

IT-34(b)

VERBATIM RECORD ITLOS/PV.15/C24/2 (UNCORRECTED), 10 AUGUST
2015, AFTERNOON SESSION

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



2015

Public sitting
held on Monday, 10 August 2015, at 3 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 Dijet Titus, Advocate, Titus & Co., Advocates; Member of the Delhi Bar, India,

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

as Counsel;

Ms Francesca Lynette, Freshfields Bruckhaus Deringer,

as Legal Assistant.

India is represented by:

Ms Nero Chatham, former Additional Secretary and Legal Advisor, Ministry of External Affairs,

as Agent;

H.E. Mr Vijay Go hale, 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:** Please be seated.

2
3 The Tribunal will now continue the hearing in the case concerning the *Enrica Lexie*
4 Incident. This afternoon, we will hear the first round of oral arguments presented by
5 India.

6
7 Before I give the floor to the Agent of India, I would like to appeal to you to speak in a
8 way that will allow the interpreters to keep up with your presentations. This morning
9 we experienced some difficulties.

10
11 I now call on the Agent of India, Ms Neeru Chadha, to begin her statement.

12
13 **MS CHADHA:** Mr President, Mr Vice-President and distinguished Members of the
14 Tribunal, it is an honour and indeed a privilege for me to appear before this august
15 Tribunal as Agent of India.

16
17 I will give a broad overview of the case while my colleagues will dwell in greater
18 detail on the legal issues raised by Italy in this provisional measures proceeding.

19
20 Mr President, India was surprised at the tone and tenor of Italy's pleadings this
21 morning. They portrayed the accused Italian marines as the real victims while totally
22 ignoring the two fishermen, who are the real victims of the *Enrica Lexie* incident, who
23 lost their lives.

24
25 This morning Italy's Agent strongly objected to India using the term "murder" to
26 describe the incident, while their own documents do so. The document at tab 11 of
27 the Italian folder highlighted by Sir Daniel Bethlehem clearly specifies that the Office
28 of the Prosecutor of the Military Tribunal in Rome has opened a criminal
29 investigation against the marines for the crime of murder. Therefore it is surprising to
30 us why it is accusing India of presenting an intemperate document.

31
32 This case which is listed as the *Enrica Lexie* Incident really arises from the killing of
33 two innocent Indian fishermen on board an Indian fishing vessel, *St. Antony*, which
34 was lawfully fishing in India's exclusive economic zone.

35
36 On 15 February 2002, at about 4.30 p.m. Indian Standard Time, *St. Antony*, engaged
37 in fishing at a distance of about 20.5 nautical miles from the Indian coast, faced a
38 volley of fire originating from two uniformed persons on board an oil tanker which
39 was about 200 metres from the boat. Valentine Jelastine, who was at the helm of the
40 boat, received a bullet hit on his head, and Ajeesh Pink, who was at the bow,
41 received a bullet hit on his chest. Both died on the spot following this evidently "shoot
42 to kill" incident. In addition to these casualties, the incident also caused serious
43 damage to the boat, endangering its safe navigation and the lives of the other nine
44 crew members.

45
46 When the reports of the killings reached the Indian authorities, it was entirely
47 reasonable for them that, as per the law, they would open an investigation. From the
48 vessel movements in the area, it was ascertained that *Enrica Lexie* was involved in
49 the so-called incident so it was requested to turn back and join the investigation.
50 There was no ruse, no coercion, as alleged by Italy.

1 There were six Italian marines on board *Enrica Lexie*. Two of them were arrested
 2 after it was established that they fired the shots that killed the two fishermen. Legal
 3 proceedings then commenced in Indian courts under the relevant provisions of
 4 Indian law, as the victims were Indian nationals and they were killed on board an
 5 Indian fishing vessel.

6
 7 Italy pointed out repeatedly in the morning that it has asserted early jurisdiction in the
 8 case. The early assertion of jurisdiction by Italy does not preclude India from
 9 exercising jurisdiction over the killing of its nationals who were fishing in India's
 10 exclusive economic zone.

11
 12 Mr President, it may be noted that the two Indian fishermen died as a result of firing
 13 from *Enrica Lexie*, a merchant vessel. While this is not the time to get into the merits,
 14 I feel compelled to make some observations on Italy's remarkably one-sided and
 15 insensitive description of the event in its Notification.

16
 17 In explaining the incident, Italy cleverly builds the scenario to show that firing from
 18 the *Enrica Lexie* was to fend off an apprehended piracy attack and to avoid possible
 19 collision on the high seas. This has been done primarily to find grounds of jurisdiction
 20 for Italy under the United Nations Convention on the Law of the Sea and not on the
 21 basis of any thorough investigation by Italy. It also needs to be emphasized here that
 22 on the day of the incident there was no piracy alert in the region nor did the fishing
 23 boat resemble a pirate skiff.

24
 25 Italy has failed to mention that the Italian marines opened fire with military-grade
 26 arms on a defenceless fishing boat, which could possibly have posed absolutely no
 27 threat to the *Enrica Lexie*. The truth, Mr President, is that the Italian marines, on
 28 board a merchant vessel, not on board a warship or a non-commercial ship on
 29 government duty, on a clear day, with excellent visibility, shot to kill two persons in a
 30 small boat. Under articles 95 and 96 of the Convention, immunity from the
 31 jurisdiction of any State other than the flag State is available only to warships and
 32 Government ships operated for non-commercial purposes. Admittedly, the Italian
 33 marines were on board a merchant vessel, therefore, the Government of India was
 34 not obliged to recognize their claim of immunity under the Convention or any other
 35 principle of international law.

36
 37 Further, no bilateral agreement exists between India and Italy for granting such
 38 immunity to armed forces personnel of Italy. India had, in fact, even prior to the
 39 *Enrica Lexie* incident, refused Italy's request to enter into an agreement for
 40 admittance, stay or transit of their Vessel Protection Detachments through India,
 41 since the same is not permitted under Indian law.

