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1.15 Further and most importantly, well-being and humanitarian considerations in favour of persons accused of a serious crime have to be balanced with that of the victims of the crime. It is a generally accepted principle that the latter should prevail in case of conflict. It is surprising that Italy is insensitive to the interests and plight of victims of crime and is adopting a discriminatory attitude. The inconveniences of Mr Latorre and Mr Girone pale in comparison to the murder of two innocent fishermen and the pain and suffering inflicted on their families.

#### B. Italy’s delaying tactic

1.16 Italy complains that “for nearly three-and-a-half years, the Marines have been subjected to the jurisdiction of the Indian courts and to bail restraints, although they have not

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<sup>16</sup> See e.g. Article 284 of the Italian Code of Criminal Procedure.

<sup>17</sup> High Court of Kerala, Order permitting Mr Latorre and Mr Girone to return to Italy for a period of two weeks (Christmas break), 20 December 2012 (Annex 13).

<sup>18</sup> Supreme Court of India, Order permitting Mr Latorre and Mr Girone to return to Italy for a period of four weeks (elections), 22 February 2013 (Annex 16). In this occasion, Italy was not faithful to its words that the petitioners would return to India; See below, para. 1.24.

<sup>19</sup> See Supreme Court of India Order of 16 December 2014 recording the withdrawal of the applications (Annex 29 to the ItSC); See also, ItSC, para. 22.

been formally charged with any offence.”<sup>20</sup> This is simply untrue either due to Italy’s failure to mention the relevant facts or by its ignorance of Indian law.

1.17 As per section 173 of the Indian Criminal Procedure Code,<sup>21</sup> a police report (which is called a charge sheet in the Indian police parlance), is submitted to the jurisdictional court after completion of the criminal investigation. The court takes cognizance of the police report as per provisions of the chapter XIV of the Code, conducts preliminary hearings and frames charges under provisions of chapters XVI and XVII. In the present case, the Kerala Police filed a charge-sheet in the local court on 18 May 2012, within 90 days of arrest of the accused persons, thus paving the way for framing of charges by the court. However, Italy preferred to access the higher courts and succeeded in having the process stayed. For its part, the National Investigation Agency (“NIA”), which was entrusted with the investigation in April 2013,<sup>22</sup> completed its investigation in November 2013, *i.e.* seven months from starting of investigation, in spite of non-cooperation from Italy and a six-months delay occasioned by Italy’s failure to make the four Marines available for questioning. Additionally, the accused made all possible efforts not to appear before the Special Court established to expeditiously try the matter, and to get the process stayed by once again approaching the Supreme Court, initially for questioning the statutory competence of the NIA to investigate the case, and subsequently by way of filing the fresh writ petition 236 of 2014 on the issues of jurisdiction and immunities. It is amply clear that the non-framing of charges is attributable to Italy’s choice of accessing legal remedies from the higher courts against the jurisdiction of the Indian investigation agencies, and not because the agencies failed to complete the investigation process.

1.18 It is also obvious that the Italian account of the facts overlooks the crucial fact that the delays Italy complains of are due to Italy’s own delaying tactic. Trying to pass the blame on India, Italy describes these delays as “...so deplorable that it was criticised by the Chief Justice of the Indian Supreme Court at a hearing on 16 December 2014.”<sup>23</sup> However, a

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<sup>20</sup>ItR, para. 24; See also, paras. 45, 49, 54 and ItSC, para. 23.

<sup>21</sup> <http://www.vakilno1.com/bareacts/crpc/criminal-procedure-code-1973.html>.

<sup>22</sup>Ministry of Home Affairs, Order No. 11011/19/2013-IS.IV, transferring the investigation to the National Investigation Agency, 1 April 2013(Annex 19).

<sup>23</sup>ItR, para. 49.

plain reading of the newspaper article on which Italy bases itself,<sup>24</sup> makes it clear that the Court's ire was targeted against Italy, precisely for its endless efforts to delay the proceedings, and not to India. A party to the dispute cannot first use all possible means to delay the process and then plead victimization of the delay.

1.19 This is what happens in the present case where Italy is wholly responsible for any delay. In this respect, a brief recapitulating chronology is in order; it will show the expeditiousness in which India attempted to bring the case to a quick closure in contrast with Italy's use of all possible means to impede the process:

- The Kerala Police filed its charge sheet in the local court on 18 May 2012, *i.e.* within 90 days after the arrest of the accused persons;<sup>25</sup>
- On 11 July 2012, Italy together with Mr Latorre and Mr Girone filed Special Leave Petition No. 20370/2012 against the High Court of Kerala, Judgement of 29 May 2012;
- Also, while the NIA promptly started its investigation, Italy failed to honour its commitment it had earlier given before the Supreme Court to make the witnesses available, which further added to the delay;<sup>26</sup>
- Italy refused to send back the Marines after voting in Italy had further complicated the matters and enhanced delays;<sup>27</sup>
- In spite of these delays caused by Italy, three months by the Kerala police and seven months by the NIA is the total sum of time consumed by the Indian investigation agencies. Moreover, had the trial commenced, it would have not taken more than a few months since an exclusive court was designated for the purpose;

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<sup>24</sup>“Supreme Court disallows Italian marines’ plea”, *DNA India*, 16 December 2014, <http://www.dnaindia.com/india/report-supreme-court-disallows-italian-marines-plea-2044405>(Annex 45).

<sup>25</sup> Police of Kerala, Charge Sheet, 15 February 2012 (Annex XX).

<sup>26</sup> See below, paras. 1.22-1.23.

<sup>27</sup>Note Verbale No. 89/635 from Minister of Foreign Affairs of Italy to the Minister of External Affairs of India, 11 March 2013 (Annex 20 to the ItSC).

- But, in spite of a clear ruling by the Supreme Court in its judgment of 18 January 2013 that cleared the pitch for a fair and speedy trial,<sup>28</sup> Italy has disregarded the principle of *res judicata* and repeatedly approached the court on jurisdictional issues and in the process sought a stay on trial proceedings;
- On 15 April 2013, Italy, Mr Latorre and Mr Girone moved to the Supreme Court of India again challenging the entrustment of the investigation to the NIA;
- On 13 January 2014, Italy, Mr Latorre and Mr Girone challenged before the Supreme Court of India the authority of the NIA to file the charge-sheet in the case against Mr Latorre and Mr Girone;
- On 8 July 2015, Italy filed an application for deferring the writ petition, pending the Award of the Annex VII Arbitral Tribunal in the present case and for extending the stay of accused Mr Latorre until the final settlement of claims in the arbitration proceedings.

1.20 Italy, having done all in its power to slow down the process and delay the trial cannot now complain of the (relative) success of its tactic. *Nemo auditor propriam turpitudinem allegans*.

### C. India's well-founded mistrust of Italy's word

1.21 In the same vein, it must be noted that India (and, by the same token, this Tribunal too) has good reasons to put Italy's word in question. In effect, on two occasions, Italy has broken its solemn promises.

1.22 The first instance of such *mala fide* behaviour concerns the non-appearance of the four marines, other than the accused, who were summoned to give their testimony during the investigation of the NIA. Their presence had been a condition made by the Writ Petition directing the release of *MV Enrica Lexie* granted by the High Court on 29 March 2012.<sup>29</sup> This

<sup>28</sup> See Supreme Court of India, Judgment, 18 January 2013 (Annex 19 to the ItSC).

<sup>29</sup> High Court of Kerala, Order releasing the *MV Enrica Lexie* and its crew, 29 March 2012 (Annex 6).

condition was confirmed by the Supreme Court of India, in Civil Appeal on 2 May 2012.<sup>30</sup>The Italian Government also gave the assurance that they would produce the four other marines on board for the purpose of the investigation and trial<sup>31</sup>and, in view of this commitment, the ship was eventually released on 7 May 2012.

1.23 However, when summoned to appear before the Investigating Agency in May 2013,<sup>32</sup> the four Italian marines did not appear for the purpose of the investigation in spite of a sovereign commitment earlier issued by Italy before the Supreme Court of India. Instead, they responded through their counsel that they were not in a position to appear.<sup>33</sup>Notwithstanding these impediments, by mid-September 2013, the NIA completed its criminal investigation except for the examination of the four Italian marines. Efforts for securing the presence of the marines in India continued through diplomatic channels. Due to the continuous non cooperative attitude of Italy, finally the NIA had to contend with examination through video conferencing on 11 November 2013, in which the four Italian marines witnesses stationed in Italy were examined.<sup>34</sup>

1.24 Another occasion when Italy clearly broke its word followed the authorization given by the Supreme Court on 22 February 2013 for the two accused persons to travel to Italy under the control and custody of the Ambassador of Italy in India, in order to cast their ballot in the elections scheduled for 24-25 February on the condition that they would promptly return to India.<sup>35</sup>However, on 11 March 2013, the Italian Foreign Ministry announced that the petitioners would not be returning to India.<sup>36</sup>It was only after the Supreme

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<sup>30</sup>Supreme Court of India, Order confirming the release of the *MV Enrica Lexie* and its crew, 2 May 2012 (Annex 10).

<sup>31</sup>Assurances given by the Republic of Italy to the Supreme Court of India ensuring that Mr Renato Voglino, Mr Massimo Andronico, Mr Alessandro Conte and Mr Antonio Fontana will remain at the disposal of India's courts and authorities, 2012 (Annex 9).

<sup>32</sup> See National Investigation Agency, Notice to witnesses Mr Renato Voglino, Mr Massimo Andronico, Mr Alessandro Conte and Mr Antonio Fontana, 10 May 2013(Annex 22).

<sup>33</sup> See letters of 11 June 2013, 21 June 2013 and 8 July 2013 (Annexes 26, 28 and 30).

<sup>34</sup> Note Verbale 447/2517 from the Embassy of Italy in India to the Minister of External Affairs of India, 5 November 2013(Annex 20 to the ItSC).

<sup>35</sup>Supreme Court of India, Order permitting Mr Latorre and Mr Girone to return to Italy for a period of four weeks (elections), 22 February 2013(Annex 16).

<sup>36</sup>Note Verbale No. 89/635 from Minister of Foreign Affairs of Italy to the Minister of External Affairs of India, 11 March 2013 (Annex 20 to the ItSC).

Court had taken exception to the conduct of Italy and taken up the matter for hearings,<sup>37</sup> that the accused individuals returned from Italy on 22 March 2013.

1.25 Bearing in mind the circumstances set out above, it appears with great clarity that the attempts made by Italy to cast itself and the accused as victims is totally misplaced. Such a presentation completely overlooks crucial elements of the case, which results in a totally distorted image. The real victims of the “incident” reconstructed by Italy are two Indian fishermen killed by the two Italian Marines, not the Italian Marines who, for their part have indeed endured some inconveniences related to their status of standing accused of murders. However, these inconveniences are in line with their status, and not comparable to the losses and suffering endured by the victims and their families. As far as Italy itself is concerned, it must be noted that the intransigence it has shown at every stage of the process and its failure to honour its sovereign commitments made before the Indian Supreme Court, do not allow it to present itself as a victim.

#### **IV. Outline of the written observations**

1.26 The present Written Observations are divided into three Chapters:

- In Chapter I, India re-establishes the true legal background of the case submitted by Italy;
- In Chapter II, it presents the factual background, which has preceded the Italian Notification of its claims; and
- Chapter III shows that the Request for the prescription of provisional measures made by Italy on 21st of July is inadmissible and ill-founded.

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<sup>37</sup>Supreme Court of India, Order directing Ambassador Daniele Mancini not to leave India without the permission of the Supreme Court, 14 March 2013; Supreme Court of India, Order extending the Order of 14 March 2013 directing Ambassador Daniele Mancini not to leave India without the permission of the Supreme Court, 18 March 2013 (Annexes 17 and 18).

## CHAPTER 2

### FACTUAL BACKGROUND

2.1 Italy's Statement of Claim and Request for Provisional Measures give an account of the facts which is grossly misleading both for their biased presentation and the various important facts they totally overlook whether concerning:

- the so-called "incident" itself (I);
- the investigation by India (II); and
- the proceedings before the Indian courts (III).

A chronology of the relevant events is annexed to the present Chapter.

#### I. The "Incident": Facts

2.2 On 15 February 2012 at about 4:30 p.m. Indian Standard Time, an Indian fishing boat *St. Anthony*, engaged in fishing activity in the deep sea at a distance of about 20.5 nautical miles in the Arabian sea off the Indian coast at Kollam, Kerala (at the position of 09 degree 17.2 Minutes North Latitude and 076 Degree 01.8 minutes E Longitude) faced a volley of fire originating from two uniformed persons on board an oil tanker ship which was roughly about 200 meters from the boat. Two fishermen were fatally hit due to fire arm injuries and the life of nine other fishermen on the boat was endangered due to the firing incident. Valentine Jelastine, who was at the helm of the boat, was hit by a bullet on his head and Ajeesh Pink, who was at the bow, was hit by a bullet on his chest – both died on the spot. In addition to the casualties, the incident also caused serious damage to the boat endangering the safe navigation of the fishing vessel.

2.3 At about 5:40 p.m., the local coastal Police Station received information about the incident through a call from the sea, which alerted the Indian Coast Guard, who in turn alerted the Marine Rescue Coordination Centre ("MRCC"), Mumbai and identified that *MV Enrica Lexie* was the vessel involved in the incident.<sup>38</sup>The vessel was then asked to return back to the coast and join the investigations, to which the captain agreed and brought the vessel to the Kochi Port at 10:35 p.m. The surviving fishermen on board *St. Anthony* reached

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<sup>38</sup> See Diary of Events of Coast Guard, 2012 (Annex 1); Statement of Commandant, Coast Guard, Officer in-Charge, MRCC, dated 16 July 2013 (Annex 31).

the Coastal Police Station, Neendakara, Kollam, Kerala at about 11:15 p.m. and lodged a police complaint<sup>39</sup> through Freddy, owner of the boat and eye witness to the incident based on which the Kerala police started a criminal investigation.

