances+
5

6 Where a dispute over the exercise of jurisdiction has arisen and has been submitted
7 for final binding determination, and where violations of due process are ongoing, the
8 status quo in relation to the marines is one where their rights and Italy's rights are
9 suffering irreparable damage on a daily basis. Every additional day in which a person
10 is deprived of these rights must be regarded as one day too many. This was a
11 principle referred to in the Order in *Arctic Sunrise*.⁷⁸ Again, I note, Mr President and
12 Members of the Tribunal, that in the light of the duration and of the circumstances of
13 the detention here, and of the other factors to which we have drawn your attention in
14 camera, the considerations of urgency are more urgent and pressing than in *Arctic*
15 *Sunrise*.
16

17 Part of the irreparable damage has of course already occurred but this is no
18 justification for inflicting more of it in the coming weeks and months and during the
19 pendency of the proceedings, particularly since, as Sir Daniel explained, urgency
20 has crystallized quite sharply over the last few weeks, as a result of the
21 developments which Sir Daniel took you through earlier.
22

23 Mr President, Members of the Tribunal, India is not only determined to prejudge the
24 outcome of the Annex VII proceedings by pursuing the exercise of jurisdiction all the
25 way to the completion of the trial before the Special Court; as is clear from their
26 Written Observations, India is also prejudging the marines' guilt before charging
27 them, and by doing so, it has aggravated the prejudice, and brought all the risks
28 connected to the ongoing exercise of criminal jurisdiction into even sharper relief.
29 The requirement of urgency in respect of Italy's Second Request is clearly met.
30

31 Before concluding, I would like to address a final point which may be relevant to the
32 analysis of urgency in relation to both measures. It is well known that this dispute is
33 not new. India makes much of this point in its Written Statement, but India is
34 conflating two analytically distinct issues: the duration of the dispute and the
35 assessment of urgency. This is clear from the jurisprudence under UNCLOS, as
36 shown in the recent order of the Special Chamber of this Tribunal in *Ghana/Côte*
37 *d'Ivoire*.
38

39 It is not uncommon for disputes over the exercise of jurisdiction and immunity of
40 State officials to be brought to an international forum after some domestic
41 proceedings. This is not because of any requirement of exhaustion of local
42 remedies . which clearly does not apply here . but because these disputes will often
43 begin with an exercise of jurisdiction by domestic authorities and they will be
44 challenged before domestic courts.
45

46 There is therefore nothing unusual about engagement with the domestic process in
47 disputes over jurisdiction; nor is there anything unusual in a case of this kind for

⁷⁸ "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.

1 political and diplomatic negotiations to take place. It would be adding insult to injury if
2 the passage of time, due to the nature of the dispute as well as to Italy's best efforts
3 to secure a negotiated solution, were somehow to be held against Italy.
4

5 The duration of the dispute, on the contrary, is a factor which, particularly in the
6 context of violations of international due process and the other special circumstances
7 of this case, strengthens the case for urgency.
8

9 Mr President, Members of the Tribunal, in conclusion, Italy's First Request is justified
10 by the irreparable prejudice which Italy will suffer if the rights which form the object of
11 this dispute were continued to be exercised by India. It is further justified by the fact
12 that continued exercise of criminal jurisdiction by India could jeopardize the future
13 implementation of an award of the Annex VII tribunal. Italy's Second Request is
14 justified on at least three bases: as a consequence of the First Request; by the
15 applicable international standards of due process; and by the circumstances which
16 have been assessed in camera. Both of Italy's requests are justified by reasons of
17 urgency and in neither case would India be placed under an undue burden.
18

19 Mr. President, Members of the Tribunal, I have now concluded. I would ask you to
20 invite Sir Daniel Bethlehem to the podium.
21

22 **THE PRESIDENT:** Thank you, Mr Verdirame. I now give the floor to Sir Daniel
23 Bethlehem.
24

25 **MR BETHLEHEM:** Mr President, Members of the Tribunal, I return to the podium to
26 make some very brief closing observations to Italy's first-round argument and, in so
27 doing, to underline a number of points on which, in our submission, this case turns.
28 I would like to pick up where Professor Verdirame left off, with irreversible prejudice,
29 urgency and undue burden. I do not repeat his submissions.
30

31 On irreversible prejudice, I note only that the risks to Italy's rights, including as
32 regards humanitarian considerations relevant to its officials, are manifest. India, in
33 contrast, can show no irreversible prejudice to its rights in issue in these
34 proceedings. If, however, contrary to Italy's submission, the Tribunal does perceive
35 there to be some risk to India's rights, this could be easily addressed by an order
36 from the Tribunal that is directed in equal terms to both Parties not to take any step
37 of criminal investigation or trial during the pendency of the Annex VII proceedings
38 that could prejudice the rights of the other Party. This would cater perfectly well for
39 any concern that could possibly be apprehended as regards India's rights. Professor
40 Verdirame has addressed you on this in more detail.
41

