

# INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



2015

Public sitting

held on Tuesday, 11 August 2015, at 4.30 p.m.,  
at the International Tribunal for the Law of the Sea, Hamburg,

President Vladimir Golitsyn presiding

**THE “ENRICA LEXIE” INCIDENT**

*(Italy v. India)*

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**Verbatim Record**

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<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
		Markiyan Kulyk
		Alonso Gómez-Robledo
		Tomas Heidar
	Judge <i>ad hoc</i>	Francesco Francioni
	Registrar	Philippe Gautier

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*Italy is represented by:*

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*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,

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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,

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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,

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*as Counsel;*

Ms Francesca Lionetti, Freshfields Bruckhaus Deringer,

*as Legal Assistant.*

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*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,

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

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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:** Good afternoon. We will now hear the second round of oral  
2 arguments presented by India in the case concerning the *Enrica Lexie* Incident.

3  
4 I give the floor to Mr Narasimha to begin his statement.

5  
6 **MR NARASIMHA:** Mr President and Members of this honourable Tribunal, I will be  
7 making a short submission before you. I will be followed by Mr Bundy and thereafter  
8 by Professor Pellet.

9  
10 I was surprised upon hearing the submission of Sir Daniel Bethlehem in his speech  
11 when he said: “The Indian Supreme Court’s judgment requiring, exceptionally, the  
12 establishment of Special Court to try the marines was questionable as a matter of  
13 Indian constitutional law.”

14  
15 I am sorry to say, Mr President, that the Special Court which the Supreme Court  
16 directed to be constituted to try the marines could not have, for some inexplicable  
17 reason, suddenly become unconstitutional. With due respect to the opinion of Italy  
18 on the Special Courts, I submit that these courts are not *ad hoc*. The Special Courts  
19 are constituted in exercise of the same law which governs the courts for the rest of  
20 the country and the appointment of judges of the Special Court is the same as that of  
21 any other court. In fact, the Special Courts are selected and designated out of the  
22 existing judges of the regular judiciary so that they are dedicated to the hearing and  
23 deciding of cases having special circumstances, requiring urgent determination. In  
24 fact, the Special Court was constituted by appointing a judge of due authority and  
25 having due regard to the rights of the marines.

26  
27 There cannot be anything further from the truth to raise non-existing grounds, and  
28 that too for a first time before this Tribunal, questioning the validity of the Special  
29 Courts. In fact, the honourable Tribunal may note that Italy has never questioned the  
30 constitutional validity of the establishment of the Special Court. A similar submission  
31 has been made by Professor Verdirame and that submission suffers from the same  
32 misconception about Special Courts.

33  
34 Mr President, today submissions have been made about the alleged delay in  
35 informing the accused of the charges. I perceive that there is some amount of  
36 confusion as regards the stage at which the information regarding the charges is to  
37 be given. In the first place, our Constitution provides for protection against arrest and  
38 detention. I now quote the relevant text, article 22(1) of the Constitution, which says,

39  
40 No person who is arrested shall be detained in custody without being  
41 informed, as soon as may be, of the grounds of such arrest nor shall be  
42 denied the right to consult, and to be defended by, a legal practitioner of his  
43 choice.

44  
45 It is not the case of either India or Italy that the above constitutional requirement  
46 followed by the procedure under the Code of Criminal Procedure has not been  
47 followed. Professor Verdirame emphatically stated yesterday that  
48 “the due process requirement to inform a person of the charges brought against him  
49 or her promptly is not an abstract legal formality”.

1 I completely agree with him. He then concluded on the point by saying that India has  
2 sought to conceal this fact by using convoluted terms such as “framing of charges”.  
3 Here the confusion becomes apparent. Informing of the charges when a person is  
4 arrested is one thing and framing of charges is another thing. I think there is  
5 substantial confusion with respect to these two incidents in the submissions that  
6 have been made.

7  
8 It is nobody’s case that these requirements have not been followed at the time of  
9 arrest and, even in the present case, both the Italian marines have undisputedly  
10 “been informed” of the charges made against them at all stages. I submit that we  
11 have gone past this stage, which occurred at the time of arrest in 2012, when the  
12 accused were informed of the charges against them. Perhaps the submission made  
13 by Italy’s Counsel pertains to the legal requirement of “filing of a charge-sheet”,  
14 which is done in a court of law. This requirement is immediately after the  
15 investigation is complete and the agency finalizes and files its report. After it is filed,  
16 the accused gets an opportunity to be heard and thereafter, a court of law frames the  
17 charges. I have made my submissions about the alleged delay in non-filing of the  
18 charge-sheet and I do not wish to labour these arguments again.

19  
20 It is baffling that two accused persons who claim to be unaware of the charges  
21 against them filed application after application stating that the NIA, the National  
22 Investigation Agency, be prevented from filing charge-sheets or that the jurisdiction  
23 of the NIA be taken away. While on the one hand they cite lofty principles of law, on  
24 the other hand they have maintained a stoic silence as regards the various  
25 applications and injunctions against the NIA. These inexplicable and contradicting  
26 claims by Italy establish that, though the Republic of Italy is before you today, neither  
27 of the marines have given up their claim before the Special Court or the Supreme  
28 Court.

29  
30 Though I do not wish to flood the Tribunal with Indian legal terminology and  
31 meanings, I take exception to Italy’s attempt at discrediting the Indian legal system,  
32 which system they have used continuously from 2012 onwards. This Tribunal is  
33 aware that the charge-sheet was filed in Kerala within 90 days, which is actually the  
34 statutory requirement under the Criminal Procedure Code. After the judgment of the  
35 Supreme Court on 18 January 2013, the Special Court was constituted and the case  
36 was entrusted to the NIA. The NIA submitted its report to the Government on  
37 27 November 2013.

38  
39 It is important to note that on 15 January 2014 the NIA received an application filed  
40 by Italy and the marines praying that the NIA should be restrained from investigating  
41 the case. I have already referred to the order dated 24 February 2014 when this  
42 question was referred to be decided by a Special Bench. This order, coupled with the  
43 subsequent order dated 28 March 2014, on which detailed submission have been  
44 already made, led to the suspension of criminal proceedings before the Special  
45 Court. The procedure is that it must be filed only in the designated court. As there  
46 was no designated court available, the charge-sheet could not be filed. I think, Mr  
47 President, that the confusion pertaining to the framing of charges and the filing of  
48 charge-sheets has led to some amount of misconception about the procedure and  
49 the rights that are supposed to have been affected.

1 Sir David Bethlehem referred to Section 161 CrPC (tab 33 – Italy’s Judges  
2 documents). However, I wish to draw the attention of the Tribunal to another  
3 important section, that is Section 160, which precedes Section 161. This section  
4 grants power to the police officer to require the attendance of witnesses. Therefore,  
5 Section 161 is only an enabling provision and specifically provides a discretion to the  
6 police officer to determine whether a person should be personally called or that video  
7 recording could be taken. It is not a mandatory provision, as has been read out from  
8 161 itself. That is why I submit that section is not mandatory and gives absolute  
9 discretion to the Agency to decide the manner in which the Agency may take a  
10 statement of a witness. Section 161 does not relate to witnesses. The question of  
11 examining a witness would arise when the trial begins. The statements which were  
12 to be recorded under Section 161 relate to statements to be taken at the time of  
13 investigation. That is the reason the judgment which has been cited has no  
14 relevance to the facts of this case. It relates to the statement that could be taken at  
15 the time of evidence which is recorded in a court of law.  
16