## II. Investigation

2.4 The Kerala police conducted inquest proceedings of the deceased fishermen, Ajeesh Pink and Valentine Jelastin and the Civil Forensic Surgeon of the Government Hospital conducted the post-mortem.<sup>40</sup>The bodies of the deceased as well as the bullet marks on the fishing boat were examined by the ballistics expert,<sup>41</sup> and evidence was collected. It was followed by a ballistic scene of crime examination.<sup>42</sup>

2.5 The preliminary investigation confirmed that on 6 February 2012, six Italian marines were deployed on board *MV Enrica Lexie* as Vessel Protection Detachment (“VPD”). On 12 February 2012, the team embarked on the ship from Galle in Sri Lanka. Chief Master Sergeant Massimiliano Lattore was the team leader and five others, including Sergeant Salvatore Girone reported to him. The investigation established that Massimiliano Lattore and Salvatore Girone were involved in the firing incident and that they were arrested on 19 February 2012. On 18 May 2012 (within 90 days after the arrest of the Marines), on the strength of evidence collected in the investigation, the Kerala Police filed its report (called charge-sheet in the Indian law enforcement parlance) in the magistrate court and recommended charges against the accused persons under various sections of Indian

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<sup>39</sup>First Information Statement of Freddy, 15 February 2012 (Annex 2) (Translated version from the vernacular language). The complaint clearly explains the unprovoked firing from the ship, the fatal nature of the injuries suffered by the two fishermen, the damage to the navigation and the trauma faced by the surviving fishermen.

<sup>40</sup> Post mortem of the deceased confirms deaths caused by fire arm injuries. Jelastine died due to a bullet injury on his head, and Ajeesh Pink died due to a bullet injury received on his abdomen (see Post-Mortem Report of Mr Ajeesh and Mr Valentine, 16 February 2012 (Annex 4)).

<sup>41</sup> Ballistics Expert Report confirms that the bullets recovered from the dead body were fired from two of the weapons seized from the *MV Enrica Lexie*, of the make 5.56 mm caliber Beretta SC AR 70/90 Rifle, which is a standard issue service rifle used by the Italian armed forces (see Ballistics Expert Report on B1-1001/FSL/2012, Thiruvananthapuram, dated 4 April 2012 (Annex 7)).

<sup>42</sup> The Ballistic Expert Report based on the scene of crime examination has confirmed the trajectory and firing distance. A separate forensic examination report has confirmed that the remnants of pellets recovered from the fishing boat as well as the bullets recovered from the dead body are similar to the recovered ammunition regarding their metallic composition (see Scene Examination Report No. B1-873/FSL/2012, dated 19 April 2012 (Annex 8)).



law.<sup>43</sup>Vide Order dated 25 February 2012, the case was committed to the Sessions Court. On 30 May 2012, the High Court of Kerala granted bail to the Marines subject to the fulfilment of certain conditions. The accused Marines were released on 2 June 2012 from prison on bail and thereafter they continue to remain on bail to the present date.

2.6 From April 2013 to November 2013 the National Investigation Agency (“NIA”) conducted an investigation in compliance with the orders of the Indian Supreme Court. During the course of its investigation, the NIA examined 71 witnesses, collected 144 numbers of documents and 44 material objects which were taken on record.

2.7 The NIA investigation confirmed the Kerala police findings and further evidence was collected to prove that:

- a) Twenty rounds were fired by the accused Marines from the 5.56 mm automatic Beretta rifles,<sup>44</sup>and they used lethal force on unarmed fishermen which was a disproportionately high response for the situation;
- b) The weather was clear,<sup>45</sup>it was day time, the boat was not far from the ship,<sup>46</sup>and as such there was no scope to assume a piracy attack when there were no piracy alerts for the region on that day.<sup>47</sup>Moreover, the area was in a fishing zone,<sup>48</sup>and the fishingboat *St. Anthony* did not even closely resemble any pirate skiff.<sup>49</sup>

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<sup>43</sup> The sections of law used were, Sections 302 (murder), 307 (attempt to murder), 427 (mischief causing damage) read with 34 (common intention) of the Indian Penal Code and Section 3 of the Suppression of Unlawful Acts Against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act of 2002 (the “SUA Act”).

<sup>44</sup>Search List for Weapons, 26 February 2012 (Annex 5); Statement of Assistant Director (Ballistic), dated 19 July 2013 (Annex 32).

<sup>45</sup> Witness statement of Captain Mr. Vitelli Umberto, dated 15 June 2013; Statement of Mr. Sahil Gupta, Crew member, dated 25 June 2013; Statement of Mr. Victor James Mandley, crew member, dated 24 July 2013. (Annexes 27, 29 and 33).

<sup>46</sup>*Ibid.*

<sup>47</sup>*Ibid.*

<sup>48</sup><http://www.mschoa.org/docs/public-documents/fishery-template-india.pdf?sfvrsn=2>

<sup>49</sup> BMP4 Best Management Practices for Protection against Somalia based Piracy, available at: [http://www.mschoa.org/docs/public-documents/bmp4-low-res\\_sept\\_5\\_2011.pdf?sfvrsn=0](http://www.mschoa.org/docs/public-documents/bmp4-low-res_sept_5_2011.pdf?sfvrsn=0).

- c) There were significant breaches of Best Management Practices (“BMP4”)<sup>50</sup> issued by the International Maritime Organisation (“IMO”) in terms of response to the incident and use of force;
- d) There was no truth in the claim of the accused Marines of sighting six armed personnel on the boat *St Anthony*<sup>51</sup> and an e-mail to that extent was created as a cover to justify their actions.<sup>52</sup>

### III. Proceedings before the Indian Courts regarding the “Incident”

#### A. Release of the *MV Enrica Lexie*

2.8 On 29 March 2012, the High Court of Kerala,<sup>53</sup> in a separate petition, directed the release of the *MV Enrica Lexie*, under certain conditions. On 2 May 2012, the Supreme Court of India confirmed the release of the Italian ship *MV Enrica Lexie* under certain conditions such as, *inter alia*, that the ship owners will produce the six crew members before the court or investigating agency when called upon to do so.<sup>54</sup> The Italian Government also made an assurance that it would produce the four other marines on board for the purpose of the investigation and trial.<sup>55</sup> The ship was eventually released on 7 May 2012.<sup>56</sup>

#### B. Challenging jurisdiction before the Kerala High Court and the Supreme Court

2.9 On 23 February 2012, Italy and the arrested persons preferred Writ Petition No.4542 of 2012 before the High Court of Kerala, challenging the jurisdiction of the Kerala

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<sup>50</sup>BMP4 Best Management Practices for Protection against Somalia based Piracy, available at: [http://www.mschoa.org/docs/public-documents/bmp4-low-res\\_sept\\_5\\_2011.pdf?sfvrsn=0](http://www.mschoa.org/docs/public-documents/bmp4-low-res_sept_5_2011.pdf?sfvrsn=0).

<sup>51</sup>Statement of Mr Sahil Gupta, Crew Member of the *MV Enrica Lexie*, 26 June 2013 (Annex 29); Statement of Mr Victor James Mandley Samson, Crew Member of the *MV Enrica Lexie*, 24 July 2013 (Annex 33).

<sup>52</sup>Statement of Mr Vitelli Umberto, Captain of the *MV Enrica Lexie*, 15 June 2013 (Annex 27).

<sup>53</sup>High Court of Kerala, Order releasing the *MV Enrica Lexie* and its crew, 29 March 2012 (Annex 6).

<sup>54</sup>Supreme Court of India, Order confirming the release of the *MV Enrica Lexie* and its crew, 2 May 201 (Annex 10).

<sup>55</sup>Assurances given by the Republic of Italy to the Supreme Court of India ensuring that Mr Renato Voglino, Mr Massimo Andronico, Mr Alessandro Conte and Mr Antonio Fontana will remain at the disposal of India’s courts and authorities, 2012 (Annex 9).

<sup>56</sup>Supreme Court of India, Order confirming the release of the *MV Enrica Lexie* and its crew, 2 May 2012 (Annex 10).

Police.<sup>57</sup>On 29 May 2012, the Court dismissed the Writ Petition and upheld the jurisdiction of the Kerala Police to investigate the offences.<sup>58</sup> Even while the matter of criminal jurisdiction was being heard by the High Court of Kerala, on 19 April 2012 Italy itself and the arrested persons chose to approach the Supreme Court of India.<sup>59</sup>After losing their case in the High Court of Kerala, the petitioners preferred a special leave petition against the judgment of the High Court of Kerala which was heard jointly with the Writ Petition. On 18 January 2013, the Supreme Court pronounced its judgment and held that the Union of India and not the Kerala Police would henceforth deal with the criminal case.<sup>60</sup> For that purpose, the government was directed to set up a Special Court for the criminal trial.<sup>61</sup>

2.10 In compliance with the Supreme Court's orders, on 1 April 2013, the Ministry of Home Affairs of the Government of India entrusted investigation to the NIA.<sup>62</sup>On 15 April 2013, the Ministry of Home Affairs notified the Special Court and Special Public Prosecutors to prosecute and try the case.<sup>63</sup>At this stage, Italy and the Marines once again approached the Supreme Court challenging the decision of the Government of India to entrust the investigation to the NIA.<sup>64</sup> The Supreme Court declined to intervene in the matter stating that its earlier judgment takes care of the interests of the petitioners.<sup>65</sup>

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<sup>57</sup>Writ Petition No. 4542 of 2012 before the High Court of Kerala (Annex 15 of volume 2-Annex A of Italy Request).

<sup>58</sup>High Court of Kerala Judgment in Writ Petition No. 4542 of 2012 (Annex 17 of volume 2-Annex A of Italy's Request).

<sup>59</sup> Writ Petition (Civil) No.135 of 2012 under Article 32 of the Constitution of India, challenging the legality of the investigation and alleging violation of their fundamental rights under Articles 14 and 21 of the Constitution of India (Annex 16 of volume 2-Annex A of Italy's Request).

<sup>60</sup>Italy & Others v. Union of India & Others, Supreme Court of India Judgement of 18 January 2013 (Annex 19 of volume 2-Annex A of Italy Request).

<sup>61</sup>Annex 19 of volume 2-Annex A of Italy Request; Relevant extracts of the operative portion of the judgement read as "The Union of India is, therefore, directed, in consultation with the Chief Justice of India, to set up a Special Court to try this case and to dispose of the same in accordance with the provisions of the Maritime Zones Act, 1976, the Indian Penal Code, the Code of Criminal Procedure and most importantly, the provisions of UNCLOS 1982, where there is no conflict between the domestic law and UNCLOS 1982".... "This will not prevent the Petitioners herein in the two matters from invoking the provisions of Article 100 of UNCLOS 1982, upon adducing evidence in support thereof, whereupon the question of jurisdiction of the Union of India to investigate into the incident and for the courts in India to try the accused may be reconsidered. If it is found that both Italy and the Republic of India have concurrent jurisdiction over the matter, then these directions will continue to hold good".

<sup>62</sup>Ministry of Home Affairs, Order No. 11011/19/2013-IS.IV transferring the investigation to the National Investigation Agency, 1 April 2013 (Annex 19).

<sup>63</sup>Ministry of Home Affairs, Order No. 11011/27/2012-IV.VI confirming Order No. 11011/19/2013-IS.IV transferring the investigation to the National Investigation Agency, 15 April 2013 (Annex 21).

<sup>64</sup>Supreme Court Orders dated 25 April 2013 and 26 April 2013 in Writ Petition No. 135/2012 (Annex 56).

<sup>65</sup> *Ibid.*

2.11 The NIA expeditiously proceeded with the investigation and concluded its collection of evidence by August 2013, except for the examination of the four Italian marine witnesses. In spite of a sovereign commitment made by Italy before the Supreme Court of India,<sup>66</sup> efforts for securing the presence of the marines in India, which commenced in May 2013 and continued through diplomatic channels up to November 2013, yielded no result, and Italy continued to dishonour its commitment. Finally, the NIA had to conduct their examination through video conferencing on 11 November 2013 with a sub-optimal outcome.

C. Challenging the jurisdiction of the Special Court and preventing the NIA from submitting the charge sheet

2.12 On 27 November 2013, the NIA completed the investigation and submitted the Investigation Report to the Ministry of Home Affairs, New Delhi, for obtaining the necessary sanction for prosecution. Simultaneously, the agency moved for transfer of the legal custody over the Marines to the Special Court as envisaged by the Supreme Court, which was resisted by the Marines by challenging the jurisdiction of the Special Court. Subsequently, on 15 January 2014, the accused persons and Italy filed an application in the Supreme Court with a prayer to prevent the NIA from filing the final report (or charge-sheet).<sup>67</sup> In the meanwhile, the Government of India decided to extend a partial reprieve to the Marines by allowing the NIA to allow prosecution only under the sections of murder, attempt to murder and incidental other offences and communicated its decision to the Supreme Court on 24 February 2014 – which was also recorded by the Court in an Order.<sup>68</sup>

2.13 In spite of repeated rulings of the Supreme Court that the issues of jurisdiction would be heard by the Special Court and that the parties would be given full liberty to argue their case there, including on jurisdiction, and further, in spite of the criminal case being ripe for the framing of charges, the start of the proceedings was delayed not once, but twice, Italy and the Marines preferred to file a fresh writ petition<sup>69</sup> challenging the Indian jurisdiction and claiming functional and sovereign immunity.

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<sup>66</sup>Assurances given by the Republic of Italy to the Supreme Court of India ensuring that Mr Renato Voglino, Mr Massimo Andronico, Mr Alessandro Conte and Mr Antonio Fontana will remain at the disposal of India's courts and authorities, 2012 (Annex 9).

<sup>67</sup>Interim Application in Special Leave Petition 20370/2012, 13 January 2014 (Annex 37).

<sup>68</sup>Supreme Court of India, Order, 24 February 2014 (Annex 38).

<sup>69</sup>Writ Petition No. 236/2014, 6 March 2014 (Annex 40).

#### D. The Indian courts' humane and flexible behaviour

2.14 On various occasions, the High Court of and the Supreme Court acted in a highly sympathetic manner and responded favourably to the requests of the Marines with regard to the relaxation of their bail conditions.

2.15 The Italian Marines had first approached the High Court of Kerala for relaxation of bail conditions and sought permission from the High Court to travel to Italy for Christmas vacations.<sup>70</sup> Though a criminal trial was pending and the proceedings were in progress, the High Court allowed the Marines to travel to Italy for a period of two weeks for Christmas vacations.<sup>71</sup> The Marines thereafter returned to India on 3 January 2015 in compliance with the Kerala High Court Order.

2.16 The Italian Marines filed another application in the Supreme Court seeking permission to travel to Italy for the purpose of casting their votes in the election in their country. In support of this request by the Marines, the Ambassador to Italy also filed a personal undertaking as to the request of the Italian Marines holding himself to be fully responsible to ensure that the Marines would return back to India upon expiry of the said period.<sup>72</sup> Upon receiving the Affidavit of Undertaking, the Supreme Court allowed the Italian Marines to travel to Italy and remain there for a period of four weeks and to return to India thereafter. The Marines were to be bound to the bail conditions once they returned from Italy.<sup>73</sup> *The Indian Government did not oppose this authorization.*

2.17 However, before the expiry of the four weeks granted, the Italian Embassy issued a communication to the Government of India to set up a meeting at the diplomatic level in order to reach an amicable solution to resolve the controversy.<sup>74</sup> It was further stated that since a controversy between the two States had arisen, the two Marines would not return

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<sup>70</sup> CrI. MA. No. 8204/2012 filed by the Italian Marines before the Kerala High Court ([Annex 52](#)).

