

IT-34(d)

VERBATIM RECORD ITLOS/PV.15/C24/4 (UNCORRECTED), 11 AUGUST
2015, AFTERNOON SESSION

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



2015

Public sitting

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

President Vladimir Golitsyn presiding

THE “ENRICA LEXIE” INCIDENT

(Italy v. India)

Verbatim Record

<i>Present:</i>	President	Vladimir Golitsyn
	Vice-President	Boualem Bouguetaia
	Judges	P. Chandrasekhara Rao
		Joseph Akl
		Rüdiger Wolfrum
		Tafsir Malick Ndiaye
		José Luís Jesus
		Jean-Pierre Cot
		Anthony Amos Lucky
		Stanislaw Pawlak
		Shunji Yanai
		James L. Kateka
		Albert J. Hoffmann
		Zhiguo Gao
		Jin-Hyun Paik
		Elsa Kelly
		David Attard
		Markiyan Kulyk
		Alonso Gómez-Robledo
		Tomas Heidar
	Judge <i>ad hoc</i>	Francesco Francioni
	Registrar	Philippe Gautier

Italy is represented by:

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

as Agent;

and

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

Ms Stefania Rosini, First Counsellor, Deputy Head, Service for Legal Affairs, Diplomatic Disputes and International Agreements, Ministry of Foreign Affairs and International Cooperation,

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

as Senior Advisers;

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

Mr Paolo Busco, Member of the Rome Bar,

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

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

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

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

as Counsel and Advocates;

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

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

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

Mr Ben Juratowitch, Solicitor Advocate, England and Wales; Solicitor of the Supreme Court of Queensland; Partner, Freshfields Bruckhaus Deringer,

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

Dr Daniel Müller, Associate, Freshfields Bruckhaus Deringer,

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

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

as Counsel;

Ms Francesca Lionetti, Freshfields Bruckhaus Deringer,

as Legal Assistant.

India is represented by:

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

as Agent;

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

as Co-Agent;

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

as Deputy Agent;

and

Mr P.S. Narasimha, Additional Solicitor General,

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

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

Mr Narinder Singh, Chairman, International Law Commission,

as Counsel and Advocates;

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

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

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

as Junior Counsel;

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

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

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

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

as Advisers.

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

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

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

9
10 I was surprised upon hearing the submission of Sir Daniel Bethlehem in his speech
11 when he said,

12
13 The Indian Supreme Court's judgment requiring, exceptionally, the
14 establishment of Special Court to try the marines was questionable as a
15 matter of Indian constitutional law.

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

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

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

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

46
47 It is not the case of either India or Italy that the above constitutional requirement
48 followed by the procedure under the Code of Criminal Procedure has not been
49 followed. Professor Verdirame emphatically stated yesterday that:

1 the due process requirement to inform a person of the charges brought
2 against him or her promptly is not an abstract legal formality.

3

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

10

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

22

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

32

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

41

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

1 charge-sheets has led to some amount of misconception about the procedure and
2 the rights that are supposed to have been affected.

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

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

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

46
47 The reply to Professor Verdirame's submission that India has not decided jurisdiction
48 after three and a half years is completely unfounded. I state that there is no
49 ambiguity on this question on behalf of India. There is no ambiguity in the stand of
50 India with respect to jurisdiction. It is the incorrect assertion by Italy and the marines

1 that India has no jurisdiction and this issue has been agitated by them without
2 finality.

3
4 I have now concluded my submissions, and I request you, Mr President, to permit Mr
5 Bundy to make his submissions.

6
7 **THE PRESIDENT:** Thank you, Mr Narasimha. I now give the floor to Mr Bundy to
8 make his statement.

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

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

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

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

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

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

¹ PV.15/C24/1, p. 14, lines 44-45.

² PV.15/C24/1, p. 15, lines 1-4.

³ PV.15/C24/1, P, 16, lines 39-40.

⁴ PV.15/C24/1, p. 15, lines 23-27.

1 the Annex VII arbitral tribunal is constituted and is in a position to deal with the
2 matter?

3
4 The answer is ~~no~~+. To show why this is the case, we need to look at the facts, not
5 mere assertions, as Counsel for Italy was prone to do. As the Special Chamber put it
6 in the *Ghana/Côte d'Ivoire* case:

7
8 The decision whether there exists imminent risk of irreparable prejudice
9 can only be taken on a case-by-case basis in light of all relevant factors.⁵

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

15
16 The urgency of the situation must be assessed taking into account the
17 period during which the Annex VII arbitral tribunal is not yet in a position to
18 ~~modify, revoke or affirm those provisional measures~~+

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

24
25 So, what was the factual position on the eve of Italy's Notification?

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

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

42
43 Third, on 26 June of this year the marines' Writ No. 236 was still pending, with a
44 hearing scheduled for 13 July. Recall, if you would, Mr President and Members of
45 the Tribunal, that in their petition the marines had asked the Supreme Court to
46 decide the key questions of jurisdiction and immunity. They wanted the Supreme
47 Court to exercise jurisdiction over those questions and they voluntarily submitted to
48 the Supreme Court's jurisdiction to decide those issues. Prior to 26 June there was

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

1 no request for an Annex VII tribunal to decide those issues, and there was no hint
 2 that the marines would subsequently change their mind and ask the Supreme Court
 3 to defer consideration of their own petition.