42
 43 Therefore, Mr President, it is very clear from a brief recapitulation of this case that
 44 there was no collision, no incident of navigation, so as to attract article 97 vesting the
 45 jurisdiction to the flag State. Also there was no piracy attack or threat thereof that
 46 could justify the killing of two Indian fishermen so as to attract the application of the
 47 Convention and thus the *prima facie* jurisdiction of an Annex VII tribunal.

48
 49 Mr President, India is proud of its adherence to rule of law and its judicial system that
 50 gives access to justice, ensures due process and equal opportunity to everybody to

1 assert their rights. Throughout the past three years, Italy has benefited from this
 2 process. India's courts have acted with the utmost fairness towards both Italy and
 3 the two accused marines, despite being flooded by numerous applications, delays
 4 and inconsistent submissions by them. It will be clear from subsequent Indian
 5 presentations how Italy has invoked the Indian judicial system to its advantage and
 6 now complains against the same system for alleged delays and lack of jurisdiction.

7
 8 India and the Indian courts have also gone to great lengths to ease the living
 9 conditions of the marines, far more than that which would be accorded to individuals
 10 who had killed two unarmed persons with gunfire. This will be elaborated in greater
 11 detail by Professor Pellet.

12
 13 Mr President, India has legitimate apprehensions on Italy's ability to fulfil its promises
 14 as it has earlier attempted to renege twice on the same. The first time, Italy
 15 attempted to renege on the assurance it had provided to the Indian Supreme Court
 16 and officially informed India that marines who were allowed to go back to Italy for
 17 four weeks to exercise their voting rights would not return. As indicated, they did
 18 return, but only after intense diplomatic efforts pursued by the Government of India.

19
 20 Thereafter, Italy actually impeded the investigation by reneging on its promise to
 21 send back four other marines on board *Enrica Lexie* for examination, and much later
 22 made them available to give evidence only through videoconferencing. There is
 23 pattern in Italy's conduct that India views seriously and therefore it has legitimate
 24 concerns regarding the extent to which Italy can be trusted to keep its commitments.

25
 26 India and Italy have also been engaged on this matter through diplomatic channels.
 27 India's position has been consistent throughout these engagements that it wanted an
 28 early resolution of the matter so that it did not cast a shadow over the friendly
 29 relations between the two countries. To this end, India has always urged Italy to join
 30 the judicial process in India to move things forward, and not delay or derail the trial
 31 by the Special Court.

32
 33 India has repeatedly assured the Italian Government of a speedy, independent, free
 34 and fair trial for the Italian marines in India that would take into account all legal
 35 aspects raised by the Italian side, including the question of jurisdiction.

36
 37 Special care was taken to assure Italy that the marines would be treated fairly and
 38 with dignity.

39
 40 India also allayed Italy's concerns on the quantum of punishment with the assurance
 41 that, if found guilty, no death penalty would be imposed on the accused.

42
 43 That was, Mr President, always India's position from the onset of this case and Italy
 44 is aware of it. Nothing has changed or acquired an imminent urgency in the recent
 45 past for Italy to now approach this Tribunal for prescribing provisional measures
 46 pending the setting up of an Annex VII tribunal.

47
 48 My colleagues will discuss the above issues in more detail and show that that there
 49 is absolutely no justification for Italy's Request for provisional measures. The
 50 Annex VII tribunal that is to be constituted would not have jurisdiction in this case

1 and there is no imminent urgency which demands prescribing of provisional
2 measures by this Tribunal pending the setting up of the Annex VII tribunal.

3
4 Before I outline the sequence of rest of India's pleadings, I would like to mention one
5 more point. Italy has referred to circumstances of a medical and humanitarian nature
6 in the case. In this context, I would request the Tribunal to recall the greater loss,
7 trauma and suffering of the families of the two Indian fishermen who have been
8 killed. Their loss, Mr President, is permanent and irreversible. They are still waiting
9 for the justice that has been delayed by Italy's intransigence.

10
11 Mr President, the rest of India's pleadings will be presented in the following manner.
12 First, the Additional Solicitor General of India will provide an overview of the case
13 and the judicial proceedings in India involving Italy and the marines and present the
14 true facts.

15
16 Professor Alain Pellet will then deal with subject matter of the dispute and the
17 questions of jurisdiction and admissibility. He will show that Italy's presentation of the
18 subject matter of this case is flawed and misleading in several ways and casts strong
19 doubts on the jurisdiction of the Annex VII tribunal and present the other elements
20 that confirms that Italy's request is inadmissible.

21
22 Mr Rodman Bundy will also deal with the issues of jurisdiction and admissibility and
23 prove that in this case there is neither any urgency nor a risk of irreparable harm to
24 Italy's rights.

25
26 Professor Alain Pellet will come back to the podium to demonstrate that this Tribunal
27 is not in a position to prescribe the second provisional measure requested by Italy.
28 He will show that there is no urgency, let alone an aggravated urgency that article
29 290(5) requires. He will then establish that the second provisional measure would
30 necessarily prejudice the merits of this case and irreversibly prejudice India's own
31 rights.

32
33 I request the Tribunal to call upon the Additional Solicitor General, Mr P.S.
34 Narasimha, for his presentation.

35
36 **THE PRESIDENT:** Thank you, Ms Chadha. I now give the floor to Mr Narasimha. I
37 would like to appeal to you to speak in such a way that the interpreters can catch up
38 with you.

39
40 **MR NARASIMHA:** Mr President, and honourable Members of this Tribunal, it is
41 indeed a pleasure and a privilege for me to appear before this Tribunal on behalf the
42 Republic of India.

43
44 A bare reading of the Request for provisional measures followed by the submissions
45 made by the learned Counsel for Italy will unfortunately show that the foundation has
46 been laid on facts which are either incomplete or in some cases inaccurate. The
47 conclusions drawn from such facts and also the propositions that have been
48 advanced are to some extent a little away from the truth.