<sup>71</sup> High Court of Kerala, Order permitting Mr Latorre and Mr Girone to return to Italy for a period of two weeks (Christmas break), 20 December 2012 (Annex 13).

<sup>72</sup> Affidavit of undertaking filed by Italian Ambassador Daniele Mancini giving assurances that Mr Latorre and Mr Girone will return to India after the elections, 9 February 2013 (Annex 14).

<sup>73</sup> Supreme Court of India, Order permitting Mr Latorre and Mr Girone to return to Italy for a period of four weeks (elections), 22 February 2013 (Annex 16).

<sup>74</sup> Note Verbale No. 89/635 from Minister of Foreign Affairs of Italy to the Minister of External Affairs of India, 11 March 2013 (Annex 20 to the ItSC).

to India on the expiry of the permission granted to them – which was in clear violation of the undertaking given to the Supreme Court. The Union of India replied to the Note Verbale,<sup>75</sup> rejected the stand taken by Italy and informed the Italian side that this was in complete violation of the Order of the Supreme Court, as well as the sovereign undertaking given to the Court.

2.18 The Supreme Court, upon being informed of the decision of the Italian Ministry not to return the Italian Marines, directed that an answer be given to this effect by the Ambassador. The Court also directed that Ambassador Daniele Mancini would not be allowed to leave India without the permission of the Court.<sup>76</sup> However, Sergeant Latorre and Sergeant Girone returned back to India on 22 February 2013 and the matter was heard by the Supreme Court wherein the Court lifted the restriction on the Italian Ambassador to travel outside India.<sup>77</sup>

2.19 An application was filed before the Supreme Court seeking permission to exempt Sergeant Latorre from reporting to the Police Station as he had suffered from a brain stroke.<sup>78</sup> The Court granted this reprieve vide its Order allowing the Marine not to report to the Police Station for some time due to his medical condition.<sup>79</sup> *The Union of India also did not oppose this application.*

2.20 Another application was also filed along with the earlier application for Sergeant Latorre to travel to Italy for a period of four months for medical recuperation and medical reasons.<sup>80</sup> The Supreme Court was pleased to grant the relief to Sergeant Latorre and allowed him to travel to Italy for a period of four months. *The Union of India again did not*

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<sup>75</sup>Ministry of External Affairs Note Verbale No. WI(A)/415/6/2012 Vol III, dated 12 March 2013 (Annex 51).

<sup>76</sup>Supreme Court of India, Order extending the Order of 14 March 2013 directing Ambassador Daniele Mancini not to leave India without the permission of the Supreme Court, 18 March 2013 (Annex 18).

<sup>77</sup> Supreme Court of India, Order acknowledging the return to India of Mr Latorre and Mr Girone, 2 April 2013 (Annex 20).

<sup>78</sup>Prayer (b) in Interim Application No. 6/2014 filed for relaxation of bail conditions (Inability to report to Police Station due to brain stroke).

<sup>79</sup>Supreme Court of India, Order, 8 September 2014 (Annex 42).

<sup>80</sup>Prayer (a) in Interim Application No. 6/2014 filed for relaxation of bail conditions (Permission to travel to Italy for a period of four months for recuperation and medical reasons).

*oppose this request by the Italian Marine. No application was made on behalf of Salvatore Girone.*<sup>81</sup>

2.21 Then for the first time after the Order of 22 February 2013 (mentioned above)<sup>82</sup> allowing Sergeant Girone to travel to Italy, another application was preferred on behalf of Sergeant Girone seeking to relax bail conditions so that he may be allowed to travel to Italy,<sup>83</sup> and simultaneously another application was filed by Sergeant Latorre asking for extension of time and seeking permission to place certain documents in sealed cover before the Court.<sup>84</sup> However, counsel appearing for both accused withdrew the interim applications<sup>85</sup> and the Supreme Court disposed of the applications as withdrawn.<sup>86</sup> *Clearly, neither the Supreme Court rejected the application by Salvatore Girone and Massimilano Latorre nor did the Union of India make any submission opposing the prayers sought.*

2.22 Thereafter, Sergeant Latorre filed another application,<sup>87</sup> seeking for bail condition relaxation and asking for an extension of his stay in Italy. The Supreme Court extended his stay for another three months.<sup>88</sup> *The Union of India again did not oppose this request by the Italian Marine. No application was made on behalf of Mr Girone.*

2.23 Thereafter, Sergeant Latorre filed another application,<sup>89</sup> seeking for bail condition relaxation and asking for another extension of his stay in Italy. The Union of India even on this occasion did not make any objection to this request by the Italian Marine and the Supreme Court extended his stay until 15 July 2015.<sup>90</sup> *The Union of India again did not*

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<sup>81</sup> Supreme Court of India, Order permitting Mr Latorre to return to Italy for a period of four months for medical treatment, 12 September 2014 (Annex 43).

<sup>82</sup> See para. 2.16.

<sup>83</sup> Application for Directions and Relaxation of Bail Conditions on Behalf of Sergeant Major Salvatore Girone, 9 December 2014 (Annex 22 to ItSC).

<sup>84</sup> *Ibid.*

<sup>85</sup> Supreme Court of India Order of 16 December 2014 recording the withdrawal of the applications (Annex 29 to the ItSC).

<sup>86</sup> *Ibid.*

<sup>87</sup> Application for Directions and Relaxation of Bail Conditions on Behalf of Chief Master Sergeant Massimiliano Latorre, 9 December 2014 (Annex 23 to the ItSC)

<sup>88</sup> Supreme Court of India, Order, 14 January 2015 (Annex 30 to the ItSC).

<sup>89</sup> Interim Application No.12 in SLP (C) No. 20370/2012 (Bail condition relaxation for Massimiliano asking for an extension of his stay in Italy) (Annex 54).

<sup>90</sup> Supreme Court of India, Order, 9 April 2015 granting a further extension to Sergeant Latorre (Annex 31 to the ItSC).

*oppose this request by the Italian Marine. No application was made on behalf of Salvatore Girone.*

2.24 Instead of respecting the repeated indulgences granted by the Supreme Court and returning to India within the extended time granted by the Supreme Court, Sergeant Latorre filed a new application seeking an extension to remain in Italy for further treatment and recuperation until the award of the decision of the Annex VII Tribunal.<sup>91</sup> Another application was filed by Sergeant Girone seeking a deferment of the proceedings in the Writ Petition in view of the commencement of the arbitration proceedings until the issues in dispute before the Annex VII Arbitration Tribunal would be decided.<sup>92</sup>

2.25 As regards the Application by Sergeant Latorre, the Court again extended his authorization until 15 January 2016 to remain in Italy for further treatment and recuperation.<sup>93</sup> The Union of India did not object to the extension of time on humanitarian grounds. With respect to the application by Sergeant Girone, the Supreme Court issued notice and directed the Union of India to file a Reply Affidavit.<sup>94</sup> *The Union of India again did not oppose this request by the Italian Marine.*

#### E. Next hearing before the Supreme Court

2.26 Subsequent to the issuance of the Notification and Statement of Claim addressed to India expressing Italy's intention to submit the dispute to an arbitral tribunal on 26 June 2015, Italy has simultaneously approached the Supreme Court of India for deferring the matter pending arbitration proceedings before the Arbitral Tribunal under Annex VII to the 1982 UNCLOS.<sup>95</sup> The Supreme Court has scheduled the next hearing for 26 August 2015.<sup>96</sup>

2.27 A Chronology of the relevant events is annexed to the present Chapter.

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<sup>91</sup>Interim Application No.13 in SLP (C) No. 20370/2012 (Extension of stay in Italy until decision by Annex VII Tribunal) (Annex 55).

<sup>92</sup>Interim Applications No. 3/2015 in Writ Petition (C) No. 236/2014 (Deferment of writ proceedings till final decision by Annex VII Tribunal), 8 July 2015 (Annex E to the ItR).

<sup>93</sup>Supreme Court of India, Order, 13 July 2015 (Annex F to the ItR).

<sup>94</sup>*Ibid.*

<sup>95</sup> Interim Application No. 3/2015 in Writ Petition (C) No. 236/2015.

<sup>96</sup>Supreme Court of India, Order, 13 July 2015 (Annex F to the ItR).



## Chronology of Events

### LIST OF DATES IN THE ITALIAN MARINES CASE

Sl. No.	Date	Details
1.	06.02.2012	Six Italian marines were deployed on Board the Italian ship <i>MV Enrica Lexie</i> as Vessel Protection Deployment (“VDP”).
2.	11.02.2012	The team of marines embarked on the ship from Galle in Sri Lanka.
3.	15.02.2012 4:30 p.m.	<i>MV Enrica Lexie</i> encountered an Indian fishing vessel, the <i>St. Anthony</i> at a distance of about 20.5 nautical miles from the Indian sea coast off Kollam, Kerala at around 4:30 p.m. (“IST”) at the position 09 degree 17.2 Minutes North Latitude and 076 Degree 01.8 minutes E Longitude. Two Italian Marines on Board, namely Sergeant Latorre and Sergeant Girone, fired 20 rounds through their Automatic Weapons on the fishing vessel killing two fishermen, Mr Jelastine who was at the helm of the boat and Mr Pink who was at the bow. The act of firing had also endangered the safety of other nine fishermen on board, caused damage to the gas cylinder and wheelhouse of the boat which amounted to endangering the safe navigation of the fishing vessel.
4.	15.02.2012 5:40 p.m.	Neendakara Coastal Police Station, Kollam, Kerala received information through a mobile phone communication from a sailor, who was in turn informed of the incident through a wireless communication from the owner of the boat, an eye witness of the incident. The Coastal Police Station, Neendakara alerted Coast Guard District Headquarters-4, Kochi alerted the MRCC, Mumbai. MRCC, Mumbai which in turn accessed the AIS Plot and identified that the <i>MV Enrica Lexie</i> was the vessel involved in the incident, and asked the captain to change course to Kochi and informed the Coast Guard HQ, Kochi of the matter.
5.	15.02.2012 10:35 p.m.	The vessel <i>LaxmiBhai</i> of the Coast Guard and Dornier Aircraft sailed from Kochi and intercepted the merchant vessel <i>MV Enrica Lexie</i> . They escorted it to the Kochi Port where it anchored at 10:35 p.m.
6.	15.02.2012 11:15 p.m.	The surviving fishermen on board of the <i>St. Anthony</i> reached the Coastal Police Station, Neendakara, Kollam, Kerala at about 11:15 p.m. and lodged a complaint through Freddy, the owner of the boat and an eye witness of the incident. On the basis of the same, FIR No.02/2012 was registered under Section 302 of the Indian Penal Code and the FIR was submitted to the Chief Judicial Magistrate Court, Kollam, Kerala. Kerala Police started an investigation.

7.	16.02.2012	The Circle Inspector inspected the deceased Ajeesh Pink and Valentine Jelastin and the civil surgeon of the Governmental Hospital conducted the <i>post-mortem (Autopsy)</i> . A ballistics expert examined the body of the deceased and the fishing boat and collected the evidence. The Coast Guard and police officers of Kochi City boarded the ship in view of collecting evidence around 11 a.m., after the ship was brought to the Cochin Oil Terminal.
8.	19.02.2012	During the investigation, Kerala Police examined the crew members, and identified and arrested Sergeant Latorre and Sergeant Girone.
9.	21.02.2012	The Director General of the Kerala Police issued Order No. T3-16/673/12, thus constituting a special investigation team.
10.	23.02.2012	Court Writ Petition No.4542 of 2012 was filed before the High Court of Kerala under Article 226 of the Constitution, challenging the jurisdiction of the State of Kerala to conduct a criminal investigation.
11.	24.02.2012	Parallel Criminal Proceedings No.9463 of 2012 were filed against the two Italian accused in Italy under Section 575 of the Italian Penal Code.
12.	26.03.2012	The Investigating Officer of the case Crime No.02/2012 filed a memorandum before the Chief Judicial Magistrate, Kollam, regarding the incorporation of the additional Sections, <i>i.e.</i> Section 3 on the Suppression of Unlawful Activities Against the Safety of Maritime Navigation Act of 2002 (the “SUA Act”) and Sections 307 and 427 of the Indian Penal Code into the charges.
13.	29.03.2012	A single judge of the High Court of Kerala decided the court’s Writ Petition 6083/12 to release the ship under certain conditions.
14.	02.04.2012	The legal heirs of the deceased filed an appeal before the Division Bench against the Judgment releasing the ship and the court kept the order in abeyance.
15.	04.04.2012	The High Court of Kerala directed the ship owners to approach the Magistrate.
16.	10.04.2012	The shipping company filed Special Leave Petition 11942/2012 before the Supreme Court of India.
17.	19.04.2012	Writ Petition No.135 of 2012 was filed under Article 32 of the Constitution of India with the Supreme Court challenging the legality of the investigation and the alleged violations of Articles 14 and 21 of the Constitution of India.

18.	02.05.2012	The Supreme Court, in Civil Appeal No.4167/2012 arising out of S.L.P. (Civil) No. 11942 of 2012, authorized the release of the <i>MV Enrica Lexi</i> through its order dated 02.05.2012 depending on certain conditions: the ship owners made assurances that they would produce the six crew members before the Supreme Court or the NIA. The Italian Government also made assurances that it would produce the four other marines of the VPD for the purposes of the investigation and the trial.
19.	07.05.2012	The ship was released.
20.	18.05.2012	Kerala Police filed a charge sheet (police report) against the accused under Sections 302, 307 and 427, read with Section 34 of the Indian Penal Code, and under Section 3 of the SUA Act of 2002.
21.	22.05.2012	The accused filed Bail Application No. 3517/12 before the High Court of Kerala and bail was granted on 30 May 12.
22.	25.05.2012	The case was committed to the Sessions Court for a criminal trial.
23.	29.05.2012	The High Court of Kerala dismissed the Writ Petition (Civil) No.4542 of 2012 on the grounds of jurisdiction and non-applicability of sovereign immunity. The Court also observed that it was up to the first respondent, the Central Government, to issue a notification authorising any police officer employed under the State Government or under the Central Government to register or investigate a case for offences falling under Section 3 of the SUA Act and further that if the state police proposes to incorporate Section 3 of the SUA Act in the charge sheet, before filing the charge sheet/final report, the sanction of the Central Government could be obtained at a later stage. Since that stage was not reached, the court ruled that the applicability of the SUA Act could not be disregarded.
24.	11.07.2012	Special Leave Petition (Civil) No.20370 of 2012 in the matter of Writ Petition (Civil) Appeal No.135/2012 was filed against the Judgment of the High Court of Kerala
25.	18.07.2012	The accused asked the Supreme Court to stay the trial proceedings of the Kollam court.
26.	20.12.2012	The High Court of Kerala vide Criminal Miscellaneous Application No. 8204/2012 agreed to temporarily relax bail conditions for both Italian Marines by allowing them to travel to Italy for two weeks (Christmas break).
27.	04.01.2013	Italian Marines returned after the Christmas break to Kerala before the deadline fixed by the High Court of Kerala.