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

14
 15 It follows, fifthly, that there is absolutely no evidence to show that it was only in May
 16 2015 that it became clear that a diplomatic solution could not be reached, or that, as
 17 Sir Daniel asserted:

18
 19 At this point . that is May 2015 . the Indian Government indicated to Italy
 20 that it had no latitude to pursue a negotiated settlement given the
 21 engagement of the Indian Supreme Court.⁶

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

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

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

46
 47 Notwithstanding this, our opponents appear to attach great importance to the fact
 48 that, on 4 July this year . that is, after Italy had already announced its intention to

⁶ PV.15/C24/1, p. 14, lines 45-47.

1 seek provisional measures . the marines petitioned the Supreme Court to defer
 2 consideration of their Writ No. 236. However, that application in no way changes the
 3 equation with respect to the question of urgency or the risk of irreparable harm. If
 4 anything, it shows that there will be no undue burden on Italy if the proceedings
 5 before the Indian Supreme Court, which the marines have themselves petitioned to
 6 decide the questions of jurisdiction and immunity, are permitted to continue.

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

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

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

38
 39 In the light of the facts on the record, the timing of Italy's Annex VII Notification and
 40 its Request for provisional measures is entirely arbitrary. Nothing changed in May
 41 2015 that created any situation of urgency.

42
 43 This morning Professor Verdirame cited *the "Camouco" Case* for the proposition
 44 that, in prompt release cases, the Tribunal found that the Convention

45
 46 does not require the flag State to file an application at any particular time
 47 after the detention of a vessel or its crew.⁷
 48

⁷ *"Camouco" (Panama v. France), Prompt release, Judgment, ITLOS Report 2000, p. 10, para. 54.*

1 My colleague argued that the same principle should apply here.

2
3 But the two situations are entirely different and are governed by different provisions
4 of the Convention. The Convention provides a measure of discretion to the flag State
5 in deciding when to file a prompt release application. However, when it comes to a
6 request for provisional measures, the prescription of such measures does not
7 depend on the appreciation solely of the applicant State. It depends on an objective
8 showing that a situation of urgency exists within the meaning of article 290(5) of the
9 Convention. If a State delays filing a request for provisional measures when it could
10 have done so earlier, it casts serious doubts over its claim that there is a real and
11 imminent risk of irreparable prejudice. In this case, as I have demonstrated, there
12 was no situation of urgency when Italy announced its intention to seek provisional
13 measures in its notification of 26 June.

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

23
24 Notwithstanding this, Professor Verdirame contends that the Indian judicial process
25 has failed in three respects.

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

41
42 Second, Counsel raised objections about the manner in which India wants to try the
43 case through the Special Court.¹⁰ My colleague, Mr Narasimha, rebutted that charge
44 a few moments ago. The Special Court was set up as a result of Italy's own
45 application submitting that the Kerala courts were without jurisdiction and that the
46 Supreme Court should take any other measures it deemed appropriate. As has been
47 explained, the manner in which the Special Court was established was fully in

⁸ PV.15.15/C24/1, p. 39, line 14.

⁹ PV.15.15/C24/1, p. 40, lines 27-28.

¹⁰ PV.15.15/C24/1, p. 40, lines 37-41.

1 conformity with Indian law and was not an exceptional procedure. It operated under
 2 the same rules as other Indian courts. Italy and the marines have the opportunity,
 3 which has been expressly preserved, to challenge the Special Court's jurisdiction,
 4 which they have done. How have they done it? By introducing Writ 236 before the
 5 Supreme Court; but having introduced that application, Italy now acts totally
 6 inconsistently by arguing that India's courts should be enjoined from acting on the
 7 marines' own petition. It is entirely disingenuous.

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

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

26
 27 The last point I wish to address concerns Sir Daniel's argument yesterday that India
 28 will suffer no prejudice if Italy's provisional measures are granted because India can
 29 always come back to request the Annex VII arbitral tribunal to modify or revoke the
 30 measures.¹³

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

38
 39 Mr President, distinguished Members of the Tribunal, that concludes my
 40 presentation. Once again, I thank the Tribunal for its attention, and would ask the
 41 floor to be given to Professor Pellet to continue India's second round.

42
 43 **THE PRESIDENT:** Thank you, Mr Bundy. I now give the floor to Mr Alain Pellet.

44
 45 **MR PELLET** (*Interpretation from French*): Mr President, distinguished Members of
 46 the Tribunal, before our Agent reads India's final submissions, it falls to me to
 47 present observations on the issues related to the jurisdiction of the Annex VII tribunal

¹¹ PV.15/C24/1, p. 41, lines 19-21.

¹² PV.15/C24/1, p. 35, lines 35-37.

¹³ PV.15/C24/1, p. 46, lines 20-26.