17 I now come immediately, Mr President, to the issue of due process. A submission  
18 was made today that India has pre-judged the issue relating to the death of the  
19 fishermen and has concluded that the marines are responsible for the death of the  
20 fishermen. The presumption of innocence is fundamental to Indian criminal  
21 jurisprudence. Every fact needs to be proved by the prosecution “beyond reasonable  
22 doubt”. Under our Constitution, interference with liberty can only be by procedure  
23 established by law and that procedure, the Supreme Court has held, must be fair,  
24 just and reasonable. We have consistently been following this principle and there are  
25 a large number of provisions which the Supreme Court examined from time to time,  
26 held them to be unconstitutional and struck down. The procedure which subsists  
27 today is therefore the constitutionally recognized procedure, which is a reasonable,  
28 fair and just procedure.  
29

30 These principles are the bedrock of the Indian Criminal Procedure Code and the  
31 judiciary does not countenance or tolerate even the smallest infraction of these  
32 principles by State action. These rights or freedoms being fundamental to an  
33 individual’s existence, Indian Courts have zealously protected them. Sir Daniel  
34 Bethlehem made a statement that India, while relying on the 18 January 2013  
35 judgment to contend that that the question of jurisdiction has been kept open, in the  
36 written statement as well as in the affidavit filed in the Supreme Court, opposed the  
37 Writ Petition as being barred by *res judicata*. He submits that this is a contradiction.  
38 In my respectful submission, there is actually no contradiction at all. The submission  
39 is just that the judgment dated 18 January 2013 is final and cannot be reopened,  
40 which also means that the right to question the jurisdiction of India is kept open. It is  
41 not the endeavour of the Supreme Court or of the Government of India to take away  
42 that right which the Supreme Court has granted to them in the earlier proceedings.  
43

44 The reply to Professor Verdirame’s submission that India has not decided jurisdiction  
45 after three and a half years is completely unfounded. I state that there is no  
46 ambiguity on this question on behalf of India. There is no ambiguity in the stand of  
47 India with respect to jurisdiction. It is the incorrect assertion by Italy and the marines  
48 that India has no jurisdiction and this issue has been agitated by them without  
49 finality.  
50

1 I have now concluded my submissions, and I request you, Mr President, to permit Mr  
2 Bundy to make his submissions.

3

4 **THE PRESIDENT:** Thank you, Mr Narasimha. I now give the floor to Mr Bundy to  
5 make his statement.

6

7 **MR BUNDY:** Mr President, Members of the Tribunal, it falls to me once again to  
8 address Italy's first request for provisional measures and how Italy has failed to  
9 sustain its burden of proof that a situation of urgency exists justifying the Tribunal  
10 enjoining India from exercising any further jurisdiction over the matter in order,  
11 allegedly, to prevent irreparable harm to Italy.

12

13 Yesterday, Sir Daniel Bethlehem advanced a number of assertions which, in his  
14 view, supported Italy's arguments in the first submission. These were repeated again  
15 this morning. Amongst these were the following:

16

17 Only in late May of this year did it become apparent that no diplomatic settlement of  
18 the dispute between India and Italy would be possible.<sup>1</sup> This so-called "political  
19 impasse" coincided with what Sir Daniel termed "acute and increasingly urgent  
20 concerns, of both a humanitarian and legal nature, that have brought us before  
21 you".<sup>2</sup>

22

23 As a consequence, Italy's requests for provisional measures, to quote my learned  
24 friend, "come on the cusp of potentially very serious complications in the dispute  
25 between Italy and India".<sup>3</sup> Finally, so the argument goes, there is "now" the prospect  
26 of imminent Indian criminal proceedings against the two marines unless India is  
27 enjoined from exercising jurisdiction. Thus, say our opponents, "the threat of  
28 irreversible prejudice to Italy's rights has ... now crystallized sharply".<sup>4</sup>

29

30 These contentions are not correct and none of them is backed up by any evidence  
31 that is on the record in this case. As I explained yesterday afternoon, and will do so  
32 again now, the record in the case shows that there is absolutely no risk of real and  
33 imminent prejudice to Italy's rights justifying India being ordered to refrain from  
34 exercising any further jurisdiction over the dispute.

35

36 In order to demonstrate this, I would invite the Tribunal to examine the situation as it  
37 existed on the "critical date", that is on 26 June 2015. That was the date of Italy's  
38 Notification commencing Annex VII arbitration. That Notification requested that India  
39 agree exactly the same provisional measures that Italy now requests from your  
40 Tribunal. It follows that, as of 26 June 2015, Italy must have considered that a  
41 situation of urgency existed justifying the prescription of provisional measures. So  
42 the essential questions are: What was the situation on that date? Does it point to a  
43 situation of urgency or of imminent irreparable prejudice that will materialize before  
44 the Annex VII arbitral tribunal is constituted and is in a position to deal with the  
45 matter?

46

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<sup>1</sup> ITLOS/PV.15/C24/1, p. 14, lines 44-45.

<sup>2</sup> ITLOS/PV.15/C24/1, p. 15, lines 1-4.

<sup>3</sup> ITLOS/PV.15/C24/1, p. 16, lines 39-40.

<sup>4</sup> ITLOS/PV.15/C24/1, p. 15, lines 23-27.



1 The answer is “no”. To show why this is the case, we need to look at the facts, not  
2 mere assertions, as Counsel for Italy was prone to do. As the Special Chamber put it  
3 in the *Ghana/Côte d’Ivoire* case:

4  
5 The decision whether there exists imminent risk of irreparable prejudice can  
6 only be taken on a case-by-case basis in light of all relevant factors.<sup>5</sup>  
7

8 Moreover, while this morning Sir Michael argued that there was nothing to prevent  
9 your Tribunal from prescribing provisional measures for the duration of the Annex VII  
10 arbitration proceedings, he failed to address the key point. As the Tribunal stated in  
11 the *Land Reclamation* case,

12  
13 The urgency of the situation must be assessed taking into account the period  
14 during which the Annex VII arbitral tribunal is not yet in a position to “modify,  
15 revoke or affirm those provisional measures”.  
16

17 Thus, the limited temporal duration of provisional measures that an applicant  
18 requests from this Tribunal before an Annex VII tribunal is constituted is a relevant  
19 factor for assessing whether there genuinely is a situation of urgency within the  
20 meaning of article 290, paragraph 5, of the Convention.  
21

22 So, what was the factual position on the eve of Italy’s Notification?  
23

24 First, the trial of the two marines before the Special Court that had been established  
25 pursuant to the Supreme Court’s Order of 18 January 2013 was in abeyance. That  
26 was a direct result of the fact that the marines had filed an application in March 2014  
27 requesting, amongst other things, India’s Supreme Court to rule that the Special  
28 Court was without jurisdiction – the famous Writ No. 236. It was in response to that  
29 application that the Supreme Court, on 28 March 2014, ordered the Special Court  
30 proceedings stayed, and that remains the case.  
31

32 Second, as my colleague, the Additional Solicitor General, just discussed, the NIA  
33 had not been able to submit its investigation report of the incident to the prosecutor  
34 or the Special Court because the Italian marines had also challenged the NIA’s  
35 authority to carry out the investigation. That made it impossible for the prosecutor to  
36 formulate charges against the marines. As a consequence of those two factors, the  
37 notion that there is a prospect of imminent criminal proceedings against the two  
38 marines is fundamentally misguided. There is not.  
39

40 Third, on 26 June of this year the marines’ Writ No. 236 was still pending, with a  
41 hearing scheduled for 13 July. Recall, if you would, Mr President and Members of  
42 the Tribunal, that in their petition the marines had asked the Supreme Court to  
43 decide the key questions of jurisdiction and immunity. They wanted the Supreme  
44 Court to exercise jurisdiction over those questions and they voluntarily submitted to  
45 the Supreme Court’s jurisdiction to decide those issues. Prior to 26 June there was  
46 no request for an Annex VII tribunal to decide those issues, and there was no hint  
47 that the marines would subsequently change their mind and ask the Supreme Court  
48 to defer consideration of their own petition.