28.	18.01.2013	The Supreme Court disposed of the Special Leave Petition (Civil) No.20370 of 2012 and Writ Petition (Civil) No.135 of 2012 and found that the State of Kerala had no jurisdiction to investigate the case.As a consequence, the Union of India directed to set up a Special Court. The question of the applicability of Article 100 of the 1982 UNCLOS and the determination of jurisdiction was left open to be decided by this Special Court.
29.	22.02.2013	A bench headed by the Chief Justice of India disposed of Interim Application (I.A.) No. 4/2013and allowed the accused, Mr Lattore and Mr Girone, to travel to Italy, under the control and custody of the Ambassador of Italy in India, to cast their ballot in the elections scheduled for February 24 and 25.
30.	11.03.2013	The Italian Ministry of Foreign Affairs announced that the two Italian Marines, who were allowed to visit Italy to cast their vote, would not return to India to face the charges pending against them.
31.	14.03.2013	The Supreme Court directed that Mr. Daniele Mancini, Ambassador of Italy, was not to leave India without the permission of the Court.
32.	22.03.2013	The two accused individuals returned from Italy.
33.	01.04.2013	The Ministry of Home Affairs issued Notification No.11011/19/2013-IS-IV to transfer the case to the NIA to conduct the investigation.
34.	04.04.2013	The NIA re-registered the case as RC 04/2013/NIA/DLI and took up the investigation.
35.	15.04.2013	The Ministry of Home Affairs vide Notification No.17011/27/2012-IS-IV, notified the Chief Metropolitan Magistrate*, Patiala House Court, New Delhi, to deal with the case and the Additional Sessions Judge-01, Patiala House Court, New Delhi as Special Designated Court, to try and dispose of the case. The Government also appointed two Special Public Prosecutors in this case.Further, the earlier notification ordering the NIA investigation was modified to include a mention of the Supreme court directions.However, the petitioners moved again to the Supreme Court to challenge the entrustment of the investigation to the NIA.
36.	26.04.2013	The Supreme Court upheld the decision of the Government's steps in compliance with the Judgment of 18 January 2013, and advised the petitioners to raise the question of jurisdiction in the appropriate forum (i.e. before the Special Court).
37.	26.04.2013	The NIA started its investigation.
38.	04.05.2013	The NIA requested the Chief Judicial Magistrate, Kollam to transfer documents and material objects.

39.	07.05.2013	Notices under Section 160 of the Indian Criminal Procedure Code (for witness examination) were prepared and sent to the Ministry of External Affairs for the service of the same to the four Italian marines who were stationed in Italy.
40.	11.05.2013	Notices under Section 160 of the Indian Criminal Procedure Code were prepared and served to the six crew members of the Vessel <i>MV EnricaLexie</i> .
41.	20.05.2013	Sessions Judge Kollam transferred the documents and material objects to the High Court of Kerala.
42.	11.06.2013	The High Court of Kerala transferred the documents and material objects to the Chief Metropolitan Magistrate, Patiala House Courts, Delhi.
43.	14.06.2013	Vacation Judge received the documents and material objects.
44.	20.06.2013	The entire documents and articles connected to the case were received by the Chief Metropolitan Magistrate Court, Patiala House Court, New Delhi.
45.	03.06.2013 to 09.08.2013	The six crew members of the Vessel <i>MV Enrica Lexie</i> were supposed to appear before the investigating officer for the purpose of the investigation. Despite summons, the four Italian marines who were stationed in Italy, did not appear for the purpose of the investigation. They responded through their counsel through letters dated 11 June 2013, 21 June 2013 and 8 July 2013, that they were not in a position to appear even though they had given a commitment to the Supreme Court in Writ Petition (Civil) 4167 of 2012.
46.	20.09.2013	The investigation was completed except for the examination of these four Italian marines. Efforts to secure the presence of the marines continued through diplomatic channels.
47.	11.11.2013	The four Italian marines witnesses, who were stationed in Italy, were examined through audio-video means due to the repeated refusal of the Government of Italy to send them to India in spite of their earlier commitment to the Supreme Court in Writ Petition (Civil) 4167 of 2012.
48.	27.11.2013	The NIA, having completed its investigation, submitted its Investigation Report to the Ministry of Home Affairs, New Delhi, for sanction of prosecution under the SUA Act.
49.	14.01.2014	The accused and Italy filed an interim application with a prayer to prevent the NIA from filing a final report under the SUA Act.

50.	06.12.2013	The accused individuals failed to appear before the designated Special Court, for transfer of custody, as ordered by the Supreme Court in its Judgment dated 18 January 2013.
51.	08.01.2014	Petitioners submitted to the Special Court that they would not appear before it because of some technical and jurisdictional issues.
52.	15.01.2014	Petitioners approached the Supreme Court with a prayer to close the right of the Union of India and the NIA to file any final report/ criminal case against the petitioners. The Supreme Court granted the petition and issued notices to the parties.
53.	17.01.2014	The Ministry of Home Affairs accorded sanction to prosecute under Section 3(1)(a), read with Section 3(1)(g)(i) of the SUA Act of 2002.
54.	06.02.2014	The Ministry of Home Affairs modified the prosecution sanction by according sanction for prosecution under Section 3(1)(a) of the SUA Act of 2002.
55.	24.02.2014	The Ministry of Home Affairs filed an affidavit before the Supreme Court expressing its opinion that the SUA Act is not attractive in this case. The accused further challenged the NIA investigation, with the result of the SUA Act being removed. The Supreme Court allowed the limited legal question of NIA jurisdiction for hearing and directed the petitioners to file an application in this regard. All proceedings in the criminal case were stayed until the disposal of this application.
56.	07.03.2014	The Central Government communicated its order withdrawing from the sanction to prosecute the sections of the SUA Act, leaving the NIA at liberty to charge sheet the case (file a police report) under the sections of the Indian Penal Code relating to murder, the attempt to murder and causing damage to the fishing boat.
57.	26.03.2014	The accused Sergeants Latorre and Girone filed Writ petition No. 236/2014 challenging Indian jurisdiction over the case.
58.	08.09.2014	Sergeant Latorre filed an interim application seeking permission to leave for Italy for rehabilitation and further medication citing brain ischemia.
59.	12.09.2014	The Supreme Court allowed the petition of Mr Latorre to leave for Italy and stay for three months.
60.	10.12.2014	Mr Girone filed an application for the his relaxation of bail conditions to allow him to visit Italy.
61.	16.12.2014	Mr Girone withdrew his petition.

62.	14.01.2015	The permission of Mr Latorre was extended by the Supreme Court for three additional month.
63.	09.04.2015	The permission was further extended upto 15 July 2015.
64.	26.06.2015	By a notification addressed to the Republic of India, Italy submitted the present dispute to Annex VII Arbitration under the UNCLOS.
65.	08.07.2015	Mr Latorre filed an application for further relaxation of his bail.
66.	08.07.2015	The accused filed an application for deferring the Writ Petition, pending the Award of the Annex VII Arbitral Tribunal in the present case and for extending the stay of accused Sergeant Latorre until the final settlement of claims in the arbitration proceedings.
67.	13.07.2015	The Supreme Court of India relaxed the bail condition of Mr Latorre for six additional months on health grounds. The Union of India has been asked to file a Counter Affidavit within four weeks, regarding the prayers filed by Italy. The matter is listed for hearings on 26 August 2015.
68.	21.07.2015	Italy submitted a request for the prescription of provisional measures before the International Tribunal for the Law of the Sea.

### CHAPTER 3

#### INADMISSIBILITY OF ITALY'S REQUEST FOR PROVISIONAL MEASURES

3.1 Italy seizes on the pretext of its Request for the Prescription of Provisional Measures to develop arguments made in its Statement of Claim as to the substance of the case. India will not do so since it is contradiction with the clear prescriptions of Article 290 of the UNCLOS, which limits the purpose of provisional measures to preserving “the respective rights of the parties to the dispute (...) pending the final decision.”<sup>97</sup> Nonetheless, India makes it very clear that its abstention to refute Italy's arguments related to the merits does not imply any acceptance of those arguments.

3.2 As will be further elaborated below,<sup>98</sup> it must be noted that, for its part, Italy does not content itself with arguing the substance of the case; it also asks the Tribunal to draw consequences from these arguments which squarely prejudice the final Award of the Annex VII Tribunal of which Italy has required the constitution. This is particularly so concerning its first submission; but it is also true, by implication with respect to its second submission. This alone is a ground justifying the rejection of the Request; as recently recalled by a Special Chamber of this Tribunal.<sup>99</sup> This is in line with the usual case law according to which “the right of the respondent State to dispute the facts alleged and to submit arguments in respect of the merits must remain unaffected by the Court's decision”<sup>100</sup> As will be further demonstrated below, the provisional measures requested by Italy must be dismissed as well on several other grounds.

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<sup>97</sup> Article 290(1). Provisional measures may also aim at preserving “to serious harm to the marine environment”, but this is not at stake in the present case.

<sup>98</sup> See below, paras. 3.48-3.75.

<sup>99</sup> ITLOS, Special Chamber, Order, 25 April 2015, *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, para. 98. See also, e.g.: ITLOS, Order, 15 December 2012, *The “ARA Libertad” Case (Argentina v. Ghana)*, para. 106; ITLOS, Order, 22 November 2013, *The Arctic Sunrise Case (Kingdom of the Netherlands v. Russian Federation)*, *Provisional Measures*, para. 100.

<sup>100</sup> I.C.J., Order, 10 May 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Provisional Measures, Reports 1984*, p. 182, para. 31. See also I.C.J., Order, 10 January 1986, *Frontier Dispute (Burkina Faso/Republic of Mali)*, *Provisional Measures, Reports 1986*, p. 11, para. 29; Order, 15 March 1996, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, *Provisional Measures, Reports 1996 (I)*, p. 22, para. 40 and Order, 3 March 2014, *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, *Provisional Measures*, para. 54.



3.3 The applicable law is clarified in abundant case law.

3.4 The first pre-requisite for the Tribunal before prescribing provisional measures, is that it “must satisfy itself that *prima facie* the Annex VII Arbitral Tribunal would have jurisdiction.”<sup>101</sup>

3.5 In the present case, Italy asserts that the jurisdiction of the Annex VII Tribunal it wishes to constitute is based on Article 287(5) of the UNCLOS<sup>102</sup> and seems to consider such basis as self-evident. India has serious doubts about it – mainly because the subject-matter of the dispute does not fall within the ambit of the Convention. As explained in the Introduction of these Written Observations, Italy mischaracterizes the subject-matter of the dispute, which is not an incident of navigation, let alone a collision, in the high seas, but a murder committed by two Italian nationals of two Indian nationals in a maritime area under the jurisdiction of India.<sup>103</sup> Similarly it is denied that Italy can invoke the benefit of any immunities recognized by the UNCLOS in favour of the two Marines concerned. Moreover, although it pretends to act in order to protect its own alleged rights, Italy in reality behaves as if it were espousing its nationals’ rights while clearly the conditions for exercising its diplomatic protection are not fulfilled. In any case, even besides the exercise of diplomatic protection, Italy should have exhausted the local remedies available before the Indian courts, given that it has repeatedly chosen to intervene by becoming a party to the petitions filed in the Indian courts by the accused individuals in the proceedings therein. The reality is that Italy has not done so. Article 295 of the UNCLOS is applicable in any case.<sup>104</sup> This is even clearer in the light of the fact that the Special Court instituted following the Judgment of the Supreme Court of India of 18 January 2013 in order to dispose of the pending proceedings

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<sup>101</sup> ITLOS, Order, 22 November 2013, *The Arctic Sunrise Case (Kingdom of the Netherlands v. Russian Federation)*, *Provisional Measures*, para. 58. See also, ITLOS, Order, 3 December 2001, *The MOX Plant Case (Ireland v. United Kingdom)*, *Provisional Measures*, para. 35 and Order, 15 December 2012, *The “ARA Libertad” Case (Argentina v. Ghana)*, para. 60. See also, I.C.J., Order, 3 March 2014, *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, *Provisional Measures*, para. 18 and the case law quoted.

<sup>102</sup> See ItSC, para. 27 and ItR, para. 28.

<sup>103</sup> See paras. 1.5-1.11.

<sup>104</sup> Article 295: “Any dispute between State Parties concerning the interpretation or application of this Convention may be submitted to the procedures provided for in this section [“Compulsory Procedures Entailing Binding Decisions”] only after local remedies have been exhausted where this is required by international law.”

expeditiously<sup>105</sup> – which would have been the case, save for the delaying tactics of Italy –<sup>106</sup> is expressly vested with the competence to reconsider the question of jurisdiction.<sup>107</sup>

3.6 The mischaracterization of the subject-matter of the case by Italy, its evident bias in favour of the individuals accused with murder and its marked and unfounded disdain for the Indian judicial system are such as to lead India to invoke an abuse of legal process on the basis of Article 294 of the UNCLOS.

3.7 India reserves its right to elaborate on the lack of jurisdiction of the ITLOS to proceed with the Request for prescription of provisional measures introduced by Italy during the Hearings on 10-11 August. In the present Written Observations, it will focus on the other conditions which must be fulfilled by a request for provisional measures to succeed.

3.8 These conditions have been enunciated with great clarity by ITLOS in the *Mox Plant* case – a case which, like the present one, involved a request for provisional measures pending the constitution of an Annex VII Tribunal:

64. *Considering* that, according to Article 290, paragraph 5, of the Convention, provisional measures may be prescribed pending the constitution of the Annex VII Arbitral Tribunal if the Tribunal considers that the urgency of the situation so requires in the sense that action prejudicial to the rights of either party or causing serious harm to the marine environment is likely to be taken before the constitution of the Annex VII Arbitral Tribunal;

65. *Considering* that the Tribunal must, therefore, decide whether provisional measures are required pending the constitution of the Annex VII Arbitral Tribunal.<sup>108</sup>

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<sup>105</sup> Supreme Court of India, Judgment, 18 January 2013, *Italy & Ors v. Union of India & Ors*, (Annex 19 to the ItSC).