1 that has to be set up, and indirectly on your own Tribunal's jurisdiction, and on the
 2 second provisional measure that Italy has requested you to prescribe. In so doing, I
 3 will make some comments of a more general nature by way of concluding remarks,
 4 and I will attempt to sum up our position on some salient points of these proceedings
 5 initiated by Italy.

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

11 Professor Tanzi went to a great deal of trouble yesterday to demonstrate that there
 12 was a dispute between India and Italy. Well, I am happy to grant him that . but a
 13 dispute about what? For my opponents . and I am quoting Mr Tanzi -- notably with
 14 reference to articles 2(3), 27, 33, 56, 58, 87, 89, 92, 94, 97, 100 and 300, of the
 15 Convention.¹⁴ Is that all? Well, this is just an identical rehearsal of the enumeration of
 16 articles contained in the Italian Notification and Request.

18 It is not enough to quote wholesale a raft of treaty provisions to prove the existence
 19 of the well-known *fumus boni iuris*. They still have to have real relevance to the
 20 dispute that we need to settle . and I would say a predominant relevance.

22 Given the number of provisions that Italy seeks to adduce, it is difficult to examine
 23 each and every one of them, but I will try to do this at a gallop . and I apologize to
 24 the interpreters in advance.

26 -Article 2(3), sovereignty over the territorial sea: the shooting took place in the EEZ;

28 - Article 27, criminal jurisdiction on board a foreign vessel. This relates to the
 29 territorial sea as well;

31 - Article 33, contiguous zone . neither of the Parties relies on that provision;

33 - Articles 56 and 58, rights of coastal States and other States in the EEZ. I will come
 34 back to that, but just note that what is important in our case is the silence of these
 35 articles on the questions relating both to the military use of the area and the question
 36 of criminal jurisdiction over crimes committed there;

38 - Articles 87 and 89: same comment, in this case with respect to the high seas;

40 - Article 92: ~~Ships~~ shall sail under the flag of one State only and, save in exceptional
 41 cases expressly provided for in international treaties or in this Convention, shall be
 42 subject to its exclusive jurisdiction on the high seas; Ships, yes, but we are not
 43 talking about a ship here; we are talking of persons accused of murder;

45 - Article 94: duties of the flag State. None of these obligations relating to the safety
 46 and management of vessels and the powers of the captain, officers and crew, is in
 47 dispute between the Parties. The two marines were not members of the crew;

¹⁴ TIDM/PV.15/A24/1 (traduction non vérifiée), p. 18. et N, par. 29; et R, par. 29.

1 - Article 97: criminal jurisdiction in matters of collision or any other incident of
 2 navigation. Allow me, distinguished Members of the Tribunal, to refer you to what I
 3 said yesterday in this respect;¹⁵

4
 5 - Article 100: duty to co-operate in the repression of piracy: How can the trial of
 6 marines accused of having killed two fishermen have anything whatsoever to do with
 7 a breach of this obligation? Let me just recall the extraordinary success that India
 8 has had in combating piracy off its coast?¹⁶

9
 10 - Finally, the inevitable article 300 on good faith: the point I would underscore is that:

11
 12 *(Read in English)*

13 It is not in itself a source of obligation where none would otherwise exist.¹⁷

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

21
 22 As proof of this, see the interpretive declarations, contradictory declarations, that the
 23 parties made regarding the rights of a coastal State with respect to the military use of
 24 the EEZ. As I mentioned yesterday, India declared:

25
 26 *(Read in English)*

27 that the provisions of the Convention do not authorize other States to carry
 28 out in the exclusive economic zone and on the continental shelf military
 29 exercises or manoeuvres, in particular those involving the use of weapons
 30 or explosives without the consent of the coastal State.¹⁸

31
 32 *(Interpretation from French)* Italy, for its part, also made a declaration about this, one
 33 that is diametrically opposed in meaning inasmuch as, according to Italy,

34
 35 the rights and jurisdiction of the coastal State in such zone do not include
 36 the right to obtain notification of military exercises or manoeuvres, or to
 37 authorize them.¹⁹

38
 39 I do not think it is very useful at this juncture to discuss in detail which interpretation
 40 is the right one. It is enough to note that eight other States parties to the

¹⁵ ITLOS/PV.15/C24/2, pp. 2 et 12.

¹⁶ *Ibid.*, p. 14.

¹⁷ C.I.J., arrêt, 20 décembre 1988, *Actions armées frontalières et transfrontalières (Nicaragua c. Honduras), compétence et recevabilité*, Recueil 1998, p. 105, par. 94.

¹⁸ Déclaration de la République de l'Inde lors de la ratification de la Convention des Nations Unies sur le droit de la mer du 10 décembre 1982, 29 juin 1995
https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&lang=fr&clang=fr . souligné par moi.

¹⁹ Déclaration de la République italienne lors de la signature Convention des Nations Unies sur le droit de la mer du 10 décembre 1982, 7 décembre 1984
https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&lang=fr&clang=fr.