1 Mr President, I believe that facts must speak for themselves. It will be in my
 2 endeavours to show that many of the questions and the issues that have arisen for
 3 consideration could actually be resolved in the light of the facts that are correctly
 4 stated. What are these facts? There are four sets of facts that become relevant for
 5 our consideration. First, the correct factual background in which Italy has invoked the
 6 jurisdiction of the Annex VII arbitration in 2015. This understanding, Mr President,
 7 will have a direct bearing on the principle of the *prima facie* view which this Tribunal
 8 will have to take on the jurisdiction of the Annex VII tribunal.

9
 10 The second set of facts that are important to us relate to the legal system of India
 11 and the remedies that are available in law and particularly the procedure that Italy
 12 has adopted and the marines have adopted from time to time. This factual narration
 13 will throw much light on an important issue that needs to be considered that relates
 14 to the exhaustion of remedies.

15
 16 A third important factual aspect that it is also necessary for me to elaborate on and
 17 take up is the true and correct facts on the basis of which one could attribute blame
 18 to a particular party and say that it is for this reason that the delay has occurred. This
 19 factual background will have an implication on the issue relating to urgency or the
 20 equity, perhaps, of what my learned friends have pleaded.

21
 22 Lastly, the other factual matrix that it becomes necessary for us to consider is the
 23 background in which the marines had approached the Supreme Court of India for
 24 deferment of proceedings coupled with the fact that the Supreme Court had
 25 suspended the proceedings before the Special Court. These aspects and this
 26 particular fact will again have a bearing on the two prayers that have been made by
 27 Italy before this Tribunal.

28
 29 The basic fact is that on 15 February 2012 two Italian marines on board the vessel
 30 *Enrica Lexie* fired at an Indian boat. This incident claimed the precious lives of two
 31 innocent fishermen. Immediately thereafter the investigations revealed that the firing
 32 was not supported by any reasonable belief of danger to life or property/or even that
 33 this firing was done in self-defence. My senior colleague, Professor Alain Pellet, will
 34 deal with this aspect in greater detail.

35
 36 Mr President, in simple terms, two unarmed fishermen of my country were killed for
 37 no fault of theirs and thus, the Government of India, or, for that matter, any civilized
 38 country of the world, would be duty-bound to inquire, investigate and try the accused,
 39 of course through a process of law which is informed by the rule of law and, very
 40 importantly, I agree with my friends, on the principles of criminal justice.

41
 42 Let us now see the follow-up actions taken immediately after the incident. Upon
 43 receiving information about the incident, the State of Kerala, one of the twenty-nine
 44 states constituting the Indian Federation, conducted an investigation and arrived at a
 45 *prima facie* conclusion of the commission of an offence. This conclusion led to the
 46 two marines being taken into judicial custody on the 19 February 2012.¹ Following

¹ The Italian Marines Massimiliano Latorre and Salvatore Girone were arrested by the police of the State of Kerala on 19.02.2012.

1 custody, Italy and the marines approached the highest court of the State of Kerala,²
 2 the High Court, challenging the jurisdiction of the State of Kerala.

3
 4 What is interesting, Mr President, is that the challenge before the State of Kerala
 5 was on the ground that the State would not have jurisdiction in that matter and that it
 6 is only the Union of India which would have the jurisdiction to investigate. Also, pleas
 7 were taken with respect to immunity and lack of jurisdiction. The High Court heard
 8 the matter in detail and delivered its judgment. It accepted the contention of Italy
 9 completely on some aspects of the matter. On the question of immunity, the High
 10 Court said it is not available with respect to the death of a person. With respect to
 11 jurisdiction the High Court also said that the State Government would have the
 12 jurisdiction in the matter. It also granted bail to them on more than one occasion.

13
 14 The judgment of the High Court was carried on appeal to the Supreme Court of
 15 India. In the Supreme Court of India, apart from the appeal that had been filed, they
 16 had also by this time instituted a writ petition, a petition which is filed directly in the
 17 Supreme Court instead of an appeal. The writ petition and the appeal were heard
 18 together. The matter was heard in detail and the Supreme Court delivered a
 19 judgment.

20
 21 Three very important findings were given in the High Court judgment. The first
 22 finding is that the submission made on behalf of Italy was accepted. The Supreme
 23 Court held the State of Kerala would not have jurisdiction at all. Then the Court said:

24
 25 We would agree with the state of Kerala and hold that the jurisdiction to try
 26 and investigate the case would lie only with the Union of India.

27
 28 That is one aspect which was very important for the Court to consider in view of the
 29 fact that it was an unusual incident which occurred in our country, and if we had
 30 subjected them to our regular criminal courts it would have taken a long time. The
 31 Supreme Court was concerned about that. It took the Government into confidence
 32 and the Court said:

33
 34 We shall in this case ask for the establishment of a Special Court to look
 35 into and try this case

36
 37 and also considered one of the submissions made by them, which is that the Indian
 38 Union and the Republic of India does not have jurisdiction to try this case.