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<sup>5</sup> *Dispute concerning Delimitation of the Maritime Boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean (Ghana/Côte d’Ivoire)*, Order of 25 April 2015, para. 43.

1  
2 Fourth, again, looking at the situation as of 26 June, Sergeant Latorre was in Italy  
3 pursuant to a previous order of the Supreme Court relaxing his bail conditions. As for  
4 Sergeant Girone, on 26 June 2015 it had been twenty-eight months, more than two  
5 years, since he had last asked the Supreme Court for leave to travel to Italy, it being  
6 recalled that Sergeant Girone had unilaterally withdrawn a petition for the relaxation  
7 of his bail in December 2014, before the Supreme Court could even rule on the  
8 application. How Italy can posit a situation of urgency regarding Sergeant Girone as  
9 of 26 June, when he had not pursued an application for relaxation of bail for over two  
10 years, is inexplicable.

11  
12 It follows, fifthly, that there is absolutely no evidence to show that it was only in May  
13 2015 that it became clear that a diplomatic solution could not be reached, or that, as  
14 Sir Daniel asserted:

15  
16 At this point – that is May 2015 – the Indian Government indicated to Italy  
17 that it had no latitude to pursue a negotiated settlement given the  
18 engagement of the Indian Supreme Court.<sup>6</sup>

19  
20 Where is the evidence of that statement? It is not on the file. Pure assertion. My  
21 colleague has not pointed to any document that supports this claim that somehow it  
22 was only in May of this year that settlement became impossible.

23  
24 Sir Daniel's arguments in this respect are pure assertion. He has not pointed to any  
25 document that supports his claim. The only thing he produced this morning, under  
26 Italy's tab 36, is an extract from a blog in which India's External Affairs Minister was  
27 asked about relations with the European Union. In answering, the Minister stated  
28 that India had repeatedly told Italy that it should join India in the judicial process  
29 taking place in India and that was *sub judice* before the Indian courts, but that Italy  
30 had not done so. That was nothing new. It had been India's consistent position over  
31 the previous three years. While Sir Daniel speculated about unreported and  
32 undocumented back-channel discussions – I was not sure if he was giving testimony  
33 or simply referring to materials that are not on the record – the fact of the matter is  
34 that the last Note Verbale that is on the record that Italy sent to India on this matter  
35 was dated 18 April 2014, 14 months earlier. Even at that time, in the spring of 2014,  
36 it was apparent that a diplomatic impasse had been reached. In short, there was  
37 absolutely nothing new in May 2015.

38  
39 It follows that Sir Daniel's contention that the Parties were on the cusp of potentially  
40 serious complications is completely unfounded. Equally misguided is the argument  
41 that there were acute and increasingly urgent concerns of both a humanitarian and  
42 legal nature at that time. There were none, as I have just explained.

43  
44 Notwithstanding this, our opponents appear to attach great importance to the fact  
45 that, on 4 July this year – that is, after Italy had already announced its intention to  
46 seek provisional measures – the marines petitioned the Supreme Court to defer  
47 consideration of their Writ No. 236. However, that application in no way changes the  
48 equation with respect to the question of urgency or the risk of irreparable harm. If

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<sup>6</sup> ITLOS/PV.15/C24/1, p. 14, lines 45-47.

1 anything, it shows that there will be no “undue burden” on Italy if the proceedings  
2 before the Indian Supreme Court, which the marines have themselves petitioned to  
3 decide the questions of jurisdiction and immunity, are permitted to continue.  
4

5 Let me put the point as succinctly as I can: a party cannot claim irreparable prejudice  
6 or undue burden if it voluntarily submits to the jurisdiction of one court (in this case,  
7 India’s Supreme Court) and asks that court to decide the essential questions in  
8 dispute – jurisdiction and immunity – and then later turns around and argues that  
9 actually those questions should be heard and decided by another court or tribunal,  
10 the Annex VII arbitral tribunal and that the first court, the Supreme Court, should be  
11 enjoined from proceeding further. Whether that is viewed as a question of estoppel  
12 or as consequence of the principle that a State cannot blow hot and cold at the same  
13 time makes little difference. Italy’s request that the Annex VII arbitral tribunal decide  
14 these issues does not trump the earlier request of the marines that the Supreme  
15 Court take that decision. By the same token, Professor Verdirame’s argument that  
16 the issue of jurisdiction would be decided before the Annex VII tribunal can consider  
17 the issue if the Supreme Court is allowed to proceed flies in the face of what Italy’s  
18 marines asked the Supreme Court to do.  
19

20 Counsel for Italy simply ignores these facts. He asserted this morning that India had  
21 not decided if, after all, it has jurisdiction, and he argued that this delay is due to  
22 India’s own legal system. Those contentions are untenable. Need I remind this  
23 Tribunal that jurisdiction would have been decided by the Special Court but for the  
24 applications of Italy and the marines challenging the jurisdiction of the Special Court  
25 and but for the marines’ application that the Supreme Court defer consideration of its  
26 petition for the Supreme Court to decide the questions of jurisdiction and immunity. If  
27 Italy and the marines had not submitted those applications the question of  
28 jurisdiction would already be decided by now. It was not India’s fault.  
29

30 It follows that, if there are any complications as a result of Italy’s and the marines’  
31 flip-flops, as Sir Daniel seems to believe, they are of the marines’ own making. That,  
32 Mr President and Members of the Tribunal, India submits, scarcely justifies India’s  
33 courts from being enjoined from being able to continue to exercise the very  
34 jurisdiction that the marines asked them to do.  
35

36 In the light of the facts on the record, the timing of Italy’s Annex VII Notification and  
37 its Request for provisional measures is entirely arbitrary. Nothing changed in May  
38 2015 that created any situation of urgency.  
39

40 This morning Professor Verdirame cited *The “Camouco” Case* for the proposition  
41 that, in prompt release cases, the Tribunal found that the Convention “does not  
42 require the flag State to file an application at any particular time after the detention of  
43 a vessel or its crew”.<sup>7</sup> My colleague argued that the same principle should apply  
44 here.  
45

46 But the two situations are entirely different and are governed by different provisions  
47 of the Convention. The Convention provides a measure of discretion to the flag State  
48 in deciding when to file a prompt release application. However, when it comes to a

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<sup>7</sup> *“Camouco” (Panama v. France), Prompt release, Judgment, ITLOS Reports 2000*, p. 10, para. 54.

1 request for provisional measures, the prescription of such measures does not  
2 depend on the appreciation solely of the applicant State. It depends on an objective  
3 showing that a situation of urgency exists within the meaning of article 290(5) of the  
4 Convention. If a State delays filing a request for provisional measures when it could  
5 have done so earlier, it casts serious doubts over its claim that there is a real and  
6 imminent risk of irreparable prejudice. In this case, as I have demonstrated, there  
7 was no situation of urgency when Italy announced its intention to seek provisional  
8 measures in its notification of 26 June.

9  
10 Let me say a few additional words about the question of due process. India firmly  
11 rejects the accusation that has been harped on by Counsel for Italy that there has  
12 been a failure of due process in the Indian judicial process. Not once over three  
13 years have Italy or the marines complained to the Supreme Court that they were not  
14 being accorded due process. To the contrary, India's Supreme Court has shown  
15 great patience with Italy's numerous petitions and has repeatedly indicated that  
16 Italy's and the marines' right to argue the issues before the competent court is  
17 preserved.