1 Convention formulated declarations along the lines of India²⁰. Two others, Germany
2 and the Netherlands, aligned themselves with the Italian position. These declarations
3 met with no formal objection by any other State apart from Italy.

4
5 Above all, the very fact that two categories of totally irreconcilable declarations can
6 have been made tends to demonstrate that, decidedly, this question does not fall
7 within the scope of the Convention, and thus escapes the obligation of the binding
8 settlement of disputes that might arise in this respect under Part XV of the
9 Convention.

10
11 The Annex VII tribunal will have to decide the matter, but *prima facie* this gives rise
12 to serious doubts regarding its jurisdiction in the instant case.

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

19
20 A further word with respect to the exhaustion . or, more accurately, non-exhaustion
21 . of domestic remedies. I shall speak solely to what Sir Michael said in this regard
22 yesterday and this morning.²⁰

23
24 One cannot reasonably argue as my opponent . and friend nevertheless . that there
25 is no prospect of success. The Indian justice system is independent and impartial;
26 and one cannot repeat often enough that the Supreme Court clearly and expressly
27 indicated that the Special Court, whose creation the Supreme Court requested,
28 would be able to rule on the question of the jurisdiction of Indian courts to try Messrs
29 Girone and Latorre.²¹ This court has been constituted and could have doubtless
30 ruled a long time ago were it not for the whole gamut of obstacles that the accused
31 and Italy have created to prevent it from so doing.

32
33 Rodman Bundy and I are not saying anything other than that. The Special Court can
34 try the accused expeditiously . that is its remit. It is the very reason why it was
35 created.²² The Special Court can also consider equally expeditiously that it has no
36 more jurisdiction than any other Indian court in the matter.²³ It is the effective
37 procedural activism of the accused and of Italy alone that has prevented the Court
38 from so doing.

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

²⁰ V. ITLOS/PV.15/C24/1 (unchecked), pp. 26-27 et 9-10.

²¹ V. Cour suprême de l'Inde, arrêt, 18 janvier 2013 (N., annexe 19).

²² ITLOS/PV.15/C24/2, p. 9.

²³ ITLOS/PV.15/C24/2, p. 19.

1 Italy wrongly invokes functional immunities on behalf of Messrs Girone and Latorre.
 2 The acts of which they are accused clearly do not fall within the scope of their official
 3 functions.

4
 5 I draw your attention once again, distinguished Members of the Tribunal, to Italian
 6 case law. As I recalled yesterday, in the judgment of 22 October 2014 the
 7 Constitutional Court of Italy firmly recalled that the immunity of the State or its
 8 representatives can be invoked

9
 10 *(Read in English)*

11 Only when it is connected . substantially and not just formally . to the
 12 sovereign functions of the foreign State.

13
 14 *(Interpretation from French)* In other words, when it acts in the exercise of its
 15 governmental functions. This decision of the Constitutional Court is far from being an
 16 isolated case, Mr President. As proof, one need look no further than the well-known
 17 judgment of the Supreme Court of Cassation of 29 November 2012, *Abou Omar*, in
 18 which the Supreme Court dismissed the argument founded on the immunities of
 19 secret agents and the military, pointing out that kidnapping could not be considered
 20 as falling within the exercise of official functions.²⁴

21
 22 Well, murders neither, Mr President.

23
 24 As to the *Louisa* case, to which Italy has referred, the Tribunal considered that the
 25 issue of exhaustion of local remedies should be examined at a future stage of the
 26 proceedings.²⁵ However, I do not believe that by so doing the Tribunal laid down a
 27 peremptory rule of procedural law.

28
 29 Finally, it is not correct, contrary to what Sir Michael asserted, that article 295 applies
 30 exclusively in the context of diplomatic protection. That is what he said.

31
 32 It does not say that at all. It just relates to those cases where international law
 33 requires the exhaustion of local remedies. That is the case, as in the matter before
 34 the Tribunal, where a State has *voluntarily* submitted itself to the courts of another
 35 State. That is indeed the meaning of the *electa una via* principle, whose existence
 36 and relevance to our case I recalled yesterday.²⁶

37
 38 We maintain, Mr President, that Italy has not established the *prima facie* competence
 39 and jurisdiction of the Annex VII tribunal that is to be set up; nor has Italy established
 40 that the essential conditions have been met for the handing down of those
 41 provisional measures that Italy has requested you prescribe.

24 Cour de cassation italienne, arrêt, 29 novembre 2012, Adler et autres (affaire « Abu Omar »), n° 46340/2012; ILDC 1960 (IT 2012). V.

http://www.academia.edu/3854342/Criminal_Proceedings_v_Adler_and_ors_Abu_Omar_case_Final_Appeal_Judgment_No_46340_2012_ILDC_1960_IT_2012

25 T.I.D.M., ordonnance, 23 décembre 2010, *Navire « Louisa » (Saint-Vincent-et-les Grenadines c. Royaume d'Espagne)*, mesures conservatoires, *Recueil 2010*, p. 69, par. 68.