42 As regards the risk of irreversible prejudice to Italy's rights in issue in the
43 international proceedings, however, a freezing order in respect of the criminal
44 proceedings is not enough. Italy's rights engaged by the prejudice that is posed to its
45 State officials cannot be adequately addressed, or even addressed at all, by an order
46 that simply maintains the status quo. The status quo is one in which Italy's rights are
47 being prejudiced daily, on an ongoing basis; and the risk of irreparable harm will be
48 readily apparent from the information that has been provided to you.
49

1 Urgency, as you have heard, is both humanitarian and legal. It is humanitarian both
2 because of the individual circumstances of the two marines, and because prolonged
3 pre-charge deprivation of liberty is a grave matter of continuing concern. This is not a
4 prompt-release case, in which the issue of deprivation of liberty was explicitly
5 envisaged and addressed in UNCLOS. The circumstances in issue here however
6 are even more egregious. The marines are officials of the State who were on official
7 duties. They are not simply the crew of a vessel flying the flag of the applicant State.
8 The marines have been subject, unlawfully, to India's exercise of jurisdiction not for
9 days, or for weeks, or even for months, as may arise in a prompt-release cases, but
10 for three-and-a-half years. The humanitarian circumstances in issue in this case also
11 distinguish this case from prompt-release cases.
12

13 Urgency is legal as, with the failure of efforts to reach a negotiated solution, the
14 dispute has reached a turning point. India's assertion of jurisdiction over the *Enrica*
15 *Lexie* Incident and over the Italian marines has now crystallized sharply into a
16 violation of Italy's rights that requires urgent attention. If provisional measures are
17 not prescribed, there is a high risk of the aggravation of the dispute as India pushes
18 forward to try the marines. The threat of irreversible prejudice to Italy's rights has
19 thus now crystallized sharply. As both Sir Michael Wood and Professor Verdirame
20 have addressed, urgency is not be assessed by the length of time since the dispute
21 has arisen but by an appreciation that every continuing day that is lost is a day that
22 can never be recovered.
23

24 This brings me to undue burden. Professor Verdirame has dealt with this fully.
25 I would make only three observations. The first is that, in the application by Sergeant
26 Latorre that was made to the Indian Supreme Court on 4 July, just a few weeks ago,
27 which I addressed in my opening submissions this morning, Italy gave an
28 undertaking to return Sergeant Latorre to India following the final determination of
29 rights by the Annex VII tribunal, if this is required by the award of that tribunal. Italy
30 repeats this undertaking here as an undertaking to this Tribunal in respect of both
31 marines.
32

33 My second observation is to recall your *Arctic Sunrise* provisional measures Order
34 and the bond that you required of the Netherlands. Pursuant to the bail order of the
35 Indian Supreme Court in this case, Italy has been required to provide surety in
36 respect of the two marines of approximately " 300,000 for each marine, denominated
37 in Indian rupees. Such that there may be any conceivable issue of prejudice to India
38 from the provisional measures requested by Italy in these proceedings, Italy would
39 be prepared to transform that surety through some appropriate arrangement into a
40 surety given to India in accordance with the stipulations of an order of this Tribunal.
41 The amount of the surety that Italy is currently maintaining in India, and is now
42 offering to continue as a bond pursuant to an order of this Tribunal, overshadows
43 that required by the Tribunal in *Arctic Sunrise*, in which the amount stipulated was in
44 respect of the release of the vessel and 30 crew members.
45

46 My third observation is that the appropriate course for the Tribunal to adopt in this
47 case, in our respectful submission, is to order the provisional measures that Italy has
48 requested for the period to the end of the Annex VII proceedings. This would
49 properly reflect the risk of irreversible prejudice to Italy's rights that we have
50 described. If circumstances change, or if India for any other reason wishes to contest

1 the measures that are prescribed, its right to do so before the Annex VII tribunal in
2 due course is safeguarded and indeed expressly envisaged by article 290(5) of
3 UNCLOS, which would allow India to apply to modify or revoke the provisional
4 measures prescribed. India's rights are more than adequately safeguarded. The risk
5 of irreversible prejudice to Italy's rights, and the nature of any conceivable burden to
6 India, properly warrants this approach.

7

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

10

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

12

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

15

16 The sitting is now closed.

17

18

(Luncheon adjournment)