18  
19 Notwithstanding this, Professor Verdirame contends that the Indian judicial process  
20 has failed in three respects.

21  
22 First, he complained again this morning that no formal charges have been brought  
23 against the marines, an accusation that was also made by Italy's distinguished Agent  
24 and Sir Daniel Bethlehem yesterday.<sup>8</sup> Again, I emphasize that this is entirely  
25 misleading, as I hope we have explained. As the learned Additional Solicitor General  
26 has explained, no formal charges could be framed until the prosecutor had examined  
27 the facts of the case; but the prosecutor had not been able to do this because Italy  
28 and the marines had blocked the submission of the NIA's report by challenging its  
29 right to conduct the investigation before the Supreme Court. Professor Verdirame  
30 labelled it "absurd" that the reasons the marines have not yet been charged is  
31 because they and Italy have not been cooperative and they also emphasized that a  
32 person has a right to remain silent;<sup>9</sup> but Italy and the marines have not remained  
33 silent. They have petitioned the Supreme Court to block the NIA investigation, which  
34 is precisely the reason why charges have not been able to be brought. India fails to  
35 see how responsibility for that situation can be laid at its door.

36  
37 Second, Counsel raised objections about the manner in which India wants to try the  
38 case through the Special Court.<sup>10</sup> My colleague, Mr Narasimha, rebutted that charge  
39 a few moments ago. The Special Court was set up as a result of Italy's own  
40 application submitting that the Kerala courts were without jurisdiction and that the  
41 Supreme Court should take any other measures it deemed appropriate. As has been  
42 explained, the manner in which the Special Court was established was fully in  
43 conformity with Indian law and was not an exceptional procedure. It operated under  
44 the same rules as other Indian courts. Italy and the marines have the opportunity,  
45 which has been expressly preserved, to challenge the Special Court's jurisdiction,  
46 which they have done. How have they done it? By introducing Writ 236 before the  
47 Supreme Court; but having introduced that application, Italy now acts totally

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<sup>8</sup> ITLOS/PV.15/C24/1, p. 39, line 14.

<sup>9</sup> ITLOS/PV.15/C24/1, p. 40, lines 27-28.

<sup>10</sup> ITLOS/PV.15/C24/1, p. 40, lines 37-41.

1 inconsistently by arguing that India's courts should be enjoined from acting on the  
2 marines' own petition. It is entirely disingenuous.

3  
4 Third, Professor Verdirame insinuated that the two marines had been deprived of the  
5 presumption of innocence.<sup>11</sup> Again, my colleague addressed that point. It is not true,  
6 and Counsel cannot point to a single order or ruling of the Supreme Court that has  
7 compromised the rights of the accused or prejudged the matter. India's courts have  
8 no more compromised the presumption of innocence than did the Prosecution Office  
9 of the Military Tribunal of Rome when it announced in 2012 that it was opening  
10 criminal proceedings against the two marines for the crime of murder.

11  
12 Professor Verdirame also asserted that if a trial takes place before the Special Court,  
13 Italy would suffer "fatal" prejudice because any trial would be a *fait accompli*  
14 depriving the Annex VII tribunal of any effect if it decides in Italy's favour.<sup>12</sup> I already  
15 responded to that allegation yesterday when I recalled that fact that India fully  
16 respects the provisions of Annex VII, including the stipulation that awards are final  
17 and binding and shall be complied with. The fact of the matter is that India has not  
18 once reneged on any of its commitments made to Italy; but the same cannot be said  
19 of Italy, which has *twice* taken a stance that was directly contrary to solemn  
20 undertakings it had made to India.

21  
22 The last point I wish to address concerns Sir Daniel's argument yesterday that India  
23 will suffer no prejudice if Italy's provisional measures are granted because India can  
24 always come back to request the Annex VII arbitral tribunal to modify or revoke the  
25 measures.<sup>13</sup>

26  
27 This is no more, I suggest, than an unsubtle attempt to reverse the burden of proof  
28 by placing it on India. It is Italy that bears the burden of demonstrating to the  
29 satisfaction of this Tribunal that its requests for provisional measures meet the  
30 requirements of article 290(5) of the Convention. I have shown that with respect to its  
31 first request, Italy has not met that burden. There is no urgency that merits upholding  
32 Italy's request, and no real and imminent risk of irreparable harm.

33  
34 Mr President, distinguished Members of the Tribunal, that concludes my  
35 presentation. Once again, I thank the Tribunal for its attention, and would ask the  
36 floor to be given to Professor Pellet to continue India's second round.

37  
38 **THE PRESIDENT:** Thank you, Mr Bundy. I now give the floor to Mr Alain Pellet.

39  
40 **MR PELLET** (*Interpretation from French*): Mr President, distinguished Members of  
41 the Tribunal, before our Agent reads India's final submissions, it falls to me to  
42 present observations on the issues related to the jurisdiction of the Annex VII tribunal  
43 that has to be set up, and indirectly on your own Tribunal's jurisdiction, and on the  
44 second provisional measure that Italy has requested you to prescribe. In so doing, I  
45 will make some comments of a more general nature by way of concluding remarks,  
46 and I will attempt to sum up our position on some salient points of these proceedings  
47 initiated by Italy.

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<sup>11</sup> ITLOS/PV.15/C24/1, p. 41, lines 19-21.

<sup>12</sup> ITLOS/PV.15/C24/1, p. 35, lines 35-37.

<sup>13</sup> ITLOS/PV.15/C24/1, p. 46, lines 20-26.

1  
2 I will start with a few words on the *prima facie* jurisdiction of the Annex VII tribunal,  
3 which is a prerequisite for your own jurisdiction to rule on the Italian Request of  
4 21 July.

5  
6 Professor Tanzi went to a great deal of trouble yesterday to demonstrate that there  
7 was a dispute between India and Italy. Well, I am happy to grant him that – but a  
8 dispute about what? For my opponents – and I am quoting Mr Tanzi – “notably with  
9 reference to articles 2(3), 27, 33, 56, 58, 87, 89, 92, 94, 97, 100 and 300, of the  
10 Convention”.<sup>1</sup>

11  
12 Is that all? Well, this is just an identical rehearsal of the enumeration of articles  
13 contained in the Italian Notification and Request.<sup>2</sup> It is not enough to quote wholesale  
14 a raft of treaty provisions to prove the existence of the well-known *fumus boni iuris*.  
15 They still have to have real relevance to the dispute that we need to settle – and I  
16 would say a predominant relevance. Given the number of provisions that Italy seeks  
17 to adduce, it is difficult to examine each and every one of them, but I will try to do this  
18 at a gallop – and I apologize to the interpreters in advance.

- 19  
20 - Article 2, paragraph 3, sovereignty over the territorial sea: the shooting took place  
21 in the EEZ;  
22  
23 - Article 27, criminal jurisdiction on board a foreign vessel. This relates to the  
24 territorial sea as well;  
25  
26 - Article 33, contiguous zone – neither of the Parties relies on that provision;  
27  
28 - Articles 56 and 58, rights of coastal States and other States in the EEZ. I will  
29 come back to that, but just note that what is important in our case is the silence of  
30 these articles on the questions relating both to the military use of the area and the  
31 question of criminal jurisdiction over crimes committed there;  
32  
33 - Articles 87 and 89: same comment, in this case with respect to the high seas;  
34  
35 - Article 92: “Ships shall sail under the flag of one State only and, save in  
36 exceptional cases expressly provided for in international treaties or in this  
37 Convention, shall be subject to its exclusive jurisdiction on the high seas”: Ships,  
38 yes, but we are not talking about a ship here; we are talking of persons accused  
39 of murder;  
40  
41 - Article 94: duties of the flag State. None of these obligations relating to the safety  
42 and management of vessels and the powers of the captain, officers and crew, is  
43 in dispute between the Parties. The two marines were not members of the crew;  
44  
45 - Article 97: criminal jurisdiction in matters of collision or any other incident of  
46 navigation. Allow me, distinguished Members of the Tribunal, to refer you to what  
47 I said yesterday in this respect;<sup>3</sup>

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<sup>1</sup> ITLOS/PV.15/C24/1 (unchecked), p. 19; N, para. 29; and R, para. 29.