26 ITLOS/PV.15/C24/2, pp. 18-19.

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

7
 8 As I showed yesterday, the second provisional measure effectively asks you to
 9 deprive India of any possibility of exercising the rights disputed by Italy.

10
 11 First of all, that request corresponds precisely with the request on the merits which
 12 Italy makes under letter (d) of the relief sought at the end of its Notification,²⁷ such
 13 that, if you were to prescribe that second preliminary measure, the arbitral tribunal
 14 would have to find that there was no need to adjudicate. Now that's what I call
 15 prejudging the merits! This would be especially shocking as this Tribunal cannot rule
 16 on the merits of this case; you would be ~~prejudging~~ on the merits even though it is
 17 not for you to give final judgment.

18
 19 This would be irremediable because if Mr Girone is authorized to return to Italy and
 20 to remain there, it is highly likely that he will not return to India to be tried in that
 21 country following an arbitral award by the Annex VII tribunal which totally or partially
 22 upheld India's case by deciding that it, exclusively or jointly with Italy, has jurisdiction
 23 to try the accused. Indeed, we have a choice here between two different aphorisms:
 24 ~~All things come in threes+or the worst is not always certain+~~ I would even tend
 25 towards a third: ~~a fault confessed is half redressed+~~ Unfortunately, it does not apply;
 26 far from acknowledging that it has failed to keep its promise at least twice, yesterday
 27 and this morning Italy tangled itself up in an improbable defence.

28
 29 ~~Yes indeed+~~, say our opponents. I am paraphrasing, Mr President. ~~Italy~~ had
 30 undertaken to ensure the *presence* of the four marines other than the two accused if
 31 so required by a court or investigative body; but participating in a videoconference is
 32 a presence.²⁸ That is not a truth, Mr President, it is a flip-flop. The lecture on Indian
 33 law proffered by Sir Daniel this morning does not alter the situation at all. Section
 34 161 of the Indian Code of Criminal Procedure does envisage the possibility of taking
 35 testimony by videoconference, but that is on the initiative of the police officer in
 36 charge of the investigation, on whom section 160 of that Code expressly confers the
 37 power ~~to~~ require attendance of witnesses~~+~~, although he may, at his discretion, agree
 38 to a videoconference. But it is for the police officer to decide, not the witness.

39
 40 I am paraphrasing here again, but I do not believe I am distorting the argument put
 41 forward by our friends opposite when they say: ~~You~~ complain that Mr Girone and Mr
 42 Latorre did not return to Delhi, when they did go back after their four-month electoral
 43 escapade.²⁹ Did they vote, incidentally? At any rate they had plenty of time to
 44 deposit their ballot papers. Having said that, it is true that they did go back to Delhi,
 45 but that is *not* the issue. The issue is that Italy had stated in a fully official Note

²⁷ Par. 33.

²⁸ Cf. ITLOS/PV.15/C24/1 (unchecked), p. 13.

²⁹ Cf. *ibid.*

1 Verbale, having no regard for the formal undertaking given by its Ambassador in
2 India, that . I am quoting again:³⁰

3
4 The two Italian Marines, Mr Latorre and Mr Girone, will not return to India
5 on the expiration of the permission granted to them.³¹

6
7 ~~They will not return.~~ They did return, but it took the outraged reaction of the
8 Supreme Court for that to happen.

9
10 At this stage we are told, and I am still paraphrasing: ~~Exactly.~~ Precisely. Horror of horrors,
11 the order of 14 March 2013, confirmed by the order of 18 March,³² is contrary to the
12 sacrosanct principle of diplomatic immunity. This too is totally irrelevant, Mr
13 President, because it does not alter the fact that Italy's representative had reneged
14 on his promise; but our opponents excel in employing these arguments which are
15 irrelevant but which sound good. ~~Pure prejudice.~~ Pure prejudice, whispered my colleague and
16 friend, Rodman Bundy, to me on this subject yesterday. It is best not to allow
17 prejudicial doubt to settle in the minds of people. So, very briefly, here are just a few
18 points to show that we should not be fooled by appearances.

19
20 The promise of the marines' return had been made to the Supreme Court; it was
21 performing its function by using the means available to it to ensure that that promise
22 was kept; by acting as guarantor before it, the Italian Ambassador had, implicitly but
23 necessarily, waived the application of immunity on that precise point.

24
25 Even if it were accepted that the temporary ban preventing the Italian Ambassador
26 from leaving India was illegal ~~per se~~ under international law, that ban would be
27 justified as a countermeasure pursuant to article 22 of the ILC Articles on
28 Responsibility of States for Internationally Wrongful Acts of 2011, and it is fully
29 consistent with the requirements of article 49 et seq. of those Articles.

30
31 Furthermore, as I have already said, the immunity of the State or of its
32 representatives can be invoked only if the acts in question are connected with
33 governmental functions;³³ reneging on a promise is not part of those functions.

34
35 I am saying all of this, Mr President, because Italy attaches an importance to this
36 episode which it just does not have, certainly not within the context of the case
37 before us. It is a way of drawing your attention away from the key issues at stake.