<sup>106</sup> See Introduction above, paras. 1.16-1.20.

<sup>107</sup> Supreme Court of India, Judgment, 18 January 2013 (Annex 19 to the ItSC).

<sup>108</sup> ITLOS, Order, 3 December 2001, *The MOX Plant Case (Ireland v. United Kingdom)*, *Provisional Measures*, paras. 64-65.

3.9 Thus the Tribunal first summarizes the usual conditions, also recently recalled by the Special Chamber in *Ghana and Côte d'Ivoire*:

42. *Considering*, in this regard, that urgency is required in order to exercise the power to prescribe provisional measures, that is to say the need to avert a real and imminent risk that irreparable prejudice may be caused to rights at issue before the final decision is delivered (see *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, *Provisional Measures, Order of 13 December 2013*, I.C.J. Reports 2013, p. 398, at p. 405, para. 25).<sup>109</sup>

3.10 In other words, there must be:

- a risk of irreparable prejudice to the rights of either party;
- such a risk must be imminent; and
- in case the Request is made before the ITLOS pending the constitution of an Annex VII Tribunal, the urgency must be such that the provisional measures are required pending the constitution the Tribunal.<sup>110</sup>

3.11 India will show that these conditions are far from being fulfilled in the present case, bearing in mind that they must be assessed “on a case by case basis in light of all relevant factors.”<sup>111</sup>

3.12 This Chapter will be divided in three sections respectively showing:

- the total absence of urgency (I);

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<sup>109</sup> ITLOS, Order, 25 April 2015, *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, para. 42. See also ITLOS, Order, 23 December 2010, *The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain)*, para. 72. See also I.C.J., Order, 8 March 2011, *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, *Provisional Measures, Reports 2011 (I)*, pp. 21-22, para. 64. See also I.C.J., Order, 23 January 2007, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, *Provisional Measures, Reports 2007 (I)*, p. 13, para. 42; Order, 28 May 2009, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, *Provisional Measures, Reports 2009*, pp. 152-153, para. 62; Order, 18 July 2011, *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of PreahVihear (Cambodia v. Thailand) (Cambodia v. Thailand)*, *Provisional Measures, Reports 2011 (II)*, p. 548, para. 47 and Order, 3 March 2014, *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, *Provisional Measures*, para. 32.

<sup>110</sup> See the *MOX Plant* case, note 108 above.

<sup>111</sup> ITLOS, Order, 25 April 2015, *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, para. 43.

- that, in fact, the measures requested by Italy would prejudice the final Award of the future Annex VII Tribunal (II); and
- that, in any case, the present situation does create any risk of irreparable prejudice to the rights invoked by Italy and that, in contrast, acceptance of the provisional measure requested by Italy would severely prejudice the rights of India (III).

All these considerations are without prejudice of the absence of jurisdiction of the Annex VII Tribunal to decide on the claims submitted by Italy.

### **I. Total absence of urgency**

3.13 Urgency is one of the basic conditions for the Tribunal to decide provisional measures. And it must be all the more pressing that it must be of a nature such as to justify the precipitous seizing of this Tribunal rather than waiting for the constitution of the Annex VII Tribunal. Neither the first nor the second Italian submission fulfils either the “aggravated urgency” standard resulting from Article 290(5) of the UNCLOS or even the “basic” standard of urgency. Contrary to the impression that Italy seeks to create: that provisional measures are nothing out of the ordinary, provisional measures are not pure routine. They are and must remain exceptional; and when requested on the basis of this provision, they are even more so. The condition of urgency is aimed at preserving this exceptional character.

3.14 Article 290(5) of the UNCLOS, pursuant to which Italy has submitted its Request for Provisional Measures, provides in relevant part as follows:

5. Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea ... may prescribe, modify or revoke provisional measures in accordance with this article if it considers *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4.

3.15 It follows that one of the central requirements for the Tribunal to prescribe provisional measures is that “the urgency of the situation so requires”. Under Article 290(5), the requirement of urgency arises in two ways.

3.16 First, as a Special Chamber of the Tribunal recently reaffirmed in its Order of 25 April 2015 on the request for provisional measures in the *Ghana-Côte d’Ivoire case*: “the Special Chamber may not prescribe provisional measures unless it finds that there is ‘a real and imminent risk that irreparable prejudice may be caused to the rights of the parties in dispute’”<sup>112</sup>As the Special Chamber went on to explain, “urgency is required in order to exercise the power to prescribe provisional measures, that is to say the need to avert a real and imminent risk that irreparable prejudice may be caused to rights at issue before the final decision is delivered”.<sup>113</sup> Thus, the burden falls on Italy as the applicant to demonstrate that the situation with respect to the two provisional measures it requests meets the condition of urgency as described by the Tribunal.

3.17 Second, given that Italy’s Request is made under Article 290(5), it will fall to the Annex VII Arbitral Tribunal, once constituted, to consider whether provisional measures (if requested) are justified or whether any provisional measures previously ordered by this Tribunal should be modified, revoked or affirmed. The notion of urgency must also be seen in this context. In other words, the Tribunal is not called upon to prescribe provisional measures that will remain in place until the substance of the dispute is finally decided by the Annex VII arbitral tribunal; only until the Annex VII Tribunal is in a position to address the matter if requested to do so. As one distinguished jurist has noted in this regard: “[i]n other words, the Tribunal must conclude, not just that there is the possibility of prejudice to the rights of one or other of the parties (or serious damage to the marine environment) but also that the prejudice or damage would occur ‘before the constitution of the arbitral Tribunal’”.<sup>114</sup>

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<sup>112</sup>*Dispute concerning Delimitation of the Maritime Boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean, Provisional Measures, Order of 25 April 2015*, para. 41, citing (*M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain)*, *Provisional Measures, Order of 23 December 2012, ITLOS Reports 2008-2010*, at p. 68. para. 72.

<sup>113</sup>*Ibid.*, para. 42, citing *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, *Provisional Measures, Order of 13 December 2013, I.C.J. Reports 2013*, p. 398, at p. 405, para. 25.

<sup>114</sup> T. Mensah: “Provisional Measures in the International Tribunal for the Law of the Sea (ITLOS)”; <http://www.zaoerv.de> © 2002, Max-Planck\_InstitutfürausländischesöffentlichesRecht und Völkerrecht, p. 47.

3.18 In its Order on Provisional Measures in the *Land Reclamation* case, the Tribunal indicated that the period up to when the Annex VII Tribunal is constituted “is not necessarily determinative for the assessment of the urgency of the situation or the period during which the prescribed measures are applicable”. Rather, it noted that “the urgency of the situation must be assessed taking into account the period during which the Annex VII arbitral tribunal is not yet in a position to ‘modify, revoke or affirm those provisional measures’”. Yet this still places a temporal limit to the assessment whether a situation of urgency exists.

3.19 As India will show below, there is no situation of urgency whatsoever that justifies either of Italy’s requests for provisional measures.

A. 1<sup>st</sup> provisional measure requested by Italy

3.20 Italy’s first submission requests the Tribunal to prescribe the following provisional measure:

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

3.21 Italy has based this request on a selective, self-serving and patently inaccurate account of the judicial and administrative actions that India has taken with regard to the killing of two unarmed fishermen operating within India’s exclusive economic zone by Italian Marines stationed on the *MV Enrica Lexie*. The Italian request also studiously avoids mentioning numerous applications filed by Italy (many of which were abusive and mutually inconsistent) and delaying tactics it engaged in before the Indian courts and in diplomatic correspondence. When the facts are placed in their proper context, they show that there is absolutely no situation of urgency that justifies the Tribunal issuing an order restraining India from continuing to take judicial or administrative measures – measures that it has always carried out lawfully and with absolute fairness to Italy and the two Marines – or to exercise any other form of jurisdiction.

3.22            Contrary to Italy's contentions, the record shows that:

- Italy has consistently resorted to the Indian courts in connection with the incident, and has been accorded full and fair due process in this regard. The Supreme Court of India has acceded to numerous applications filed by Italy in its own name and on behalf of the two Marines, including for the relaxation of bail and the stay of proceedings before the Special Court established by India to try the issues relating to the incident.
- In contrast, Italy has directly flaunted an order of the Supreme Court regarding the return of the two Marines to India after the Court granted them leave to visit Italy in 2013 based on an express undertaking by Italy that they would return by a stipulated date.<sup>115</sup> Italy also reneged on a solemn commitment it gave to India that the four other marines stationed on the *MV Enrica Lexie*, who were allowed to return to Italy, would be made available in India when requested in order to give statements as part of India's investigation.<sup>116</sup> This seriously delayed and compromised India's investigation of the incident.
- Italy's tactics before the Indian courts have also caused unnecessary delay. Despite clear rulings from the Supreme Court that the incident was to be dealt with by the Special Court before which Italy could argue its jurisdictional and immunity objections,<sup>117</sup> Italy has persisted in filing applications on these matters before the Supreme Court. In other instances, the Marines filed applications before the Supreme Court (for example with respect to easing the bail restrictions on Sergeant Girone in December 2014) only to unilaterally withdraw them later. And on 15 January 2014, Italy introduced an application to the Supreme Court challenging the investigation being carried out by the NIA. And less than a month ago, another application was filed before the Supreme Court that the proceedings in its own application be suspended.<sup>118</sup>

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<sup>115</sup> Supreme Court of India, Order permitting Mr Latorre and Mr Girone to return to Italy for a period of four weeks (elections), 22 February 2013 (Annex 16).

<sup>116</sup> Assurances given by the Republic of Italy to the Supreme Court of India ensuring that Mr Renato Voglino, Mr Massimo Andronico, Mr Alessandro Conte and Mr Antonio Fontana will remain at the disposal of India's courts and authorities, 2012 (Annex 9).

<sup>117</sup> Supreme Court of India, Judgment, 18 January 2013, (Annex 19 to the ItSC).

<sup>118</sup> Interim Applications No. 3/2015 in Writ Petition No. 236/2014 (Deferment of writ proceedings till final decision by Annex VII Tribunal), 8 July 2015 (Annex E to the ItR).

3.23 The present position is as follows. All proceedings before the Indian Special Court which has jurisdiction over the incident have been stayed as of March 2014 pursuant to an application made by the Italian side to the Supreme Court. The proceedings that were supposed to be heard on 13 July 2015 did not take place because *the Marines themselves* requested that they be suspended as a consequence of the 26 June 2015 Notification instituting Annex VII Arbitration. That issue – whether to stay consideration of Writ 236/2014 – was and still is scheduled to be heard on 26 August 2015 after allowing India a chance to respond.<sup>119</sup> But before India could do so, Italy filed its Request for Provisional Measures on 21 July. In these circumstances, there is no risk that Italy will suffer any prejudice with respect to these proceedings, no urgency of the situation that would justify provisional measures and no grounds for restraining the Indian judicial and administrative process, which has operated in an exemplary fashion, notwithstanding the various tactics employed by Italy to disrupt the proceedings.

3.24 Without repeating all matters that have already been discussed in the previous sections of these Written Observations, the following facts place the misplaced nature of Italy's first request in perspective.

3.25 In July 2012, Italy moved to quash the jurisdiction of the State Court of Kerala off the coast of which the fishermen had been shot.<sup>120</sup> The matter eventually was raised to the Supreme Court, which issued a Judgment on 18 January 2013 in which it ruled that, given the nature of the dispute, the courts of the State of Kerala did not have jurisdiction.<sup>121</sup> The Supreme Court directed the Union of India to set up a Special Court to try the case. The Court also stated that Italy would be able to raise any objections relating to the right of India to investigate the incident or the Special Court's jurisdiction before the Special Court.

3.26 Shortly afterwards, Italy and the two individuals accused of murder applied for leave to return to Italy to vote in the Italian elections. This application was granted by the Supreme Court in the light of an undertaking made by the Italian Ambassador that the Marines would return by a stipulated date. As discussed in the next section, Italy reneged on

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<sup>119</sup> Supreme Court of India, Order, 13 July 2015 (Annex F to the ItR).

<sup>120</sup> Special Leave Petition 20370/2012, 11 July 2012 (Annex 18 to the ItSC).

<sup>121</sup> Supreme Court of India, Judgment, 18 January 2013 (Annex 19 to the ItSC).



this undertaking by communicating that the Marines would not return. It thus took a further Order by the Supreme Court for Italy to arrange for the Marines to return to India, at which points restrictions that the Court had placed on the Ambassador were lifted.<sup>122</sup>

3.27 During this period, India was taking steps to establish the Special Court, in consultation with the Chief Justice, and to designate the NIA with investigating authority over the incident.<sup>123</sup> Italy approached the Supreme Court seeking to quash the NIA's investigation, but the Supreme Court, in an Order dated 26 April 2013, ruled that it was for the Central Government to take a decision on the matter of responsibility for the investigation. The Court added that, if there was any jurisdictional error in this regard, Italy and the marines could take the issue up with the appropriate forum, which was the Special Court.<sup>124</sup>

3.28 Notwithstanding the ruling of the Supreme Court, Italy continued to impede the investigation by raising challenges to both the jurisdiction of the NIA to carry out the investigation and to the legitimacy of the Special Court. In particular, counsel on behalf of the two Marines filed a separate application on 6 March 2014 (Writ No. 236), without naming Italy as a party, seeking to strike down the NIA investigation and prosecution of the matter before the Special Court, and raising fresh challenges to India's jurisdiction and the immunity of the Marines that the Supreme Court had already ruled were to be heard by the Special Court.<sup>125</sup> This was yet another tactic to impede India's investigation of the incident and the proceedings before the Special Court.

3.29 In the meantime, Italy further disrupted the NIA's investigation of the matter by refusing to make available in India the four other marines who had been stationed on the *MV Enrica Lexie* when the murder of the fishermen took place (there were six marines on the vessel). As part of the arrangements for the release of the vessel, its crew and the four marines who were not subject to charges, the Government of Italy had provided an

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<sup>122</sup> Supreme Court of India, Order acknowledging the return to India of Mr Latorre and Mr Girone, 2 April 2013 (Annex 20).

<sup>123</sup> Ministry of Home Affairs, Order No. 11011/19/2013-IS.IV transferring the investigation to the National Investigation Agency, 1 April 2013; Ministry of Home Affairs, Order No. 11011/27/2012-IV.VI confirming Order No. 11011/19/2013-IS.IV transferring the investigation to the National Investigation Agency, 15 April 2013 (Annexes 19 and 21).