<sup>2</sup> and N, par. 29; and R, par. 29.

<sup>3</sup> ITLOS/PV.15/C24/2, pp. 2 and 12.

1  
2 - Article 100: duty to co-operate in the repression of piracy: How can the trial of  
3 marines accused of having killed two fishermen have anything whatsoever to do  
4 with a breach of this obligation? Let me just recall the extraordinary success that  
5 India has had in combating piracy off its coast?<sup>4</sup>  
6

7 - Finally, the inevitable article 300 on good faith: the point I would underscore is  
8 that *(Read in English)* “It is not in itself a source of obligation where none would  
9 otherwise exist.”<sup>5</sup>  
10

11 *(Interpretation from French)* Mr President, I do not dispute that our case has some  
12 relationship to the sea, given that it was at sea that the shooting of 15 [February]  
13 2012 took place; but this fact is just a matter of chance. The only legal issue is to  
14 know what State or States – because there could be competing jurisdictions – has  
15 jurisdiction to try the perpetrators of this shooting, which led to the death of two  
16 Indian fishermen. On this point the Montego Bay Convention is silent. As proof of  
17 this, see the interpretive declarations, contradictory declarations, that the parties  
18 made regarding the rights of a coastal State with respect to the military use of the  
19 EEZ.  
20

21 As I mentioned yesterday, India declared:

22  
23 *(Read in English)*  
24 that the provisions of the Convention do not authorize other States to carry  
25 out in the exclusive economic zone and on the continental shelf military  
26 exercises or manoeuvres, *in particular those involving the use of weapons*  
27 *or explosives without the consent of the coastal State.*<sup>6</sup>  
28

29 *(Interpretation from French)* Italy, for its part, also made a declaration about this, one  
30 that is diametrically opposed in meaning inasmuch as, according to Italy, “the rights  
31 and jurisdiction of the coastal State in such zone do not include the right to obtain  
32 notification of military exercises or manoeuvres, or to authorize them”.<sup>7</sup>  
33

34 I do not think it is very useful at this juncture to discuss in detail which interpretation  
35 is the “right” one. It is enough to note that  
36

37 - eight other States parties to the Convention formulated declarations along the  
38 lines of India’s. Two others, Germany and the Netherlands, aligned themselves  
39 with the Italian position.  
40

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<sup>4</sup> *Ibid.*, p. 14.

<sup>5</sup> *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment [of 20 December 1988], I.C.J. Reports 1988*, p. 105, para. 94.

<sup>6</sup> Declaration by the Republic of India upon ratifying the United Nations Convention on the Law of the Sea of 10 December 1982, 29 June 1995

([https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en&clang=en#EndDec](https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en&clang=en#EndDec)) – emphasis added.

<sup>7</sup> Declaration by the Italian Republic upon signing the United Nations Convention on the Law of the Sea of 10 December 1982, 7 December 1984

([https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en&clang=en#EndDec](https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en&clang=en#EndDec)).

- 1 - These declarations met with no formal objection by any other State apart from  
2 Italy.  
3  
4 - Above all, the very fact that two categories of totally irreconcilable declarations  
5 can have been made tends to demonstrate that, decidedly, this question does not  
6 fall within the scope of the Convention, and thus escapes the obligation of the  
7 binding settlement of disputes that might arise in this respect under Part XV of  
8 the Convention. The Annex VII tribunal will have to decide the matter, but *prima*  
9 *facie* this gives rise to serious doubts regarding its jurisdiction in the instant case.

10

11 Let me add, Mr President, that in 2012 the two Governments held consultations with  
12 a view to concluding a possible agreement on vessel protection detachments, which  
13 were unsuccessful. As it so happened, it was on 7 February, 2012, eight days before  
14 the shooting, that the Indian Foreign Ministry notified the Italian Embassy in Delhi of  
15 the failure of the talks.

16

17 A further word with respect to the exhaustion – or, more accurately, non-exhaustion  
18 – of domestic remedies. I shall speak solely to what Sir Michael said in this regard  
19 yesterday and this morning.<sup>8</sup>

20

21 One cannot reasonably argue as my opponent – and friend nevertheless – that there  
22 is no prospect of success. The Indian justice system is independent and impartial;  
23 and one cannot repeat often enough that the Supreme Court clearly and expressly  
24 indicated that the Special Court, whose creation the Supreme Court requested,  
25 would be able to rule on the question of the jurisdiction of Indian courts to try Messrs  
26 Girone and Latorre.<sup>9</sup>

27

28 This court has been constituted and could have doubtless ruled a long time ago were  
29 it not for the whole gamut of obstacles that the accused and Italy have created to  
30 prevent it from so doing. Rodman Bundy and I are not saying anything other than  
31 that. The Special Court can try the accused expeditiously – that is its remit. It is the  
32 very reason why it was created.<sup>10</sup> The Special Court can also consider equally  
33 expeditiously that it has no more jurisdiction than any other Indian court in the  
34 matter.<sup>11</sup> It is the effective procedural activism of the accused and of Italy alone that  
35 has prevented the Court from so doing.

36

37 Third, for the reasons that I gave yesterday, Italy is acting first and foremost to  
38 protect the rights of its nationals, on the basis of the notion of “diplomatic protection”.  
39 Thus the emphasis placed by opposing counsel on, for example, respect for due  
40 process, has no justification unless seen from the perspective of diplomatic  
41 protection.

42

43 Fourth, Italy wrongly invokes functional immunities on behalf of Messrs Girone and  
44 Latorre. The acts of which they are accused clearly do not fall within the scope of  
45 their official functions. I draw your attention once again, distinguished Members of  
46 the Tribunal, to Italian case law. As I recalled yesterday, in the judgment of 22

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<sup>8</sup> See ITLOS/PV.15/C24/1 (unchecked), pp. 26 and 27 and 9 and 10.

<sup>9</sup> See Supreme Court of India, Judgment of 18 January 2013 (N, Annex 19).

<sup>10</sup> ITLOS/PV.15/C24/2, p. 9.

<sup>11</sup> ITLOS/PV.15/C24/2, p. 19.



1 October 2014 the Constitutional Court of Italy firmly recalled that the immunity of the  
2 State or its representatives can be invoked (*Read in English*) “Only when it is  
3 connected – substantially and not just formally – to the sovereign functions of the  
4 foreign State.”

5  
6 (*Interpretation from French*) In other words, when it acts in the exercise of its  
7 governmental functions. This decision of the Constitutional Court is far from being an  
8 isolated case, Mr President. As proof, one need look no further than the well-known  
9 judgment of the Supreme Court of Cassation of 29 November 2012, *Abou Omar*, in  
10 which the Supreme Court dismissed the argument founded on the immunities of  
11 secret agents and the military, pointing out that kidnapping could not be considered  
12 as falling within the exercise of official functions.<sup>12</sup> Well, murders neither, Mr  
13 President.

14  
15 As to the *M/V “Louisa”* case, to which Italy has referred, the Tribunal considered that  
16 the issue of exhaustion of local remedies should be examined at a future stage of the  
17 proceedings.<sup>13</sup> However, I do not believe that by so doing the Tribunal laid down a  
18 peremptory rule of procedural law.