38
39 To come back to the incident that is relevant, namely the initial refusal by Italy to
40 return Mr Latorre and Mr Girone to Delhi, of which the order of the Supreme Court of
41 14 March 2013 is just one collateral element, the fact is that, combined with the non-
42 presence of the other four marines in the NIA investigation, it naturally gives rise to
43 the greatest possible mistrust on the part of India, to say the least.

44
45 However, as I said yesterday,³⁴ it goes further than that. It is clear from the case law
46 of the two Italian supreme courts, the Constitutional Court and the Court of

³⁰ Cour suprême de l'Inde, ordonnance, 22 février 2013 (OE, annexe 16).

³¹ Note verbale 89/635 du 11 mars 2013 (N., annexe 20).

³² ITLOS/PV.15/C24/1 (unchecked), pp. 13 et 47.

³³ V. supra, par. 6.

1 Cassation, that they give primacy to principles derived from the Constitution, and in
 2 particular from article 2, relating to inalienable human rights, and from article 24, on
 3 the right of access to the courts, over Italy's international obligations, including where
 4 these stem from a judgment of the International Court of Justice. There is hardly any
 5 doubt that this case law would be applied in the present case if the Annex VII tribunal
 6 were to uphold the request made in paragraph 33(d) of the Italian Notification,
 7 particularly since Italy . or at least the Italian courts, which do form part of the State
 8 . could also invoke article 26 of the Constitution, under which %extradition of a citizen
 9 may be granted only if it is expressly envisaged by international conventions+.
 10 However, there is no extradition treaty between India and Italy.

11
 12 In short, Mr President, if this Tribunal were to prescribe the second provisional
 13 measure that is requested of it, India would have absolutely no means of exercising
 14 the jurisdiction, whether it be exclusive or joint, that any future award might
 15 recognize.

16
 17 This brings me to the three concluding comments made by Sir Daniel Bethlehem
 18 yesterday morning, which I commented on only briefly yesterday afternoon.

19
 20 First of all, he said that Italy reiterates the undertaking that it has already given to the
 21 Indian Supreme Court to return Sergeant Latorre to India if the Annex VII tribunal so
 22 decides, and extends that undertaking to both the marines.³⁵ That undertaking was
 23 repeated this morning by the Agent for Italy. Mr President, that would be a fine thing
 24 and I do not for one moment doubt the good faith of our opponents, but
 25 unfortunately, in the present case, they cannot prevail over positions already taken
 26 by the supreme courts in Italy. Italy adopts a two-track approach. Its supreme courts
 27 are not inclined to respect international *res judicata*. I think I have made that point
 28 enough.

29
 30 Secondly, Sir Daniel proposed a kind of deal. I am not sure if it was for India or the
 31 Tribunal. He recalled that Italy paid (in Indian rupees) a surety of around " 300,000
 32 for each of the marines concerned, and he made a pretty extraordinary offer. And I
 33 read:

34
 35 *(Read in English)*

36 Italy would be prepared to transform that surety through some appropriate
 37 arrangement into a surety given to India in accordance with the stipulations
 38 of an order of this Tribunal. The amount of the surety that Italy is currently
 39 maintaining in India, and is now offering to continue as a bond pursuant to
 40 an order of this Tribunal, overshadows that required by the Tribunal in
 41 *Arctic Sunrise*, in which the amount stipulated was in respect of the release
 42 of the vessel and 30 crew members.³⁶

43
 44 *(Interpretation from French)* In commenting on this rather odd proposal, I will also be
 45 replying on behalf of India to the question asked this morning by Judge Cot.
 46 However, we are the respondents in this case and since Italy did not answer the

³⁴ V. ITLOS/PV.15/C24/2, pp. 38-40.

³⁵ V. ITLOS/PV.15/C24/1 (unchecked), pp. 45-46.

³⁶ *Ibid.*

1 question this morning, as was its right, we would appreciate the possibility of being
2 able to comment, if only briefly, in due course on what it has to say on the subject.

3
4 With that proviso in mind, we consider, first of all, that the comparison with *Arctic*
5 *Sunrise* is not relevant. That case concerned the prompt release of the Greenpeace
6 vessel and 30 members of its crew, who were alleged by the Russian Federation to
7 have infringed its laws and regulations, but who were not accused of murder, unlike
8 Mr Girone and Mr Latorre.

9
10 That makes a big difference. Murders are not ~~compensable~~ offences under section
11 302 of the Indian Penal Code. Mr President, I cannot help being troubled and quite
12 disturbed by Sir Daniel's offer, which I feel to be a kind of proposal to buy impunity
13 for the two marines who stand accused of murder. In addition, the proposal is
14 deceptive and, for India, it would be a fool's bargain. It would quite simply be
15 tantamount to ~~expatriating~~ the surety which has already been paid . and is not that
16 high, in view of the circumstances of the case . which has been paid in India by way
17 of guarantee in accordance with the order of the Indian Supreme Court of 30 May
18 2012.³⁷ Be that as it may, Mr President, I have been instructed to state that India is
19 most adamantly opposed to such a transaction.