<sup>124</sup> Supreme Court of India, Judgment, 18 January 2013 (Annex 19 to the ItSC).

<sup>125</sup> *Ibid.*

undertaking in the form of a Statement that Italy was “agreeable to give an assurance to the Supreme Court of India that if the presence of these marines is required by any Court or in response to any summons issued by any Court or lawful authority, then (subject to their right to challenge such summons or the legality of any such order for production) Italy shall ensure their presence before the appropriate court or authority”.<sup>126</sup>

3.30 After the NIA had been authorized to carry out the investigation of the incident, it sent a note to the Indian Ministry of External Affairs dated 10 May 2013 requesting the Ministry to issue notices to Italy via diplomatic channels for the four marines to be examined in India as part of its investigation.<sup>127</sup> The note referred to the assurances that had been given by Italy in its Statement to that end.

3.31 On 13 May 2013, India sent a Note Verbale to Italy enclosing Notices to Witnesses issued by the NIA for the purpose of answering certain questions relating to the *MV Enrica Lexie* case and the firing incident involving the two other Italian Marines on board.<sup>128</sup> Italy responded by a Note Verbale dated 15 May 2013.<sup>129</sup> Italy started by stating that it “would like to express its willingness and commitment to extend all possible co-operation in the investigation in order to establish the universal truth and complete facts in the case.” However, Italy then went on to say that the four marines were presently deployed on sensitive postings, “and it would be difficult to relieve them of their duties immediately in order to present them for examination by the NIA.” Italy therefore proposed other alternatives for examining the marines that did not involve them travelling to India.

3.32 Several comments can be made about this Note. First, Italy’s proposals were fundamentally incompatible with the undertaking it had made in its Statement, in which it assured India that Italy “shall ensure” the marines’ presence if so requested. Second, Italy said that the marines could be made available in Italy for questioning if the NIA sent an Investigating Officer. It belies belief that, for the next six months, the marines could not

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<sup>126</sup> Assurances given by the Republic of Italy to the Supreme Court of India ensuring that Mr Renato Voglino, Mr Massimo Andronico, Mr Alessandro Conte and Mr Antonio Fontana will remain at the disposal of India’s courts and authorities, 2012 (Annex 9).

<sup>127</sup> Note Verbale No. 415/6 from the Ministry of External Affairs of India to the Embassy of Italy in India, 13 May 2013 (Annex 23).

<sup>128</sup> *Ibid.*

<sup>129</sup> Note Verbale No. 198/1097 from the Embassy of Italy in India to the Ministry of External Affairs of India re. Notice to witnesses, 15 May 2013 (Annex 24).

equally have been available for a few days in India, particularly given Italy's prior assurances.

3.33 India responded by a Note Verbale dated 5 June 2013 in which it recalled the Italian Statement, and pointed out that the options suggested by Italy were "at variance with the unqualified commitment given by the Embassy before the Honourable Supreme Court of India towards ensuring the presence of the four marines for their examination before the Investigating Officer."<sup>130</sup>

3.34 This situation persisted until November 2013. Again, it is not credible that the marines could not have been made available during that time. But when, after six months, Italy continued to refuse to arrange for their presence, India had no choice but to conduct the interview by videoconference. Not only had Italy reneged on its promise, the investigation was delayed for six months, and videoconferencing is obviously not an effective means of conducting a comprehensive investigation.

3.35 Following these obstacles against the conduct of the investigation, both accused individuals applied for a stay of the Special Court proceedings and NIA's prosecution of the case in connection with Writ No. 236/2014. By an Order dated 28 March 2014, the Supreme Court of India granted the stay ordering the trial court (the Special Court) to keep the proceedings in abeyance.<sup>131</sup> On the one hand, this showed once again the lengths to which the Supreme Court was prepared to go to protect Italy's and the two Marines' rights. On the other hand, by virtue of the Marines' application, the proceedings have been further delayed for an indefinite period and remain so to date.

3.36 As discussed in the next section, in December 2014 the accused, accompanied by assurances by the Italian Ambassador, applied to the Supreme Court for a relaxation of Sergeant Girone's bail conditions in India. Similar applications had been made for Sergeant Latorre on health grounds, and had been accepted by the Supreme Court without any objection from India. Yet, inexplicably, shortly thereafter Mr Girone applied to the same Court to withdraw its application with respect to Sergeant Girone.

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<sup>130</sup> Note Verbale No. 415/6 from the Ministry of External of India to the Embassy of Italy in India, 5 June 2013 (Annex 25).

<sup>131</sup> Supreme Court of India, Order, 28 March 2014 (Annex 41).

3.37 Turning to more recent events, as noted above, the proceedings before the Special Court remain stayed, as they have been for the past two years. At the same time, Writ No. 236, which seeks to quash the NIA investigation, remains before the Supreme Court. A hearing on the Writ had been scheduled for 13 July 2015. However, just before that hearing, a further petition was filed to defer consideration of Writ No. 236/2014.<sup>132</sup> Instead of pressing for a speedy decision, Italy and the Marines now ask the Supreme Court to defer consideration of Writ 236 until the Annex VII Tribunal has finally decided the case. Even before India had a chance to respond to this new application, let alone before the Court had a chance to consider it, Italy filed its Request for Provisional Measures.

3.38 Based on the above, several conclusions can be drawn:

- First, while Italy complains that it has been three and one-half years since the incident occurred, Italy has been responsible both for delays in allowing the investigation of the incident to be carried out (while at the same time not producing any investigative report of its own) and delays to the Indian court proceedings. Italy cannot blow hot and cold at the same time: on the one hand complaining of delays to the Indian investigative and judicial process while, on the other, being the party that mainly contributed to those delays.
- Second, Italy has been treated entirely fairly by the Supreme Court. Many of its, and the two Marines', applications have been favourably ruled on, and Italy has been repeatedly assured that it would have the chance to make its jurisdictional arguments before the appropriate forum.
- Third, notwithstanding this, Italy has, on several occasions, abused the judicial process and introduced applications only to turn around and either withdraw them or ask for their deferral.
- Fourth, Italy twice reneged on undertakings it had made. The first was when Italy refused to honour its commitment to send the Marines back in 2013 after they had

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<sup>132</sup> Interim Application No. 3/2015 in Writ Petition No. 236/2014 (Deferment of writ proceedings till final decision by Annex VII Tribunal), 8 July 2015 (Annex E to the ItR).

been allowed to travel to Italy under express time limits. The second was when Italy refused to honour its commitment to make the other four marines available in India to assist the NIA's investigation. Thus, when Italy complains of potential prejudice to its rights if India's judicial and administrative jurisdiction is not enjoined, Italy does not come before the Tribunal with clean hands.

- Fifth, Italy succeeded in obtaining a stay of the Special Court proceedings. In conjunction with the other factors mentioned above, this means that there is no real and imminent risk of irreparable prejudice to Italy's rights – in other words, that there is no urgency to the situation that merits provisional measures being ordered restraining the exercise by India of taking any judicial or administrative measures against the two Marines. If anything, it is India's rights that have been compromised by Italy's conduct.
- Sixth, the fact that Italy waited over three years to bring the Annex VII Arbitration and to introduce a Request for Provisional Measures itself attests to the lack of urgency. Nothing that has recently taken place with respect to the legal situation in India and the proceedings there even remotely adds any urgency to the matter.

#### B. 2<sup>nd</sup> provisional measure requested by Italy

3.39 In its second submission, Italy requests that the Tribunal prescribe that:

India shall take all measures necessary to ensure that restrictions on the liberty, security and movement of the Marines be immediately lifted to enable Sergeant Girone to travel to and remain in Italy and Sergeant Latorre to remain in Italy throughout the duration of the proceedings before the Annex VII Tribunal.<sup>133</sup>

3.40 This supposes that the actual situation of the two individuals accused of murder is so dramatic that the Tribunal should prescribe total liberty, security and movement for both of them including their stay in or return to Italy.

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<sup>133</sup>ItR, para. 57(b).

3.41 The Tribunal will have noted the theatrical language used by Italy, which included a claim for the “security” of its nationals. Interestingly, nowhere else either in its Statement of Claim or in its Request, does Italy dare allege that their security is threatened. And indeed it is not and has never been the case. And, more generally speaking, the situation of either of the accused persons cannot justify any pre-judgment by this Tribunal concerning their conditions of living.<sup>134</sup>

3.42 Mr Latorre actually is in Italy and has been granted successive leaves to stay there on humanitarian grounds on 12 September 2014, 14 January 2015, 9 April 2015 and 13 July 2015.<sup>135</sup> As a consequence he is now authorized to stay in Italy until 15 January 2016 and, as can be implied with certainty by the precedents, new extensions are not to be excluded if necessary on humanitarian grounds. In *none* of these occasions did the Union of India oppose the granting of these successive authorizations to stay in Italy.

3.43 Italy complains that this term is “plainly inadequate given that it is inevitable that the international proceedings will last longer than that and given Sergeant Latorre’s serious medical situation set out in the Confidential Addendum.”<sup>136</sup> This calls for several remarks:

(1) It is common practice that leaves from bail restrictions be periodically renewed; this was the case for example in precedents invoked by Mr Latorre in support of its application for extension of time before the Supreme Court,<sup>137</sup>

(2) It is not India’s intention to comment here on the medical documents introduced confidentially in support of Italy’s Statement of claim and Request. However, it is noticeable that as described by the medical doctors who have examined Mr Latorre,<sup>138</sup> his state of health is evolving and may improve during the coming months, which also justifies the stand taken by the Indian Supreme Court;

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<sup>134</sup> See Introduction, para. 1.14.

<sup>135</sup> See Introduction, para. 1.13.

<sup>136</sup> ItR, para. 14.

<sup>137</sup> See: Application for Directions on Behalf of Chief Master Sergeant Massimiliano Latorre, 4 July 2015, paras. 10 and 12 (Annex I to the ItR).

<sup>138</sup> See e.g., Application for Directions and Relaxation of Bail Conditions on Behalf of Chief Master Sergeant Massimiliano Latorre dated 5 September 2014, pp. 28 and 31 (Annex 21 to the ItSC); Medical Case Summary of

(3) In any case, it is clear that, at the present time, given the renewable six months leave granted by the Supreme Court on 13 July 2015, Italy is ill-advised to invoke any urgency in this matter.

3.44 As for Mr Girone, he is under bail conditions.<sup>139</sup> As explained elsewhere in these Written Observations, these restrictions are usual (and very moderate) when a person is accused of murder.<sup>140</sup> Italy makes no allegations of ill-treatment against him. And for good reasons: Mr Girone's life in Delhi does not call for lamentations: he lives in the comfort of the Residence of the Italian Ambassador in New-Delhi,<sup>141</sup> and seems to enjoy quite a comfortable life.

3.45 Moreover, concerning Mr Girone, the urgency of authorizing him to go back to and stay in Italy is belied by his own behaviour, in particular in the occasion of the proceedings before the Supreme Court on 16 December 2014: on that occasion, he formally withdrew his interim application seeking to relax bail conditions so that he may be allowed to travel to Italy.<sup>142</sup> The Court disposed of the application as withdrawn.<sup>143</sup>

3.46 Another application was filed seeking a deferment of the proceedings in the Writ Petition in view of the commencement of the Arbitration until the issues in dispute before the Annex VII Arbitration Tribunal are decided.<sup>144</sup> This application has been neither

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Dr.RajashekarReddi, Principal Consultant and Head of Unit Neurology, Max Institute of Neurosciences, Max Super Speciality Hospital, 9 September 2014, p. 4 (Annex K to the ItR); Reports of Dr.Mendicini, Specialist Neurologist, Military Hospital in Taranto, 14 October 2014 and 14 November 2014, p. 1 (Annex 24 to the ItSC); Clinical Report of Doctor Mendicini, Head of Neurology, Military Hospital in Taranto, 2 January 2015, p. 1 (Annex M to the ItR) and Clinical Report of Doctor Mendicini, Head of Neurology, Military Hospital in Taranto, 31 March 2015, p. 1 (Annex N to the ItR).

<sup>139</sup> High Court of Kerala, Order granting bail to Mr Latorre and Mr Girone, 30 May 2012 (Annex 11).

<sup>140</sup> See Introduction, para. 1.14.

<sup>141</sup> See e.g., "Italian marines case: Italy questions ballistic evidence", *The Hindu*, 15 November 2013 (<http://www.thehindu.com/news/national/kerala/italian-marines-case-Italy-questions-ballistic-evidence/article5354153.ece>) (Annex 34); D. Rider, "Italian Marines: Rome frowns Delhi down", *Neptune*, 26 February 2014 (<http://www.neptunemaritimensecurity.com/italian-marines-rome-frowns-delhi-down/>) (Annex 39).

<sup>142</sup> Application for Directions and Relaxation of Bail Conditions on Behalf of Sergeant Major Salvatore Girone, 9 December 2014 (Annex 22 to ItSC).

<sup>143</sup> Supreme Court of India Order of 16 December 2014 recording the withdrawal of the applications (Annex 29 to the ItSC). In plain contradiction with what Italy writes (ItR, para. 15), the Supreme Court did not reject the "application by Sergeant Girone for leave to travel to Italy in December 2014"; it was *withdrawn* by the petitioner.

<sup>144</sup> Interim Applications No. 3/2015 in Writ Petition No. 236/2014 (Deferment of writ proceedings till final decision by Annex VII Tribunal) (Annex E to the ItR).

denied nor accepted by the Supreme Court: as this was a request of great magnitude involving interpretation and application of rules of international law, it could not be expected that the Supreme Court would immediately grant the same and it was perfectly reasonable for the Court to invite the Union of India to reply (within four weeks from the date of the Order) and to list the matter for a new hearing on 26 August 2015. Nevertheless, without waiting to even see the reply that would be made by India to this request, Italy has approached the ITLOS despite no grave circumstances having come into play with respect to Salvatore Gironi. Here again, it is plain that Italy's claim of urgency is totally unsupported by the facts.

3.47 This is true *per se*, even more so since Italy unduly rushed to apply to the ITLOS, thus depriving the future Annex VII Tribunal of its normal competence to decide on provisional measures. Although India wishes to say that this argument is not a sign of mistrust towards the ITLOS, it deems it indispensable that it put an end to this diversion which would risk constituting an unacceptable precedent.