19  
20 Finally, it is not correct, contrary to what Sir Michael asserted, that article 295 applies  
21 exclusively in the context of diplomatic protection. That is what he said.

22  
23 It does not say that at all. It just relates to those cases where international law  
24 requires the exhaustion of local remedies. That is the case, as in the matter before  
25 the Tribunal, where a State has *voluntarily* submitted itself to the courts of another  
26 State. That is indeed the meaning of the *electa una via* principle, whose existence  
27 and relevance to our case I recalled yesterday.<sup>14</sup>

28  
29 We maintain, Mr President, that Italy has not established the *prima facie* competence  
30 and jurisdiction of the Annex VII tribunal that is to be set up; nor has Italy established  
31 that the essential conditions have been met for the handing down of those  
32 provisional measures that Italy has requested you prescribe.

33  
34 Mr President, this leads me to make a few comments, if I may, on the second  
35 provisional measure requested by Italy, which calls upon the Tribunal to prescribe  
36 that India lift all bail restrictions and authorize Mr Girone to travel to Italy and Mr  
37 Latorre to remain there until the end of the proceedings before the Annex VII  
38 tribunal. I will take the opportunity to expand my remarks to include other aspects of  
39 the Italian request.

40  
41 As I showed yesterday, the second provisional measure effectively asks you to  
42 deprive India of any possibility of exercising the rights disputed by Italy.

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12 Italian Court of Cassation, Judgment of 29 November 2012, Adler and ors (Abu Omar Case), No. 46340/2012; ILDC 1960 (IT 2012). See [http://www.academia.edu/3854342/Criminal\\_Proceedings\\_v\\_Adler\\_and\\_ors\\_Abu\\_Omar\\_case\\_Final\\_Appeal\\_Judgment\\_No\\_46340\\_2012\\_ILDC\\_1960\\_IT\\_2012](http://www.academia.edu/3854342/Criminal_Proceedings_v_Adler_and_ors_Abu_Omar_case_Final_Appeal_Judgment_No_46340_2012_ILDC_1960_IT_2012)

13 *M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010, p. 69, para. 68.

14 ITLOS/PV.15/C24/2, pp. 18 and 19.

1 First of all, that request corresponds precisely with the request on the merits which  
2 Italy makes under letter (d) of the relief sought at the end of its Notification,<sup>15</sup> such  
3 that, if you were to prescribe that second preliminary measure, the arbitral tribunal  
4 would have to find that there was no need to adjudicate. Now that's what I call  
5 prejudging the merits! This would be especially shocking as this Tribunal cannot rule  
6 on the merits of this case; you would be "prejudging" on the merits even though it is  
7 not for you to give final judgment.

8  
9 This would be irremediable because if Mr Girone is authorized to return to Italy and  
10 to remain there, it is highly likely that he will not return to India to be tried in that  
11 country following an arbitral award by the Annex VII tribunal which totally or partially  
12 upheld India's case by deciding that it, exclusively or jointly with Italy, has jurisdiction  
13 to try the accused. Indeed, we have a choice here between two different aphorisms:  
14 "all things come in threes" or "the worst is not always certain". I would even tend  
15 towards a third: "a fault confessed is half redressed". Unfortunately, it does not apply;  
16 far from acknowledging that it has failed to keep its promise at least twice, yesterday  
17 and this morning Italy tangled itself up in an improbable defence.

18  
19 "Yes indeed", say our opponents – I am paraphrasing, Mr President – "Italy had  
20 undertaken to ensure the *presence* of the four marines other than the two accused if  
21 so required by a court or investigative body; but participating in a videoconference is  
22 a presence".<sup>16</sup> That is not a truth, Mr President, it is a flip-flop. The lecture on Indian  
23 law proffered by Sir Daniel this morning does not alter the situation at all. Section  
24 161 of the Indian Code of Criminal Procedure does envisage the possibility of taking  
25 testimony by videoconference, but that is on the initiative of the police officer in  
26 charge of the investigation, on whom section 160 of that Code expressly confers the  
27 power "to require attendance of witnesses", although he may, at his discretion, agree  
28 to a videoconference. But it is for the police officer to decide, not the witness.

29  
30 I am paraphrasing here again, but I do not believe I am distorting the argument put  
31 forward by our friends opposite when they say: "You complain that Mr Girone and Mr  
32 Latorre did not return to Delhi, when they did go back after their four-month electoral  
33 escapade".<sup>17</sup> Did they vote, incidentally? At any rate they had plenty of time to  
34 deposit their ballot papers. Having said that, it is true that they did go back to Delhi,  
35 but that is *not* the issue. The issue is that Italy had stated in a fully official Note  
36 Verbale, having no regard for the formal undertaking given by its Ambassador in  
37 India, that – I am quoting again:<sup>18</sup> "The two Italian Marines, Mr Latorre and Mr  
38 Girone, will not return to India on the expiration of the permission granted to them."<sup>19</sup>  
39 "They will not return". They did return, but it took the outraged reaction of the  
40 Supreme Court for that to happen.

41  
42 At this stage we are told, and I am still paraphrasing: "Precisely. Horror of horrors,  
43 the order of 14 March 2013, confirmed by the order of 18 March,<sup>20</sup> is contrary to the  
44 sacrosanct principle of diplomatic immunity". This too is totally irrelevant, Mr

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<sup>15</sup> Para. 33.

<sup>16</sup> See ITLOS/PV.15/C24/1 (unchecked), p. 13.

<sup>17</sup> *Ibid.*

<sup>18</sup> See Supreme Court of India, Order of 22 February 2013 (WO, Annex 16).

<sup>19</sup> Note Verbale 89/635 of 11 March 2013 (N, Annex 20).

<sup>20</sup> ITLOS/PV.15/C24/1 (unchecked), pp. 13 and 47.

1 President, because it does not alter the fact that Italy's representative had reneged  
2 on his promise; but our opponents excel in employing these arguments which are  
3 irrelevant but which sound good. "Pure prejudice", whispered my colleague and  
4 friend, Rodman Bundy, to me on this subject yesterday. It is best not to allow  
5 prejudicial doubt to settle in the minds of people. So, very briefly, here are just a few  
6 points to show that we should not be fooled by appearances.

7  
8 The promise of the marines' return had been made to the Supreme Court; it was  
9 performing its function by using the means available to it to ensure that that promise  
10 was kept; by acting as guarantor before it, the Italian Ambassador had, implicitly but  
11 necessarily, waived the application of immunity on that precise point.

12  
13 Even if it were accepted that the temporary ban preventing the Italian Ambassador  
14 from leaving India was illegal "per se" under international law, that ban would be  
15 justified as a countermeasure pursuant to article 22 of the ILC Articles on  
16 Responsibility of States for Internationally Wrongful Acts of 2011, and it is fully  
17 consistent with the requirements of article 49 et seq. of those Articles.

18  
19 Furthermore, as I have already said, the immunity of the State or of its  
20 representatives can be invoked only if the acts in question are connected with  
21 governmental functions;<sup>21</sup> reneging on a promise is not part of those functions.

22  
23 I am saying all of this, Mr President, because Italy attaches an importance to this  
24 episode which it just does not have, certainly not within the context of the case  
25 before us. It is a way of drawing your attention away from the key issues at stake.

26  
27 To come back to the incident that is relevant, namely the initial refusal by Italy to  
28 return Mr Latorre and Mr Girone to Delhi, of which the order of the Supreme Court of  
29 14 March 2013 is just one collateral element, the fact is that, combined with the non-  
30 presence of the other four marines in the NIA investigation, it naturally gives rise to  
31 the greatest possible mistrust on the part of India, to say the least.