20
21 Now I turn to Sir Daniel's third and last point yesterday. After having called on you to
22 prescribe the two measures requested by Italy, my learned friend and opponent
23 added this and I quote:

24
25 *(Read in English)*

26 If circumstances change, or if India for any other reason wishes to contest
27 the measures that are prescribed, its right to do so before the Annex VII
28 tribunal in due course is safeguarded and indeed expressly envisaged by
29 article 290(5) of UNCLOS, which would allow India to apply to modify or
30 revoke the provisional measures prescribed.³⁸

31
32 *(Interpretation from French)* I will not spend much time on that suggestion, if only
33 because without referring to it explicitly I did respond to it yesterday indirectly when I
34 pointed out that this would amount to making the Annex VII tribunal a sort of
35 appellate jurisdiction for the present Tribunal.³⁹ But that is not the purpose of article
36 290(5) of the Convention on the Law of the Sea: the purpose is to cope with
37 extremely urgent situations in which the prescription of provisional measures cannot
38 wait for an arbitral tribunal to be set up.

39
40 Mr President, let me at this juncture say that we do not accept Sir Daniel's proposals
41 but that India is prepared to make a different offer. I have been instructed to state
42 that India is prepared to guarantee that the decision of the Special Court could be
43 handed down within four months from the date on which the hearings open, if Italy
44 were to cooperate and withdraw its objections to the procedure before the Indian
45 Supreme Court.

37 V. OE, annexe 11.

38 *Ibid.*

39 V. ITLOS/PV.15/C24/2, p. 36.

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

6
 7 Concerning the first measure, Mr Bundy showed that there was no risk of imminent .
 8 imminent . harm to the right claimed by Italy to exercise jurisdiction to try (or rather,
 9 clearly, not to try) the two accused, and certainly no injury to this right within the
 10 three months likely to be necessary to set up the Annex VII tribunal . unless the
 11 Parties were to agree to choose another form of settlement. The Indian offer I just
 12 made is no doubt relevant here as well.

13
 14 The same applies to Italy's second requested provisional measure:

15
 16 . Mr Latorre is receiving care in Italy. His condition seems to be improving and there
 17 is no reason to think that, if necessary, the Indian Supreme Court would not extend
 18 the authorization for him to stay in Italy, which has already been renewed four times;

19
 20 . As to Mr Girone, I can readily believe that he is homesick but I sincerely doubt that
 21 we need to feel too sorry for him. Yesterday I gave you some details concerning his
 22 life in Delhi and the many family visits he has been receiving without restriction.⁴⁰ He
 23 has access to . and, it would seem, has been making full use of . modern means of
 24 communication: Skype, Twitter, Facebook and so on.

25
 26 Before I conclude, Mr President, please allow me to make a few quick comments of
 27 a more general nature.

28
 29 The first goes back to the very beginnings of the case and the note verbale of 16
 30 February 2012, the day after the shooting, which you will find in tab 9 of the Judges's
 31 folder prepared by Italy. In this the Italian Embassy announced:

32
 33 (Read in English)

34 The Italian Navy team has photographic evidence of the pirate vessel
 35 during the attack.⁴¹

36
 37 (*Interpretation from French*) We have never received that photographic evidence. No
 38 such evidence was adduced in the course of the proceedings. This is telling.

39
 40 My second comment will be to observe that this morning Italy did not return to the
 41 fact that the marines attempted to fabricate evidence corroborating the so-called
 42 attack by a pirate vessel, particularly by telling the Master of the vessel what he
 43 should say.⁴² Italy not only has not denied that this happened; it has even appended

⁴⁰ V. ITLOS/PV.15/C24/2, p. 33.

⁴¹ Note Verbale 67/438, 16 février 2012 (N, annexe 10 et dossier des juges de l'Italie, onglet 9).

⁴² V. ITLOS/PV.15/C24/2, p. 13 et Statement of Mr Vitelli Umberto, Captain of the *MV Enrica Lexie*, 15 June 2013 (OE, annexe 27); Statement of Mr Sahil Gupta, Crew Member of the *MV Enrica Lexie*, 26 June 2013 (Observations écrites de l'Inde (ci-après: « OE », annexe 29) and Statement of Mr Victor James Mandley Samson, Crew Member of the *MV Enrica Lexie*, 24 July 2013 (OE, annexe 29).

1 one item of evidence of this to the Notification of 26 June.⁴³ I am referring to the
2 logbook of the Master of the *Enrica Lexie*.

3
4 Thirdly, let me correct the very grim picture that our learned friends have been trying
5 to paint. Over the 36 months which have elapsed since the *St. Antony* incident+,
6 and as you know that period is the result of stalling actions taken by the accused and
7 by Italy itself . the marines have spent a grand total of 43 days in prison, and Mr
8 Latorre has been in Italy for roughly half of that time. Let me add . contrary to what
9 Italy and its counsel like to assert again and again (as always with a view to
10 prejudicing the atmosphere) . that the marines are not detained, not imprisoned.
11 They are at large under what I would call very light supervision.