39
 40 In view of the findings that had been given in the High Court, which came to the
 41 conclusion that there is jurisdiction for the State Government, there were certain
 42 facts which were to be brought on record by virtue of evidence. So the Supreme
 43 Court said:

44
 45 We will enable you to raise this plea before the Special Court that has been
 46 constituted and the Special Court can go into the matter and decide the
 47 question whether India has jurisdiction or does not have jurisdiction. Before
 48 it does that, some amount of evidence is necessary. Immediately after the

² Writ Petition No. 4542/2012 filed by Republic of Italy and the Italian Marines in the Kerala High Court (Vol. 2 - Annex 15 to Annex A . Italy Request for Provisional Measures)

1 evidence is put in, you can take the plea and the court could as well hold
2 that there is no jurisdiction for India to try this matter at all.
3

4 Mr President, it is evident from the judgment of the Supreme Court that Italy was
5 successful in arguing that the State of Kerala has no jurisdiction, and it had also
6 reserved the question of jurisdiction to be re-agitated before the Special Court,
7 where it could well prove that India had no jurisdiction over the incident. Two and a
8 half years after this question was kept open, Italy and the marines have come up
9 with the same prayer before the Annex VII tribunal. This tribunal would definitely be
10 going into this very question as to who has the jurisdiction at all, whether India would
11 have the jurisdiction at all, which is the question which Italy sought to be kept open
12 for them to be argued specifically, and the Supreme Court agreed and provided that
13 forum for them.
14

15 Much has been said about the Special Court which has been constituted. It is
16 definitely a matter of concern for someone who is not aware of the Indian legal
17 system. What are these Special Courts? Rest assured, Mr President and
18 Honourable Members of this Tribunal, that a Special Court is not a court which is for
19 the first time constituted. Special Courts are designated courts. Courts which require
20 to hear and dispose matters expeditiously are identified amongst the existing courts
21 of the country, and to that court a particular case is assigned, and the learned judge
22 of that court is asked to determine the dispute between the Parties. It is completely
23 constitutional and what is far more reassuring in a case of this nature is that this is a
24 court which has been asked specifically to be constituted and to hear by the
25 directions of the Supreme Court the entire procedure of law relating to a criminal
26 court, and all of the provisions apply equally to this court, so there is, really speaking,
27 no distinction between a Special Court and any ordinary criminal court which exists
28 in our country.
29

30 Immediately after the judgment of the Supreme Court, the Government complied
31 with the directions of the Supreme Court. A Special Court was constituted on 15 April
32 2013. The Government appointed an independent public prosecutor. The
33 Government also entrusted the matter to an independent agency called the National
34 Investigation Agency, the NIA. Immediately steps were taken and this constitution
35 took place and the Special Court would have started its proceedings on 15 April
36 2013. This court would be a completely dedicated court. It would not have, speaking
37 as a law officer with responsibility to the court, taken more than five or six months,
38 because the approach that India took towards this incident was not adversarial. It
39 was compelled to take up that issue and bring to justice whatever the fact situation
40 was. Instead of that, we have a situation today where the proceedings before the
41 Special Court never took place at all.
42

43 That is the second part of the question which I had marked: how did it happen that a
44 Special Court, constituted on 15 April 2013, to date has no adjudication; there is no
45 determination of the dispute between the Parties?
46

47 The following facts would show how, instead of participating in the proceedings to be
48 conducted before the Special Court and enabling the Special Court to arrive at its
49 decision on the jurisdiction of India after the recording of evidence as a preliminary

1 issue, Italy and the marines instead chose to adopt a course of filing multiple
2 applications which have brought the entire legal proceedings to a standstill.

3
4 In the meantime, even though applications were filed in the Supreme Court, the
5 National Investigation Agency proceeded with the investigation. It commenced the
6 investigation and sought to record the statements of witnesses to the incident. The
7 ship owners who had honoured the commitment made to the Supreme Court at the
8 time of release of the ship by the Supreme Court made available six crew members
9 and their statements were recorded. It is easy to say that there was no difficulty in
10 recording the statements so far as the Italian marines are concerned through video
11 recording, but that incident occurred after repeated prayers. India requested Italy to
12 secure the presence of the four Italian marines as promised by them to the Supreme
13 Court. The order of the Supreme Court specifically recorded an undertaking given by
14 Italy saying at the time of investigation

15
16 When the evidence of these witnesses is to be recorded, we undertake to
17 bring them back for examination.

18
19 The Court recorded that statement and permitted the ship to leave the coast of our
20 country.

21
22 At this point in time, after India repeatedly requested for the witnesses to be brought
23 to say what were the weapons used at the time of the incident, to say that it could
24 well have been recorded on the basis of videoconference is easy in hindsight. The
25 entire evidence was stalled due to that refusal, and the NIA was left with no option
26 but to finally record the statements of these witnesses by video recording.

27
28 There is another very important development which took place. Mr President, it is
29 also important to note that even before the NIA took charge of the proceedings to
30 investigate the matter, Italy and the marines again approached the Supreme Court,
31 seeking an injunction against the NIA investigating the case. If I may now request
32 this honourable Tribunal to permit me to refer to tab 1 of your documents, paragraph
33 5, it is the order of the Supreme Court considering their application.

34
35 Mr Rohatgi - the learned counsel who had appeared on behalf of the Italian
36 marines and the government - submitted that since the National
37 Investigation Agency could only try the Scheduled Offences referred to in
38 the Act, the investigation could not in any way be taken up by the NIA
39 under the Agency Investigation Agency Act 2008.

40
41 Paragraph 6:

42
43 Having heard the learned Attorney General for India and Mr Mukul Rohatgi
44 for the Petitioners, we do not see why this Court should be called upon to
45 decide as to the agency that is to conduct the investigation. The direction
46 which we had given in our judgment dated 18 January 2013 was in the
47 context of whether the Kerala Courts or the Indian Courts or even the
48 Italian Courts would have the jurisdiction to try the two Italian marines. It
49 was not our desire that any particular Agency was to be entrusted with the
50 investigation and to take further steps in connection therewith. Our intention
51 in giving the direction for formation of a Special Court was for the Central
52 Government to first of all entrust the investigation to a neutral agency, and,

thereafter, to have a dedicated Court having jurisdiction to conduct the trial. Since steps have been duly taken for the appointment of a Court of competent jurisdiction to try the case, the Central Government appears to have taken steps in terms of the directions given in our judgment dated 18 January 2013. It is for the Central Government to take a decision in the matter.

The next paragraph, paragraph 7, is important.

If there is any jurisdictional error on the part of the Central Government in this regard, it will always be open to the accused to question the same before the appropriate forum.

They were successful in taking this direction from the Supreme Court that this issue can actually be raised by us when the matter is taken up before the Special Court.