32  
33 However, as I said yesterday,<sup>22</sup> it goes further than that. It is clear from the case law  
34 of the two Italian supreme courts, the Constitutional Court and the Court of  
35 Cassation, that they give primacy to principles derived from the Constitution, and in  
36 particular from article 2, relating to inalienable human rights, and from article 24, on  
37 the right of access to the courts, over Italy's international obligations, including where  
38 these stem from a judgment of the International Court of Justice. There is hardly any  
39 doubt that this case law would be applied in the present case if the Annex VII tribunal  
40 were to uphold the request made in paragraph 33(d) of the Italian Notification,  
41 particularly since Italy – or at least the Italian courts, which do form part of the State  
42 – could also invoke article 26 of the Constitution, under which "extradition of a citizen  
43 may be granted only if it is expressly envisaged by international conventions".  
44 However, there is no extradition treaty between India and Italy.

45  
46 In short, Mr President, if this Tribunal were to prescribe the second provisional  
47 measure that is requested of it, India would have absolutely no means of exercising

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<sup>21</sup> See above, para. 6.

<sup>22</sup> See ITLOS/PV.15/C24/2, pp. 38-40.

1 the jurisdiction, whether it be exclusive or joint, that any future award might  
2 recognize.

3  
4 This brings me to the three concluding comments made by Sir Daniel Bethlehem  
5 yesterday morning, which I commented on only briefly yesterday afternoon.

6  
7 First of all, he said that Italy reiterates the undertaking that it has already given to the  
8 Indian Supreme Court to return Sergeant Latorre to India if the Annex VII tribunal so  
9 decides, and extends that undertaking to both the marines.<sup>23</sup> That undertaking was  
10 repeated this morning by the Agent for Italy. Mr President, that would be a fine thing  
11 and I do not for one moment doubt the good faith of our opponents, but  
12 unfortunately, in the present case, they cannot prevail over positions already taken  
13 by the supreme courts in Italy. Italy adopts a two-track approach. Its supreme courts  
14 are not inclined to respect international *res judicata*. I think I have made that point  
15 enough.

16  
17 Secondly, Sir Daniel proposed a kind of deal. I am not sure if it was for India or the  
18 Tribunal. He recalled that Italy paid (in Indian rupees) a surety of around €300,000  
19 for each of the marines concerned, and he made a pretty extraordinary offer. And I  
20 read:

21  
22 *(Read in English)*

23 Italy would be prepared to transform that surety through some appropriate  
24 arrangement into a surety given to India in accordance with the stipulations  
25 of an order of this Tribunal. The amount of the surety that Italy is currently  
26 maintaining in India, and is now offering to continue as a bond pursuant to  
27 an order of this Tribunal, overshadows that required by the Tribunal in *Arctic*  
28 *Sunrise*, in which the amount stipulated was in respect of the release of the  
29 vessel and 30 crew members.<sup>24</sup>

30  
31 *(Interpretation from French)* In commenting on this rather odd proposal, I will also be  
32 replying on behalf of India to the question asked this morning by Judge Cot.  
33 However, we are the respondents in this case and since Italy did not answer the  
34 question this morning, as was its right, we would appreciate the possibility of being  
35 able to comment, if only briefly, in due course on what it has to say on the subject.

36  
37 With that proviso in mind, we consider, first of all, that the comparison with “*Arctic*  
38 *Sunrise*” is not relevant. That case concerned the prompt release of the Greenpeace  
39 vessel and 30 members of its crew, who were alleged by the Russian Federation to  
40 have infringed its laws and regulations, but who were not accused of murder, unlike  
41 Mr Girone and Mr Latorre.

42  
43 That makes a big difference. Murders are not “compensable offences” under  
44 section 302 of the Indian Penal Code. Mr President, I cannot help being troubled and  
45 quite disturbed by Sir Daniel’s offer, which I feel to be a kind of proposal to buy  
46 impunity for the two marines who stand accused of murder. In addition, the proposal  
47 is deceptive and, for India, it would be a fool’s bargain. It would quite simply be  
48 tantamount to “expatriating” the surety which has already been paid – and is not that

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<sup>23</sup> See ITLOS/PV.15/C24/1 (unchecked), pp. 45 and 46.

<sup>24</sup> *Ibid.*

1 high, in view of the circumstances of the case – which has been paid in India by way  
2 of guarantee in accordance with the order of the Indian Supreme Court of 30 May  
3 2012.<sup>25</sup> Be that as it may, Mr President, I have been instructed to state that India is  
4 most adamantly opposed to such a transaction.

5  
6 Now I turn to Sir Daniel's third and last point yesterday. After having called on you to  
7 prescribe the two measures requested by Italy, my learned friend and opponent  
8 added this and I quote:

9  
10 *(Read in English)*

11 If circumstances change, or if India for any other reason wishes to contest  
12 the measures that are prescribed, its right to do so before the Annex VII  
13 tribunal in due course is safeguarded and indeed expressly envisaged by  
14 article 290(5) of UNCLOS, which would allow India to apply to modify or  
15 revoke the provisional measures prescribed.<sup>26</sup>

16  
17 *(Interpretation from French)* I will not spend much time on that suggestion, if only  
18 because without referring to it explicitly I did respond to it yesterday indirectly when I  
19 pointed out that this would amount to making the Annex VII tribunal a sort of  
20 appellate jurisdiction for the present Tribunal.<sup>27</sup> But that is not the purpose of  
21 article 290, paragraph 5, of the Convention on the Law of the Sea: the purpose is to  
22 cope with extremely urgent situations in which the prescription of provisional  
23 measures cannot wait for an arbitral tribunal to be set up.

24  
25 Mr President, let me at this juncture say that we do not accept Sir Daniel's proposals  
26 but that India is prepared to make a different offer. I have been instructed to state  
27 that India is prepared to guarantee that the decision of the Special Court could be  
28 handed down within four months from the date on which the hearings open, if Italy  
29 were to cooperate and withdraw its objections to the procedure before the Indian  
30 Supreme Court.

31  
32 Having said that, I now return to the subject of the extreme urgency required by  
33 article 290, paragraph 5, of the Convention. Quite plainly, Mr President, there is no  
34 such urgency prevailing here; in fact, there is no heightened urgency or even any  
35 urgency at all: having concluded these two days of oral statements, we really cannot  
36 see anything that could establish the existence of it.

37  
38 Concerning the first measure, Mr Bundy showed that there was no risk of imminent –  
39 imminent – harm to the right claimed by Italy to exercise jurisdiction to try (or rather,  
40 clearly, not to try) the two accused, and certainly no injury to this right within the  
41 three months likely to be necessary to set up the Annex VII tribunal – unless the  
42 Parties were to agree to choose another form of settlement. The Indian offer I just  
43 made is no doubt relevant here as well.

44  
45 The same applies to Italy's second requested provisional measure:  
46

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<sup>25</sup> See WO, Annex 11.

<sup>26</sup> *Ibid.*

<sup>27</sup> See ITLOS/PV.15/C24/2, p. 36.

1 – Mr Latorre is receiving care in Italy. His condition seems to be improving and there  
2 is no reason to think that, if necessary, the Indian Supreme Court would not extend  
3 the authorization for him to stay in Italy, which has already been renewed four times;  
4

5 – As to Mr Girone, I can readily believe that he is homesick but I sincerely doubt that  
6 we need to feel too sorry for him. Yesterday I gave you some details concerning his  
7 life in Delhi and the many family visits he has been receiving without restriction.<sup>28</sup> He  
8 has access to – and, it would seem, has been making full use of – modern means of  
9 communication: Skype, Twitter, Facebook and so on.