## II. A request for “pre-judgment”

3.48 The very purpose of provisional measures, whatever the judicial forum where they are to be decided, is to preserve the respective rights of the parties to the dispute when the judgment or award to come is rendered, not to prejudge the final result of the proceedings. As recalled by the Tribunal in its Order for the prescription of provisional measures in the *M/V “SAIGA” (No. 2)* case, “the present Order in no way prejudices any questions relating to the jurisdiction of the Tribunal or to the merits of the case, and leaves unaffected the right of both parties to submit arguments in respect of such questions”.<sup>145</sup> Similarly, in its recent Order in the *Ghana-Côte d’Ivoire* case, the Special Chamber of the Tribunal repeated what is by now a well-established principle – namely, that “the present Order in no way prejudices the question of the jurisdiction of the Special Chamber to deal with the merits of the case or relating to the merits themselves”.<sup>146</sup> *A fortiori*, a court or tribunal must not prescribe any provisional measure which could make impossible or more difficult the implementation of

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<sup>145</sup>*The M/V “SAIGA” (No. 2) Case (Saint Vincent and the Grenadines v. Guinea), Provisional Measures, Order of 11 March 1998*, para. 46. See also I.C.J., Order, 10 January 1986, *Frontier Dispute, Provisional Measures, Reports 1986*, p. 11, para. 30.

<sup>146</sup>*Dispute concerning Delimitation of the Maritime Boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean (Ghana/Côte d’Ivoire), Provisional Measures, Order of 25 April 2015*, at para. 104.



the final decision. This would be the case if the ITLOS were to accept either one of the two measures requested by Italy.

A. 1<sup>st</sup> provisional measure requested by Italy

3.49 Italy's first submission runs afoul of the principle of "no prejudgment" referred to above. If granted, the right of India to pursue its judicial review of the case would be severely prejudiced and effectively prejudged.

3.50 In paragraph 29 of its Notification of Arbitration, Italy set forth a number of claims in which it alleges that India violated various provisions of the UNCLOS. Under claim (a), Italy asserts that India caused, by ruse and coercion, the *MV Enrica Lexie* to alter course so as to enter into Indian territorial waters and thereafter arrested, interrogated and detained the crew and the Italian Marines in violation of Article 27(5) of the UNCLOS. The premise that India used ruse and coercion to cause the vessel to berth at the Kochi anchorage is completely untrue. While this is a matter for the merits, the fact remains that India has fully investigated the incident (through the NIA investigation),<sup>147</sup> while Italy has proffered no evidence at all that it carried out an investigation of its own or that its allegations are well founded. India's investigation shows that there was no subterfuge or coercion on India's part. Rather, given that two unarmed Indian fishermen had been killed while fishing in India's exclusive economic zone by the firing of military grade arms from the *MV Enrica Lexie*, it was entirely appropriate for India to seek to question the individuals on board for their version of this serious event. In any event, the vessel with all its crew and four of the six marines were subsequently released.

3.51 With respect to the marines, Italy never claimed that India did not have the right to interrogate them. As pointed out above,<sup>148</sup> Italy even undertook to ensure the presence of the other four marines who had not been detained to give statements in connection with the NIA's investigation of the incident, although Italy subsequently reneged on that undertaking. To recall what Italy said in its Note Verbale to India of 15 May 2013: "The Embassy of Italy,

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<sup>147</sup> See above, para. 2.4-2.7.

<sup>148</sup> See paras. 3.29-3.31.

on behalf of Italy, would like to express its willingness and commitment to extend all possible co-operation in the investigation”.<sup>149</sup>

3.52 As for the other two Marines, India twice permitted them to travel back to Italy by not opposing their applications to do so before the Supreme Court. Even though Italy failed to comply with the conditions for the second trip, in each instance the Marines returned to India. There was no coercion by India; rather India simply expected Italy to comply with its own commitments to send the Marines back.

3.53 India has also explained above<sup>150</sup> how Italy has consistently made appearances before the Indian courts and has filed numerous applications, all of which have been fully considered and a number of which have been granted. The Indian proceedings have been in progress for some three years, in large measure due to the numerous petitions Italy has raised. In contrast, Italy has provided no evidence of the institution of proceedings against the two Marines in Italy. We simply have no record that the Italian courts have done anything in this respect. The same can be said about the lack of any evidence of a serious investigation into the incident on the part of Italy.

3.54 To order India now to refrain from taking or enforcing any further judicial or administrative measures with respect to the two Marines would not only be entirely one-sided, it would also prejudge the merits by implying that the investigations and judicial proceedings conducted with rigorous fairness by India to date were somehow inappropriate, despite the unprovoked killing of two of its nationals. This would not be consistent with the principle that any order of provisional measures should not prejudge the merits, and the principle, discussed in the next section, that both Parties’ rights must be preserved.

3.55 Italy’s request to enjoin any further Indian judicial and administrative actions would also effectively prejudge claims (b), (c) and (d) advanced in Italy’s Notification (claim (e) will be addressed with respect to Italy’s second provisional measures submission). The essence of these claims centres on whether the Indian courts have jurisdiction over the

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<sup>149</sup>Note Verbale No. 198/1097 from the Embassy of Italy in India to the Ministry of External Affairs of India re. Notice to witnesses, 15 May 2013 (Annex 24).

<sup>150</sup> See para. 1.19.

incident and whether the Italian Marines enjoyed immunity from suit although the claims are cast in terms of alleged breaches of the UNCLOS.

3.56 As discussed above, on numerous occasions, India's Supreme Court has made it clear that Italy's right to contest the jurisdiction of the Indian courts, the authority of the NIA to carry out an investigation, and the issue of immunity before the competent court – the Special Court – is fully preserved. There has been no prejudgment by the Supreme Court on any of these issues. In contrast, there have been no similar guarantees made by the Italian courts as to India's rights in the event the Marines were to be tried in Italy. Indeed, there are no records of any Italian court proceedings that have been produced before the Tribunal. What there is instead is a constant refrain from Italy that its own courts have jurisdiction and that the Marines enjoy immunity. That scarcely augurs well for impartiality in Italy.

3.57 Once again, Italy's first submission is entirely one-sided and attempts to prejudge the issues without preserving the rights of India to continue a process that has been in train for three years and in which Italy and the Marines have fully participated. India could just as well ask for any Italian judicial or administrative measures to be enjoined although there is little or no evidence that such actions have actually been undertaken.

3.58 India will respect the decision of Annex VII Tribunal in accordance with its obligations under UNCLOS.

3.59 In support of its first submission, Italy's Request refers to the Tribunal's statement in the *M/V "SAIGA" (No. 2)* case that:

...the rights of the Applicant would not be fully preserved if, pending the final decision, the vessel, its Master and other members of the crew, its owners or operators were to be subjected to any judicial or administrative measures in connection with the incidents leading to the arrest and detention of the vessel and to the subsequent prosecution and conviction of the Master ....<sup>151</sup>

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<sup>151</sup> Request at para. 43, citing *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, *Provisional Measures, Order of 11 March 1998, ITLOS Reports 1998*, p. 24, at p. 38, para. 41.

3.60            However, this statement was made in an entirely different factual context and is inapposite in this case, except to the extent that it shows how differently India has conducted itself in comparison with the Respondent State in *SAIGA 2*.

3.61            In *SAIGA*, the Tribunal had rendered a Judgment on 4 December 1997 ruling that the vessel *M/V SAIGA* and its crew be released from detention upon the posting of a reasonable security. Notwithstanding this, and the fact that Saint Vincent and the Grenadines did post a reasonable security, Guinea did not immediately release the vessel or six members of its crew. Instead it promptly lodged criminal charges against the Master on 10 December 1997 and announced the civil liability of Saint Vincent and the Grenadines. Criminal proceedings were thereafter commenced against the Master, who was found guilty by a Guinean court just one week later. This procedure was clearly contrary to the 4 December Judgment and incompatible with basic due process. Consequently, when the Tribunal ruled on a request for provisional measures filed by Saint Vincent and the Grenadines shortly thereafter, it made the statement referred to by Italy in its Request.

3.62            The situation before the Indian courts could not be more different. The proceedings in India had been on-going for more than three years when Italy filed its Request for Provisional Measures. As previously explained, India's Supreme Court fully protected Italy's rights throughout this period. It also refrained from ruling on the substance of the matter, which was reserved for the Special Court (the proceedings before which have been suspended for over 16 months at the Italian side's request). Not only has there been no failure of due process in the Indian courts, there was no flouting of previous judgment ruling that the *MV Enrica Lexie* or its crew (including the Marines) should be promptly released (the vessel was released, along with its crew and four of the six marines on board), and there has been no criminal judgment rendered against the two Marines – indeed, the proceedings with respect to the Marines have not even commenced due to the stay of the Special Court proceedings.

3.63            In short, in addition to the fact that there is no urgency justifying Italy's Request for Provisional Measures, the prescription of such measures would prejudge a number of issues that should be reserved for the merits and would not preserve India's rights.

## B. 2<sup>nd</sup> provisional measure requested by Italy

3.64 If granted, Italy's second requested provisional measure too would prejudice the decision of the Annex VII Tribunal or preclude its implementation.

3.65 In reality, the inadmissibility of the second measure requested by Italy is a consequence of that of the first one: lifting all restrictions on the liberty and movement of Mr. Latorre and Mr Girone, would mean that the Tribunal accepts that these restrictions, which are a normal (and, in this case, minimal) consequence of an accusation of murder, are illegitimate and unlawful. And, indeed, the Italian argument in support of this measure confirms that this is the case; it is based on the same ground as that supposed to justify the first requested measure: the alleged immunities of the two accused persons.<sup>152</sup>

3.66 In this respect, it must be noted that the comparisons insistently made by Italy between the present case and those of the *M/V "SAIGA" (N° 2)* or of the *Arctic Sunrise* are as irrelevant as concerning the first Italian submission: as correctly noted by Italy, in those cases, there was no issue of immunities; it is precisely why granting the requested measure in the present case would be prejudging the merits: what Italy tries to obtain in this way, is a recognition by the ITLOS that the accused individuals are entitled to claim immunities from the jurisdiction of Indian courts. Moreover, in the present case, contrary to the situation in *Saiga 2*, as noted above,<sup>153</sup> a previous judgment on the merits has not been done (and cannot be done at this stage) and, contrary to that of the *Arctic Sunrise*, where the Master, the crew and other passengers were all in detention when the ITLOS ordered provisional measures, the *MV Enrica Lexie* and its crew have long been voluntarily released by India. Also, in *Saiga 2*, Guinea had obtained from the ITLOS strong guarantees against the non-implementation of the Tribunal's future decision in that prompt release case consisting of "(1) the amount of gasoil discharged from the *M/V Saiga*; and (2) the amount of 400,000 United States dollars, to be posted in the form of a letter of credit or bank guarantee or, if agreed by the parties, in any other form."<sup>154</sup>In the case of the *Arctic Sunrise* too, the Tribunal ordered that, as The

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<sup>152</sup> See ItR, paras. 43-45.

<sup>153</sup> Paras. 3.59-3.61.

<sup>154</sup> See the Judgment of the Tribunal in *Saiga 1*, Judgment, 4 December 1997, *The M/V "SAIGA" Case (Saint Vincent and the Grenadines v. Guinea)*, Prompt Release, para. 86(4) and (6).

Netherlands offered,<sup>155</sup> a “bond or other financial security [...] in the amount of 3,600,000 euros [should] be posted by the Netherlands with the competent authority of the Russian Federation.”<sup>156</sup> However, such a solution would be grossly unsatisfactory for at least two reasons:

(1) as will be emphasized below, everything suggests that, in view of its past conduct, Italy will not oblige the two Marines to return in India to be judged by Indian courts whether during the proceedings or once the Award of the Annex VII Tribunal is rendered<sup>157</sup> since the little respect shown by Italy to its own formal commitments as well as to international judicial decisions<sup>158</sup> gives no hope that such a security would, by any means, guarantee Italy’s future compliance with its international obligations;

(2) in any case, India squarely rejects it since it would be perfectly immoral to accept that Italy could “buy” its declared unlawful behaviour; this would constitute a pure outrage to the memory of the victims of the murders and the feelings of their families.

3.67 As for the rest of the Italian argument, it is based on the same “humanitarian” or “compassional” arguments that Italy keeps bringing up all along its writings. India has already shown how artificial these inflated arguments are.<sup>159</sup> Moreover, they are all the more inappropriate that they totally overlook the distress of the families of the victims which such a measure could only grossly aggravate.<sup>160</sup> In any case, such considerations are totally irrelevant with respect to the “pre-judgment argument” India is making here.

3.68 And there is more: considering Italy’s *mala fide* behaviour in the past, if such measure were to be granted, there would be a serious risk that the Award of the Annex VII Tribunal would remain un-applied. As already explained, on two occasions, Italy has betrayed solemn promises made to India.

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<sup>155</sup> ITLOS, Order, 22 November 2013, *The Arctic Sunrise Case (Kingdom of the Netherlands v. Russian Federation)*, *Provisional Measures*, para. 91.

<sup>156</sup> *Ibid.*, para. 96.

<sup>157</sup> See below, paras. 3.68-3.75.

<sup>158</sup> See below, paras. 3.73-3.74.

<sup>159</sup> See Introduction, paras. 1.13-1.15 and above 3.13-3.47.

<sup>160</sup> See below, para. 3.88.

3.69 In 2012, the release of the *MV Enrica Lexie* was granted by the High Court<sup>161</sup> then by the Supreme Court of India,<sup>162</sup> under the express condition that the four other marines embarked on the ship at the time of the murders would give their testimony during the investigation of the NIA.<sup>163</sup> They were eventually prevented to appear in spite of Italy's formal assurance:

Italy is agreeable to give an assurance to the supreme court of India that if the presence of these marines is required by any Court or in response to any summons issued by any Court or lawful authority, then (subject to their right to challenge such summons or the legality of any such order for production) Italy shall ensure their presence before an appropriate court or authority.<sup>164</sup>

3.70 Italy again failed to keep its solemn word to India in another circumstance which augurs very badly for a loyal and faithful implementation of the provisional measures which it calls upon this Tribunal to prescribe – all the more so that the situation was largely similar to that which would be created by the requested measure.

3.71 In effect, on 22nd February 2013, Mr Latorre and Mr Girone filed an application to the Supreme Court seeking permission to travel to Italy for the purpose of casting their votes in the election scheduled on 24-25 February 2013. In support of this request, the Ambassador to Italy gave assurances that the Marines' return back to India upon expiry of the said period.<sup>165</sup> Upon receiving the Affidavit of Undertaking, the Supreme Court allowed Mr Latorre and Mr Girone to travel to Italy and remain there for a period of four weeks and to return to India thereafter. The Marines were to be bound to the bail conditions once they returned from Italy.<sup>166</sup> However, before the expiry of the said period, the Italian Embassy sent a Note Verbale to the Minister of External Affairs of India explaining that,

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<sup>161</sup>High Court of Kerala, Order releasing the *MV Enrica Lexie* and its crew, 29 March 2012 (Annex 6).