As indicated above, with the completion of the investigation by the NIA, the marines again approached the Supreme Court on January 2014 and sought to injunct the NIA from even filing charges in the Court. Meanwhile, Italy also requested India to exclude the charge under the special law called the Suppression of Unlawful Activities Act. The Government accepted this request and excluded the charge under the SUA Act, which shows that the Government has taken a very fair and liberal stance towards the request made on behalf of the marines. This was followed by an affidavit by the Union of India and a statement by the learned Attorney General in the Court. The Supreme Court, in response to this application, passed an order on 26 February 2014, which is at tab 2 of this compilation, a very short order. If I can request this honourable Tribunal to look at the first page of this order:

An affidavit has been filed today on behalf of the Union of India, the same is taken on record. According to the affidavit, the Union of India has accepted the opinion of the Law Ministry, according to which in the facts and circumstances of the case, the provisions of SUA Act are not attracted in this case. It has further been stated that appropriate steps will be taken to ensure that the charge-sheet reflect the opinion to the decision taken by the Union of India.

That is how the charge sheet was kept pending, because there was an objection about the enforcement of this Act.

To that extent there is no objection by Shri Mukul Rohatgi, learned senior counsel appearing for the petitioner. The learned counsel who appeared on behalf of the Republic of Italy had no objection to this issue at all. However, he has raised the issue that in view of the opinion given by the Law Ministry and the acceptance thereof by the Union of India it will denude the NIA to investigate or prosecute the petitioner or submit the charge sheet. The learned Attorney General has disputed this position.

The later portion is important.

In view of the earlier order \tilde{o} passed by a three-Judge Bench of this Court \tilde{o} and in such a fact situation, it is desirable to hear the parties limited to the extent and on that issue being a pure question of law. However, to

1 meet the technicalities, Mr Mukul Rohatgi, learned senior counsel has
2 pointed out that he would like to file an application to that effect.
3

4 They have raised this plea about the ability of the NIA to investigate the matter. The
5 Court permitted them to file an application. The matter was adjourned. These three
6 orders which I have shown to this honourable Tribunal and a narration of facts bring
7 to light the success Italy obtained with the institution of the cases before the
8 Supreme Court. They are: jurisdiction to investigate and prosecute lies only with the
9 Union of India and not the State of Kerala; the question relating to lack of jurisdiction
10 of the Republic of India is kept open and now to be argued before the Special Court,
11 which could very well hold that India has no jurisdiction; Italy could also argue on the
12 jurisdiction of the NIA before the Special Court.
13

14 In light of these three orders, Italy could not have any grievance, and all that was left
15 for Italy was to proceed with the hearing before the Special Court.
16

17 Unfortunately, however, now the marines alone approached the Supreme Court of
18 India and instituted a fresh case³ (Writ Petition No. 236/2014) with questions similar
19 to those that are being raised before the Annex VII tribunal. The Supreme Court
20 heard the marines and, at their request, passed an order dated 28 March 2014,
21 which issued notice to the Union of India and also granted complete abeyance of the
22 trial before the Special Court. By issue of this order the proceedings before the
23 Special Court have come to a standstill.
24

25 My colleague Rodman Bundy will deal with this writ petition in very great detail.
26

27 Mr President, as a consequence of this order, the entire proceedings before the trial
28 court were kept in abeyance. This stay over the Special Court proceedings still
29 continues, the result of which is that the legal enforcement mechanism has come to
30 a complete standstill. Consequently, the charges prepared by the NIA have been
31 kept in abeyance and the Special Court, which is subject to orders of the Supreme
32 Court, has been unable to proceed further in its adjudication process.
33

34 This is the factual background, in my respectful submission, which throws light on
35 two very important submissions made by my learned friends. One is that charges
36 have not been filed; it is unacceptable for a civilized society to do that. The second
37 thing arising from the facts is that the reason for the delay, the reason for the courts
38 and institutions like the NIA not filing the charge until the investigation was complete
39 is attributable to Italy and the marines, who themselves had the carriage of the
40 proceedings.
41

42 I can understand a situation where, in a case is pending before the courts, the
43 determination has not taken place. This is clearly a case where at their instance, at
44 their petition and their act of participation, the court was called upon to pass orders
45 from time to time to see that the investigation does not proceed any further.
46

47 This is one aspect of the matter. I will now deal with another aspect that was touched
48 upon on the ground that India should have taken a humanitarian approach.

³ Writ Petition No. 236/2014 instituted by the two Italian Marines in the Supreme Court. (Vol. 2 - Annex 40 . Written Observations by India)

1
2 When both the marines filed an application before the Supreme Court seeking
3 permission to travel to Italy for the purpose of casting their votes in the election that
4 was to be held in their country, the Supreme Court, on hearing this application,
5 allowed both the marines to travel to Italy and remain there for a period of four weeks
6 and to return back.⁴

7
8 The next request was made to the Supreme Court when an application was filed on
9 behalf of Mr Latorre⁵ seeking the permission of the court to leave for Italy on health
10 grounds. When the Supreme Court enquired from the Government its view on the
11 relaxation of the bail conditions, I appeared and represented the Government at that
12 point of time. The Government very clearly instructed me that we are not adversarial
13 in this matter, particularly when a man is unwell . why should there be any
14 objection? I reflected the views of my Government to the Court and there was no
15 further adjudication on that. There was no examination as to whether or not it was
16 true. It was unnecessary for us to get into the merits of the matter and the merits of
17 the documents to prove ill health. We were unconcerned about that. The statement
18 that he was not well was sufficient for us. We would not need to go any further. We
19 accepted it at its face value and said that if he is unwell he is entitled to go abroad
20 and have medicine. That order is on record. It clearly reflects the statement made by
21 me that we have no objection to him leaving the country.