12
13 Lastly, could I remind us all how important it is to keep things in perspective. Let us
14 never forget the very serious charges against the two marines and yet they have
15 enjoyed an exceptionally lenient treatment. Nor should we forget the suffering
16 brought about by the shootings of 15 October 2012 for the fishermen of the *St.*
17 *Antony* (two of them are dead - they are the real victims in this case!), for their
18 families and for the village community they belonged to.

19
20 Once again, Mr President, Members of the Tribunal, I am not trying to play on the
21 sentiments. And, by the way, it cannot be said that our opponents have shed many
22 tears over the fate of the victims of the shooting . including this morning.⁴⁴

23
24 However that may be, Mr President, we must nevertheless make no mistake as to
25 who the real victims are!

26
27 Mr President, Members of the Tribunal, I am very grateful for your kind attention.
28 May I request, Mr President, that you now call to the podium the Agent of the
29 Republic of India, Ms Neeru Chadha, Agent of the Republic of India, who will read
30 out our final submissions.

31
32 Thank you.

33
34 **MR PRESIDENT:** Thank you, Mr Pellet.

35
36 I understand that this was the last statement made by India during this hearing.
37 Article 75, paragraph 2, of the Rules of the Tribunal provides that at the conclusion of
38 the last statement made by a Party at the hearing, its Agent, without recapitulation of
39 the arguments, shall read the Party's final submissions. The written text of these
40 submissions, signed by the Agent, shall be communicated to the Tribunal and a copy
41 of it shall be transmitted to the other Party.

42
43 I now invite the Agent of India, Ms Chadha, to take the floor to present the final
44 submissions of India.

45
46 **MS CHADHA:** Thank you, Mr President. I shall now read the final submissions of the
47 Republic of India. These remain unchanged from those in our Written Observations.

⁴³ Log book of the Master of the *Enrica Lexie* (N, annexe 14)

⁴⁴ TIDM/PV.15/A24/3, p. 18.

1
2 For the reasons explained by India in the Written Observations and during the oral
3 hearings, the Republic of India requests the International Tribunal for the Law of the
4 Sea to reject the submissions made by the Republic of Italy in its Request for the
5 prescription of provisional measures and refuse the prescription of any provisional
6 measure in the present case.

7
8 Mr President, in accordance with rule 75 of the Rules of Procedure, a copy of the
9 written text of the submissions is being communicated to the Registrar of the
10 Tribunal.

11
12 Mr President, with your permission, I would like to convey our thanks to all those who
13 have helped in these proceedings. First, I wish to thank the Registrar, Mr Philippe
14 Gautier, and the members of the Registry for their cooperation and professionalism
15 and for working so efficiently to ensure the smooth running of these proceedings.

16
17 I especially thank the interpreters, who have certainly not had an easy time, keeping
18 pace with those of us who speak so fast.

19
20 I also thank all those who have worked long hours to produce promptly the verbatim
21 records of the public sessions.

22
23 We thank our friends from Italy for their cooperation in the course of the proceedings.

24
25 I would take this opportunity also to thank our Counsel who, despite the short notice,
26 readily rushed back from their respective vacations to help us prepare for this case. I
27 also want to thank other members of the Indian team who have spent long hours
28 preparing for these proceedings.

29
30 Before concluding, I would like to thank you Mr President and all the Members of this
31 distinguished Tribunal for giving us a patient hearing.

32
33 **THE PRESIDENT:** Thank you, Ms Chadha. This brings us to the end of the hearing.
34 On behalf of the Tribunal I would like to take this opportunity to express our
35 appreciation for the high quality of the presentations of the representatives of both
36 Italy and India.

37
38 I would like also to take this opportunity to thank both the Agent of Italy and the
39 Agent of India for their exemplary spirit of cooperation.

40
41 The Registrar will now address questions in relation to documentation.

42
43 **THE REGISTRAR** (*Interpretation from French*): Mr President, pursuant to article 86,
44 paragraph 4, of the Rules of the Tribunal, the Parties may, under the supervision of
45 the Tribunal, correct the transcripts of speeches and statements made on their
46 behalf, but in no case may such corrections affect the meaning and scope thereof.
47 This must be done in the official language used by the Party concerned. These
48 corrections relate to the checked versions of the transcripts in the official language
49 used by the Party in question. The corrections should be submitted to the Registry

1 as soon as possible and by Monday 17 August 2015 at 12 noon, Hamburg time, at
2 the latest.

3
4 Thank you, Mr President.

5
6 **THE PRESIDENT:** Thank you, Mr Registrar.

7
8 The Tribunal will now withdraw to deliberate. The date for the reading of the Order in
9 this case is tentatively set to 24 August 2015. The Agents of the Parties will be
10 informed reasonably in advance of any change to this date.

11
12 In accordance with the usual practice, I request the Agents to kindly remain at the
13 disposal of the Tribunal in order to provide any further assistance and information
14 that it may need in its deliberations prior to the delivery of the order.

15
16 *(The sitting closed at 5.54 p.m.)*