10  
11 Before I conclude, Mr President, please allow me to make a few quick comments of  
12 a more general nature.  
13

14 The first goes back to the very beginnings of the case and the note verbale of 16  
15 February 2012, the day after the shooting, which you will find in tab 9 of the Judges’  
16 folder prepared by Italy. In this the Italian Embassy announced (*Read in English*):  
17 “The Italian Navy team has photographic evidence of the pirate vessel during the  
18 attack.”<sup>29</sup>  
19

20 (*Interpretation from French*) We have never received that photographic evidence. No  
21 such evidence was adduced in the course of the proceedings. This is telling.  
22

23 My second comment will be to observe that this morning Italy did not return to the  
24 fact that the marines attempted to fabricate evidence corroborating the so-called  
25 attack by a pirate vessel, particularly by telling the Master of the vessel what he  
26 should say.<sup>30</sup> Italy not only has not denied that this happened; it has even appended  
27 one item of evidence of this to the Notification of 26 June.<sup>31</sup> I am referring to the  
28 logbook of the Master of the *Enrica Lexie*.  
29

30 Thirdly, let me correct the very grim picture that our learned friends have been trying  
31 to paint. Over the 36 months which have elapsed since the “*St. Antony* incident” –  
32 and as you know that period is the result of stalling actions taken by the accused and  
33 by Italy itself – the marines have spent a grand total of 43 days in prison, and Mr  
34 Latorre has been in Italy for roughly half of that time. Let me add – contrary to what  
35 Italy and its counsel like to assert again and again (as always with a view to  
36 prejudicing the atmosphere) – that the marines are not detained, not imprisoned.  
37 They are at large under what I would call very light supervision.  
38

39 Lastly, could I remind us all how important it is to keep things in perspective. Let us  
40 never forget the very serious charges against the two marines and yet they have  
41 enjoyed an exceptionally lenient treatment. Nor should we forget the suffering  
42 brought about by the shootings of 15 October 2012 for the fishermen of the

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<sup>28</sup> See ITLOS/PV.15/C24/2, p. 33.

<sup>29</sup> Note Verbale 67/438, 16 February 2012 (N, Annex 10, and Judges’ folder produced by Italy, tab 9).

<sup>30</sup> See ITLOS/PV.15/C24/2, p. 13, and statement of Mr Vitelli Umberto, Captain of the *MV Enrica Lexie*, 15 June 2013 (WO, Annex 27); Statement of Mr Sahil Gupta, Crew Member of the *MV Enrica Lexie*, 26 June 2013 (WO, Annex 29); and Statement of Mr Victor James Mandley Samson, Crew Member of the *MV Enrica Lexie*, 24 July 2013 (WO, Annex 33).

<sup>31</sup> Log book of the Master of the *Enrica Lexie* (N, Annex 14)

1 *St. Antony* (two of them are dead - they are the real victims in this case!), for their  
2 families and for the village community they belonged to.

3  
4 Once again, Mr President, Members of the Tribunal, I am not trying to play on the  
5 sentiments. And, by the way, it cannot be said that our opponents have shed many  
6 tears over the fate of the victims of the shooting – including this morning.<sup>32</sup>

7  
8 However that may be, Mr President, we must nevertheless make no mistake as to  
9 who the real victims are!

10  
11 Mr President, Members of the Tribunal, I am very grateful for your kind attention.  
12 May I request, Mr President, that you now call to the podium the Agent of the  
13 Republic of India, Ms Neeru Chadha, Agent of the Republic of India, who will read  
14 out our final submissions.

15  
16 Thank you.

17  
18 **MR PRESIDENT:** Thank you, Mr Pellet.

19  
20 I understand that this was the last statement made by India during this hearing.  
21 Article 75, paragraph 2, of the Rules of the Tribunal provides that at the conclusion of  
22 the last statement made by a Party at the hearing, its Agent, without recapitulation of  
23 the arguments, shall read the Party's final submissions. The written text of these  
24 submissions, signed by the Agent, shall be communicated to the Tribunal and a copy  
25 of it shall be transmitted to the other Party.

26  
27 I now invite the Agent of India, Ms Chadha, to take the floor to present the final  
28 submissions of India.

29  
30 **MS CHADHA:** Thank you, Mr President. I shall now read the final submissions of the  
31 Republic of India. These remain unchanged from those in our Written Observations.

32  
33 For the reasons explained by India in the Written Observations and during the oral  
34 hearings, the Republic of India requests the International Tribunal for the Law of the  
35 Sea to reject the submissions made by the Republic of Italy in its Request for the  
36 prescription of provisional measures and refuse the prescription of any provisional  
37 measure in the present case.

38  
39 Mr President, in accordance with rule 75 of the Rules of Procedure, a copy of the  
40 written text of the submissions is being communicated to the Registrar of the  
41 Tribunal.

42  
43 Mr President, with your permission, I would like to convey our thanks to all those who  
44 have helped in these proceedings. First, I wish to thank the Registrar, Mr Philippe  
45 Gautier, and the members of the Registry for their cooperation and professionalism  
46 and for working so efficiently to ensure the smooth running of these proceedings.

47  

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<sup>32</sup> ITLOS/PV.15/C24/3, p. 16.

1 I especially thank the interpreters, who have certainly not had an easy time, keeping  
2 pace with those of us who speak so fast.

3  
4 I also thank all those who have worked long hours to produce promptly the verbatim  
5 records of the public sessions.

6  
7 We thank our friends from Italy for their cooperation in the course of the proceedings.

8  
9 I would take this opportunity also to thank our Counsel who, despite the short notice,  
10 readily rushed back from their respective vacations to help us prepare for this case. I  
11 also want to thank other members of the Indian team who have spent long hours  
12 preparing for these proceedings.

13  
14 Before concluding, I would like to thank you Mr President and all the Members of this  
15 distinguished Tribunal for giving us a patient hearing.

16  
17 **THE PRESIDENT:** Thank you, Ms Chadha. This brings us to the end of the hearing.  
18 On behalf of the Tribunal I would like to take this opportunity to express our  
19 appreciation for the high quality of the presentations of the representatives of both  
20 Italy and India.

21  
22 I would like also to take this opportunity to thank both the Agent of Italy and the  
23 Agent of India for their exemplary spirit of cooperation.

24  
25 The Registrar will now address questions in relation to documentation.

26  
27 **THE REGISTRAR** (*Interpretation from French*): Mr President, pursuant to article 86,  
28 paragraph 4, of the Rules of the Tribunal, the Parties may, under the supervision of  
29 the Tribunal, correct the transcripts of speeches and statements made on their  
30 behalf, but in no case may such corrections affect the meaning and scope thereof.  
31 This must be done in the official language used by the Party concerned. These  
32 corrections relate to the checked versions of the transcripts in the official language  
33 used by the Party in question. The corrections should be submitted to the Registry  
34 as soon as possible and by Monday 17 August 2015 at 12 noon, Hamburg time, at  
35 the latest.

36  
37 Thank you, Mr President.

38  
39 **THE PRESIDENT:** Thank you, Mr Registrar.

40  
41 The Tribunal will now withdraw to deliberate. The date for the reading of the Order in  
42 this case is tentatively set to 24 August 2015. The Agents of the Parties will be  
43 informed reasonably in advance of any change to this date.

44  
45 In accordance with the usual practice, I request the Agents to kindly remain at the  
46 disposal of the Tribunal in order to provide any further assistance and information  
47 that it may need in its deliberations prior to the delivery of the order.

48  
49 The sitting is closed.

50



*(The sitting closed at 5.54 p.m.)*