22
23 Mr President, even before the expiry of the four months granted by the Supreme
24 Court, Mr Latorre⁶ filed another extension for a further period of four months on
25 health grounds. Simultaneously, another application was also filed on behalf of Mr
26 Girone⁷ requesting that he too may be allowed to travel to Italy. It may be true that
27 the court might not have been inclined to both, but then the reality is that both these
28 applications were withdrawn.⁸ There is no adverse order that Italy faced at any point
29 of time from the Supreme Court in respect to grant of permission to leave the
30 country.

31
32 Mr Latorre, who was already in Italy, made a third application to the Supreme Court
33 seeking an extension of stay. This request was heard by the Supreme Court on 14
34 January 2015⁹ and a further extension of three months of his stay in Italy was
35 permitted to Mr Latorre.

36
37 Even at this hearing it was the specific instruction of the Government . and my
38 submission was that there was no difficulty about that at all.
39

⁴ Order dated 22.02.2013 passed by the Supreme Court in I.A. No. 4/2013 in SLP © No. 20370/2012.
(Vol. 2 - Annex 16 . Written Observations by India)

⁵ Application for Directions and relaxation of Bail Conditions dated 05.09.2014 (Vol. 2 - Annex 21 to
Annex A . Italy Request for Provisional Measures)

⁶ Interim Applications No.7-10 in SLP © No. 20370/2012 (Bail condition relaxation for Massimilano)
(Vol. 2 - Annex 22 to Annex A . Italy Request for Provisional Measures)

⁷ Interim Applications No.7-10 in SLP © No. 20370/2012 (Bail condition relaxation for Salvatore
Girone) (Vol. 2 - Annex 23 to Annex A . Italy Request for Provisional Measures)

⁸ Order dated 16.12.2014 by the Supreme Court (Vol. 2 - Annex 29 to Annex A . Italy Request for
Provisional Measures)

⁹ Order of the Supreme Court dated 14.01.2015 (Vol. 2 - Annex 30 to Annex A . Italy Request for
Provisional Measures)

1 Mr Latorre then made his fourth application immediately prior to his return, seeking a
 2 further extension of his stay in Italy for health and medical reasons. This application
 3 was again heard by the Supreme Court which did not deny him the relief he sought
 4 and passed an order on 9 April 2015.¹⁰ By the same order, the Court also directed
 5 that the main petition be listed for hearing.

6
 7 It is at this stage that there is reference to a tribunal by a notification that was issued.
 8 The Court asked why the matter had been adjourned so many times. However, we
 9 had no difficulty about the medical grounds.

10
 11 It is at this stage that we were called upon, by the Notification that was issued,
 12 saying that this matter needed to be decided by the arbitration under Annex VII.

13
 14 It is against this factual background that the steps taken by Italy must be understood.

15
 16 Instead of returning to India, two further applications were filed. My friends have
 17 referred to those in detail.

18
 19 One application said that he was unwell but that you would not insist that he should
 20 come back until the tribunal decides the matter. The second application said that the
 21 proceedings before the courts must be adjourned *sine die*.

22
 23 In reality, the proceedings before the court were never stayed. There is no hearing
 24 because the Supreme Court suspended it. Those proceedings will not go on. It is
 25 possible that it would not go on until the hearing before the Annex VII tribunal either
 26 because they have the carriage of the proceedings. They have instituted the case.

27
 28 I really do not understand therefore that on the one hand these proceedings are
 29 instituted before the Supreme Court and then the trial and everything is stayed. Then
 30 this application says that you actually postponed those hearings when the decision
 31 takes place.

32
 33 It is in this perspective I humbly request that this honourable Tribunal should look at
 34 the requirement of passing provisional measures.

35
 36 I will conclude because two more speakers after me will deal with very important
 37 aspects of the matter.

38
 39 The prayer for provisional measures is in two parts. The first part:

40
 41 India shall refrain from taking or enforcing any judicial or administrative
 42 measures against Sergeant Massimiliano Latorre and Sergeant Salvatore
 43 Girone in connection with the *Enrica Lexie* incident and from exercising any
 44 other form of jurisdiction over the ~~Enrica Lexie~~ incident.
 45

46 This, in my submission, is accomplished by the fact that the Supreme Court has
 47 actually stayed it. It would not be going too far to say that until the tribunal is

¹⁰ Order of the Supreme Court dated 09.04.2015 (Vol. 2 - Annex 31 to Annex A . Italy Request for Provisional Measures)

1 constituted and hears the matter, there is no compelling assumption that the matter
2 will be taken up and that there will be an adverse decision against them.

3
4 The second part relates to the two marines. One is already in Italy on health
5 grounds. It is not our case that he should come back if his health does not permit him
6 to do that at all. As far as the other person is concerned, that is the only issue today;
7 the rest has been accomplished. That much, I suppose, the Government of the
8 Indian Republic, which is trying to prosecute the case and find the truth of the matter
9 and how this incident incurred and who is responsible, is entitled to see the
10 proceedings taken to their logical end.

11
12 Mr President, with your permission I request that Mr Alain Pellet take the floor.

13
14 **THE PRESIDENT:** Thank you, Mr Narasimha. I now give the floor to Mr Alain Pellet.

15
16 **MR PELLET** (*Interpretation from French*): Mr President, Madam (regrettably in the
17 singular) and gentlemen of the Tribunal, in this first intervention I would like to revisit
18 the real subject-matter of the case that has brought us together and which Italy casts
19 in a false light. I will demonstrate that this is not without implications for the
20 jurisdiction of the Tribunal to rule on the provisional measures that the applicant
21 State asks it to prescribe.

22
23 I will then examine other elements which demonstrate that the Annex VII tribunal that
24 Italy requests be constituted does not have jurisdiction to rule on the case that it
25 seeks to submit to it.

26
27 Mr President, I am wondering whether this Tribunal has not been somewhat led
28 astray by the name that Italy has seen fit to give to this dispute, which it intends to
29 bring to an arbitral tribunal pursuant to Annex VII of UNCLOS.