<sup>162</sup>Supreme Court of India, Order confirming the release of the *MV Enrica Lexie* and its crew, 2 May 2012 (Annex 10).

<sup>163</sup>*Ibid.*

<sup>164</sup>Assurances given by the Republic of Italy to the Supreme Court of India ensuring that Mr Renato Voglino, Mr Massimo Andronico, Mr Alessandro Conte and Mr Antonio Fontana will remain at the disposal of India's courts and authorities, 2012 (Annex 9).

<sup>165</sup>Affidavit of undertaking filed by Italian Ambassador Daniele Mancini giving assurances that Mr Latorre and Mr Girone will return to India after the elections, 9 February 2013 (Annex 14).

<sup>166</sup>Supreme Court of India, Order permitting Mr Latorre and Mr Girone to return to Italy for a period of four weeks (elections), 22 February 2013 (Annex 16).

because of the controversy between the two States had arisen, the two Marines will not return to India on the expiry of the permission granted to them.<sup>167</sup> In response, the Minister of External Affairs of India pointed out that the stand taken by Italy constituted a clear violation of the Order of the Supreme Court as well as the sovereign undertaking given to the Supreme Court.<sup>168</sup> Following repeated reactions by the Supreme Court,<sup>169</sup> the two accused persons returned back to India.

3.72 Also to be noted, these repeated betrayals of its promises by Italy have not discouraged the Supreme Court to accept Mr Latorre's petition to return to Italy on humanitarian ground on 12 September 2014<sup>170</sup> and to renew its authorization to stay there by three successive orders. But what is done by India in the exercise of its Supreme Court's free and sovereign appreciation has very different implications than those which would result from the ITLOS' prescription of the requested measure which would prejudice the validity of the main Italian submission.

3.73 And there is something more: Italy's record of compliance with international judicial decisions is seriously tainted by the recent decision of the Italian Constitutional Court following the Judgment of the International Court of Justice of 3 February 2012 in the case concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*. In that Judgment, which is binding and final for the Parties,<sup>171</sup> the ICJ denied the jurisdiction of Italian courts in the examination of action for damages for crimes considered *jure imperii*, committed by the Third Reich on the Italian territory. However, in its Judgment of 22 October 2014, which is appended to the present Written Observations as Annex 44, the Italian Constitutional Court first recalls its previous jurisprudence according to which "the fundamental principles of the constitutional order and inalienable human rights constitute a 'limit to the introduction (...) of generally recognized norms of international law, to which the Italian legal

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<sup>167</sup>Note Verbale No. 89/635 from Minister of Foreign Affairs of Italy to the Minister of External Affairs of India, 11 March 2013 (Annex 20 to the ItSC).

<sup>168</sup>Note Verbale from Minister of External Affairs of India to the Minister of Foreign Affairs, Italy, March 2013 (Annex 51)

<sup>169</sup>Supreme Court of India, Order directing Ambassador Daniele Mancini not to leave India without the permission of the Supreme Court, 14 March 2013; Supreme Court of India, Order extending the Order of 14 March 2013 directing Ambassador Daniele Mancini not to leave India without the permission of the Supreme Court, 18 March 2013 (Annexes 17 and 18).

<sup>170</sup>Supreme Court of India, Order permitting Mr Latorre to return to Italy for a period of four months for medical treatment, 12 September 2014 (Annex 43).

<sup>171</sup>Article 59 of the Statute of the International Court of Justice.



order conforms under Article 10, para. 1 of the Constitution”<sup>172</sup>. Then the Constitutional Court asserts:

Insofar as the law of immunity from jurisdiction of States conflicts with the aforementioned fundamental principles [of the Constitution], it has not entered the Italian legal order and, therefore, does not have any effect therein.<sup>173</sup>

Hence, notwithstanding Articles 94 and 103 of the UN Charter, the Court concludes that:

The obligation to comply with the decisions of the ICJ, imposed by the incorporation of Article 94 of the United Nations Charter, cannot include the Judgment by which the ICJ obliged the Italian State to deny its jurisdiction in the examination of actions for damages for war crimes and crimes against humanity, in breach of fundamental human rights, committed *jure imperii* by the Third Reich in Italian territory.<sup>174</sup>

3.74 Such a position is all the more alarming that it is not isolated but in line with the case-law of the Italian Constitutional Court recalled at some length in the pre-quoted decision. Moreover, India notes in this respect, that, contrary to the judgments of the ICJ, the decisions of this Tribunal do not benefit from the pre-eminence and quasi-executory character resulting from Article 103 and 94 of the Charter.

3.75 Transposed to the present situation, the firmly established jurisprudence of the Italian Constitutional Court shows that whatever precaution the ITLOS could take to try to guarantee that the measures it would be ready to decide would not jeopardise the future Award of the Annex VII Tribunal, it would more than likely, be neutralized by the invocation of the superiority of supposed Italian constitutional principles.

### III. The question of irreparable prejudice

3.76 In its Request, Italy asserts that Italy will suffer irreversible damage if either of its submissions for provisional measures is not granted. With respect to the first submission,

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<sup>172</sup> Section 3.2, quoting its own Judgment No. 48/1979 and No. 73/2011.

<sup>173</sup> *Ibid.*, Section 3.5.

<sup>174</sup> *Ibid.*, Section 5.1.

Italy argues that “Italy’s rights will suffer irreversible damage” as a consequence of the continuing exercise of jurisdiction by India.<sup>175</sup> With respect to Italy’s second submission, a similar plea is made; namely, that unless the Tribunal orders India to lift the measures against the Marines, “Italy’s rights will suffer serious and irreversible prejudice”.<sup>176</sup>

3.77 Conspicuously absent from Italy’s Request is any mention that India also possesses fundamental rights that would be prejudiced if the Tribunal were to accede to Italy’s submissions. Italy simply proceeds on the assumption that it is the only Party that has rights that must be preserved without taking into account the fact that, if anything, India has even more important rights that are at stake in the case. In particular, Italy is blind to the fact that the case actually arose because of the murder by two Italian Marines of two unarmed Indian fishermen plying their trade legitimately in India’s exclusive economic zone and an attack on a vessel, the *Saint Anthony*, that posed absolutely no threat to the large oil tanker – the *MV Enrica Lexie*. But for the actions of the Marines in opening fire on an innocent fishing vessel, the present proceedings, and the dispute as a whole, would not exist.

3.78 In these circumstances, what is irreparable are not the rights that Italy claims will be prejudiced, but rather the fact that two Indian fishermen are dead because of the actions of the Italian Marines. Death is irreparable. And, unlike situations where there has been judicial error that can be corrected on appeal or by reparation, there is no appeal or reparation for the two fishermen who have died or compensation that could return those persons to their families and loved ones. Those individuals are entitled to expect that justice will be done, and that the Indian courts will reach a just decision on responsibility for the incident.

3.79 Not only does Italy paint an entirely one-sided picture of the rights that it claims will be prejudiced if its provisional measures are not ordered, it also ignores the clear principle set out in Article 290(1) of the UNCLOS that:

If a dispute has been duly submitted to a court or tribunal which considers that *prima facie* it has jurisdiction under this Part, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances

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<sup>175</sup> Request for Provisional Measures, para. 41; and see also para. 39.

<sup>176</sup> *Ibid.*, para. 51.

to preserve the rights *of the parties* to the dispute or to prevent serious harm to the marine environment. (Emphasis added.)

3.80 It follows that the rights of *both* parties must be considered and preserved in this case when assessing whether provisional measures are justified and, if so, the nature of such measures. As the Special Chamber stated in its Order of provisional measures in the *Ghana-Côte d'Ivoire* case: “the Chamber must be concerned to safeguard the respective rights which may be adjudged in its Judgment on the merits to belong to either party”.<sup>177</sup>

#### A. The Present Situation Does Not Jeopardize Italy's Rights

3.81 Italy's position is that the prescription of the provisional measures it has submitted is appropriate and necessary in order to preserve Italy's rights *pendent lite*.<sup>178</sup> With respect to Italy's first submission, Italy considers that if the Indian courts or administrative agencies are allowed to continue to exercise jurisdiction over the matter before a final decision is taken by the Annex VII arbitral tribunal— a jurisdiction and investigation that has been proceeding for three years without any request for provisional measures – Italy will suffer irreversible prejudice. To quote from Italy's Request: “India's decision to persist in exercising jurisdiction, notwithstanding the commencement of international proceedings under the UNCLOS, creates a clear risk of prejudice to the carrying out of future decisions of the Annex VII arbitral tribunal”.<sup>179</sup>

3.82 This is pure, unwarranted speculation without a shred of evidence to back it up. In the first place, as demonstrated earlier in these Observations, the conduct of the Indian courts in the matter over the past three years has been beyond reproach. India's Supreme Court has gone to considerable lengths to preserve Italy's (and the two Marines') rights, including the right to raise any issues of jurisdiction and immunity before the Special Court. There are no grounds for assuming that the courts will not act appropriately in the future when they have done so to date. This position contrasts sharply with what has happened in Italy – or, more accurately, what has not happened. For there is no evidence that the Italian

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<sup>177</sup> *Dispute concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015*, para. 40.

<sup>178</sup> *Id.*, para. 39.

<sup>179</sup> *Ibid.*, para. 41.

courts have conducted themselves impartially, or at all, with respect to the culpability of the two Marines.

3.83 Secondly, even in the event, *quod non*, that the Annex VII Tribunal decides in Italy's favour on the question of jurisdiction, Italy will always be in the position to judge the Marines. Italy appears to assume that India will not respect any award made by the Annex VII Arbitral Tribunal. But India respects international law and it is a party to the UNCLOS. Article 11 of Annex VII provides that:

The award shall be final and without appeal, unless the parties to the dispute have agreed in advance to an appellate procedure. It shall be complied with by the parties to the dispute.

3.84 Neither Italy nor, with respect, this Tribunal have any grounds for assuming that India will not respect the provisions of Annex VII, including its Article 11. In short, there is no basis for Italy's bald assertion that the continuing exercise of jurisdiction in India will create a risk of prejudice to the carrying out of future decisions of the Annex VII Arbitral Tribunal.

B. The prescription of the measures requested by Italy would irremediably  
jeopardize Indian rights

3.85 As it abundantly results from the above, while there is no need of any kind of provisional measures to preserve Italy's rights, on the contrary the measures invoked by Italy would clearly jeopardize the effectiveness of India's rights at stake in the present case.

3.86 Before elaborating more on this point, it is appropriate to recall that the function of provisional measures is to preserve the rights of *both* Parties.<sup>180</sup> As the ICJ must be preserved: "the Court (...) must at all times be alert to protect *the rights of both the parties* in proceedings before it and, in indicating provisional measures, has not infrequently done so

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<sup>180</sup> See also above, para. 3.2.

with reference to *both the parties*.<sup>181</sup> This is as true concerning the Tribunal as stems from a plain reading of Article 290 of the UNCLOS which describes provisional measures as those “appropriate under the circumstances to preserve the *respective* rights of the parties to the dispute...”<sup>182</sup>

3.87 The first measure requested by Italy consists in trying to obtain from the ITLOS that it prescribe to India to “refrain from taking or enforcing any judicial or administrative measures against” the two accused persons and from “exercising any other form of jurisdiction over the Enrica Lexie Incident”. Now suppose that India, which has the same claim as to its jurisdiction in these matters, request the same from Italy; at first sight, this might look as resulting in a balanced situation; but it is in reality fully asymmetrical:

- (1) the first measure must be read in view of the second: if both measures are granted the two Marines would be in Italy and clearly Italy is not ready to impose upon them measures of control and restrictions of movement which are normal and necessary when a person is accused with murder as is the case of Mr Latorre and Mr Girone;
- (2) as shown above,<sup>183</sup> in all likelihood the two accused persons would not be obliged to return to India once the Annex VII Tribunal will have decided that jurisdiction in this case is vested in Indian courts;
- (3) such prescription would mean delaying for a very long period the final trial of the accused person (and it is quite paradoxical that Italy ask for such a measure while, on the other hand, it vociferously complains of the length of the proceedings before the Indian courts<sup>184</sup>— itself causing the delays it complains of and taking no initiative to charge or judge its nationals nor even inquiring seriously on the murders.)

3.88 Furthermore, such suspension of the trial proceedings until the proceedings in the present case would constitute a serious injustice to the memory of the victims and to the

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<sup>181</sup> I.C.J., Order, 15 December 1979, *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, *Provisional Measures, Reports 1979*, p. 17, para. 29 – italics added. See also: I.C.J., Order, 3 March 2014, *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, *Provisional Measures*, para. 22.

<sup>182</sup> Paragraph 1.

<sup>183</sup> See paras. 3.68-3.75 above.

<sup>184</sup> See e.g. ItSC, paras. 23 or ItR, paras. 25, 45, 49 and 54.

feelings, rights and interests of their families which have been devastated by the murders, not to speak of the owner of the *St Antony* which remains stuck in a police port, where it is being held as evidence. The situation of the relatives of the victims has been described in some press articles which are annexed to the present Written Observations.<sup>185</sup> Italy counts for nothing the distress of these persons (including the other fishermen present on the *St Antony* when it was shot by the two Marines.) It goes without saying that provisional measures releasing the two persons accused of murders from bail conditions will only aggravate their sorrow and distress.

### SUBMISSION

3.89 For the above reasons and those which India will supplement and develop during the Hearings on 10-11 August 2015, the Republic of India requests the International Tribunal for the Law of the Sea to reject the submissions made by the Republic of Italy in its Request for the prescription of provisional measures and to refuse prescription of any provisional measure in the present case.

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<sup>185</sup> See e.g., “Jelestine’s Son Pessimistic about Case Progress”, *The New Indian Express*, 17 February 2013 <http://www.newindianexpress.com/states/kerala/article1467522.ece> (Annex 15).

<sup>185</sup> A. Katz, “Brother Shot Dead Fishing Tests Armed Guards’ Accountability”, *Bloomberg*, 29 November 2012 (<http://www.bloomberg.com/news/articles/2012-11-29/brother-shot-dead-fishing-tests-armed-guards-accountability>) (Annex 12).

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'Chadha', with a long horizontal stroke extending to the right.

Dr Neeru CHADHA  
Agent of the Republic of India





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