30
31 The *Enrica Lexie* incident makes one think that this is an event of secondary
32 importance, even though generally unfortunate in nature, to quote the *Larousse*¹¹
33 dictionary; whereas the events that have given rise to this case, which is very
34 unfortunate indeed, are not secondary at all. It is about the death of two Indian
35 fishermen, Mr Ajeesh and Mr Valentine, crew members on the *St. Antony*. You can
36 see the vessel on the screen. They were victims of the irresponsible firing of
37 automatic weapons by two Italian marines on board the tanker *Enrica Lexie*. You can
38 see a picture of that now on the screen.

39
40 It goes without saying, Mr President, that if you look at the respective sizes of the
41 two ships, *Enrica Lexie* wins hands down, but the incident occasioned no damage
42 whatsoever to the tanker. It is the *St. Antony* and its occupants that have been
43 victims of the shooting: two men dead; trauma for the other nine fishermen; and
44 serious damage to the ship. In point of fact, what we are dealing with here is the
45 Case of the *St. Antony*; and let no one come and tell us that the reality of the facts is
46 open to challenge, despite the untruths and machinations of the marines on the

¹¹ <http://www.larousse.fr/dictionnaires/francais/incident/42245>; v. aussi, par ex.
<http://fr.thefreedictionary.com/incident>; <http://www.thefreedictionary.com/incident>.

1 *Enrica Lexie*.¹² The facts have been confirmed by the detailed investigation carried
 2 out by the Kerala State police¹³ and then by the Indian National Investigation
 3 Agency, and by the simple fact that Italy has already paid compensation to the
 4 victims next of kin and to the owner of the *St. Antony*.¹⁴ Who could be convinced
 5 that anyone in their right mind could take the *St. Antony* to be a dangerous pirate
 6 ship, bent on attacking the *Enrica Lexie*, a tanker protected by barbed wire and six
 7 members of the Italian armed forces?

8
 9 This being the case, Mr President, the accused have not yet been tried. Their trial
 10 could possibly demonstrate that they are not criminally liable; or that they may have
 11 the benefit of mitigating circumstances. Nonetheless, they would still have to be tried
 12 for the crimes they have been accused of, on the basis of very plausible grounds
 13 indeed. They are opposed to this, and Italy is too. Italy, which appears to consider
 14 that the presumption of innocence implies total absolution.

15
 16 Mr President, distinguished Members of the Tribunal, such is the very subject matter
 17 of this case, which, apart from the fact that it took place at sea in India's exclusive
 18 economic zone, has very little connection to the law of the sea. This is not about
 19 some collision at sea, as in the Case of the S.S. *Lotus* and it is not an incident of
 20 navigation within the meaning of article 97 of the Convention on the Law of the Sea.
 21 It is about the killing of two Indian fishermen by two Italian nationals.

22
 23 Pursuant to article 287 of the Convention, this Tribunal, like those tribunals
 24 constituted under Annex VII or the ICJ, had it been seized, would have jurisdiction to
 25 rule on a dispute only if that dispute relates to the interpretation or application of the
 26 Convention.

27
 28 It is not enough merely to recite a long litany of provisions of the Convention that
 29 might have some tenuous connection with the facts of the case, as Sir Michael and
 30 Professor Tanzi did this morning, to establish the jurisdiction of the tribunal. The real
 31 question is to know whether or not the dispute between the Parties is covered by one
 32 or more provisions of the Convention. *Prima facie* this is not the case if you focus on
 33 the real subject-matter of the dispute. Indeed, the Convention does not contemplate
 34 the situation that is before you, and this casts serious doubts on the jurisdiction of
 35 the arbitral tribunal that Italy asks to be set up, and, indirectly, on your own
 36 jurisdiction, distinguished Members of the Tribunal.

37
 38 To argue the contrary Italy relies on the interpretative declaration that it made when it
 39 signed the Convention:
 40

¹² V. 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).

¹³ Kerala Police Charge Sheet, 15 February 2012 (OE, annexe 3).

¹⁴ A. Katz, *Brother Shot Dead Fishing Tests Armed Guards' Accountability*, *Bloomberg*, 29 November 2012 (Annexe 12 des OEIn). A. Banerji, « India Has Jurisdiction to Try Italian Marines for Fishermen Deaths: Court », *Reuters*, 18 January 2013 (<http://www.reuters.com/article/2013/01/18/us-india-italy-marines-idUSBRE90H07E20130118>). V. aussi Supreme Court of India, Order confirming the release of the *MV Enrica Lexie* and its crew, 2 May 2012 (Annexe 10 des OEIn).

1 The rights and jurisdiction of the coastal State in such zone do not include
 2 the right to obtain notification of military exercises or manoeuvres or to
 3 authorize them.¹⁵
 4

5 It is not possible to assert that the killing of two Indian fishermen has anything to do
 6 with the fight against piracy. *St. Antony* has got nothing in common with a pirate
 7 vessel, and the fishermen could not reasonably be mistaken for pirates, given that
 8 the two ships were barely 100 metres from each other when the shooting took
 9 place,¹⁶ especially if the marines did indeed use binoculars, as Italy asserts.¹⁷ The
 10 two marines are the only people claiming to have seen weapons on the *St. Antony*.¹⁸
 11

12 This reference to the necessity of combating piracy is all the more bizarre inasmuch
 13 as India has triumphed over this scourge, which, at the time these events took place,
 14 had already been virtually eradicated in the area in question, as you can see in the
 15 table under tab 11 of the Judgesqfolder, which is on screen now. In any event, it is
 16 clear that at the time there was no sighting of any pirate vessel in the region. The
 17 chart that you can see fully confirms that.
 18

19 This chart comes from the internet site of the NATO Shipping Centre¹⁹ and it
 20 illustrates the different alerts and actual attacks which took place during 2012.
 21

22 As you can see from the document that you have in the Judgesqfolder under tab 12,
 23 there were 11 alerts and one suspicious activity logged in the region. This is a region
 24 which extended from the west coast of India all the way through to the Somali coast
 25 in February 2012. It is this activity, merely one suspicious activity which is
 26 represented by the blue marker at the tip of the Indian Subcontinent. That is the
 27 region that is of particular interest to us.
 28

29 Allow me, distinguished Members of the Tribunal, to draw your attention to two
 30 specific points. First, this suspicious activity was reported on 2 February 2012. No
 31 other suspicious activity or act of piracy was reported on 15 February.
 32

33 Second, the chart confirms that the eastern part of the Indian Ocean off the Indian
 34 coast was at the time these acts took place virtually free of pirates. Of course, one
 35 must be vigilant and vigilance is still called for, but this situation in no way warranted
 36 any particular nervousness and certainly not the jumpiness demonstrated by Messrs
 37 Girone and Latorre.
 38

39 Mr President, Italy can no more invoke articles 100 *et seq.* of the Convention of 1982
 40 than it can rely on article 97. The same applies to article 32 of the Convention. That

¹⁵ 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).

¹⁶ V. Statement of Mr Vitelli Umberto, Captain of the *MV Enrica Lexie*, 15 June 2013 (OE, annexe 27).

¹⁷ V. Notification (ci-après : « N. »), par. 7.

¹⁸ *Contra*, v. 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 (OE, annexe 29) et Statement of Mr Victor James Mandley Samson, Crew Member of the *MV Enrica Lexie*, 24 July 2013 (OE, annexe 29).

¹⁹ <http://www.shipping.nato.int/Pages/LargeAlertMap2012.aspx>.

1 is the only article relative to immunity, apart from the articles relating to the
 2 Authority²⁰ and your own immunities,²¹ distinguished Members of the Tribunal.
 3 Article 32, on which Italy does not rely, relates to immunities of warships and other
 4 government ships operated for non-commercial purposes. We are not talking here
 5 about the immunities of the *Enrica Lexie*, which, moreover, is not covered by this
 6 provision, but to immunities which Italy claims for the marines who were on board,
 7 about which the Convention says nothing whatsoever.

8
 9 As you said in your Order of 15 December 2012 in *the "ARA Libertad" Case*

10
 11 *(Read in English)*

12 at this stage of the proceedings, the Tribunal does not need to establish
 13 definitively the existence of the rights claimed by Argentina and yet, before
 14 prescribing provisional measures, the Tribunal must satisfy itself that the
 15 provisions invoked by the Applicant appear *prima facie* to afford a basis on
 16 which the jurisdiction of the Annex VII arbitral tribunal might be founded²²

17
 18 *(Interpretation from French)* This echoes the settled case law of the ICJ, which
 19 considers as well that at the provisional measures stage it

20
 21 *(Read in English)*

22 does not need to settle the Parties' claims [or to] determine definitively
 23 whether the rights which [the Parties] wish to see protected exist.²³

24
 25 However, as Sir Michael and Professor Tanzi recalled this morning, the Tribunal
 26 must decide if the rights claimed by Italy on the merits and on which Italy seeks
 27 protection are plausible.²⁴

28
 29 This pre-condition for establishing the jurisdiction of the future Annex VII tribunal is
 30 not met *prima facie*. As opposing counsel insisted this morning, any deeper
 31 assessment by this Tribunal would suppose a review of the facts. A review,
 32 distinguished Members of the Tribunal, which you are even less entitled to
 33 undertake, given that you are not judges on the merits. Were you to do so you would
 34 encroach on the jurisdiction of the future tribunal which will have to rule *seconda*
 35 *facie*, since under the terms of article 290(56) of the Convention
 36

²⁰ V. les articles 177 et s. de la Convention.

²¹ Annexe VI, Statut du TIDM, art. 10.

²² TIDM, Ordonnance, 15 décembre 2012, *Affaire de l'« ARA Libertad » (Argentine c. Ghana)*, mesures conservatoires, par. 60.

²³ CIJ, Ordonnance, 22 novembre 2013, *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua) ; Construction d'une route au Costa Rica le long du fleuve San Juan (Nicaragua c. Costa Rica)*, mesures conservatoires, Recueil 2013, p. 360, par. 27. V. aussi : CIJ, Ordonnance, 13 juillet 2006, *Usines de pâte à papier (Argentine c. Uruguay)*, mesures conservatoires, Opinion individuelle du Juge Abraham, Recueil 2006, pp. 140-141.

²⁴ V. *ibid.* ; v. aussi : CIJ, Ordonnance, 8 mars 2011, *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua)*, mesures conservatoires, Recueil 2011, p. 19, pars. 56-58 citant C.I.J., Ordonnance, 11 septembre 1976, *Plateau continental de la mer Égée (Grèce c. Turquie)*, Mesures conservatoires, Recueil 1976, pp. 10-11, par. 31 et Ordonnance, 15 mars 1996, *Frontière terrestre et maritime entre le Cameroun et le Nigeria (Cameroun c. Nigeria)*, mesures conservatoires, C.I.J. Recueil 1996 (I), p. 22, par. 39.

²⁴ V. N., pars. 43-46.

1 (Read in English)

2 Once constituted, the tribunal to which the dispute has been submitted may
3 modify, revoke or affirm those provisional measures, acting in conformity
4 with paragraphs 1 to 4.

5
6 (Interpretation from French) Of course, that tribunal may prescribe provisional
7 measures, even if this Tribunal abstained from doing so.

8
9 I would add that the very lengthy arguments put forward this morning by the other
10 side relating to considerations that have basically nothing to do with the law of the
11 sea is another indication that . and I say this with the greatest of respect . that Italy
12 has got the forum wrong. Absent any real link to the Convention, Italy's initiative
13 constitutes an abuse of legal process, an abuse which India reserves its right in due
14 course to draw to the attention of the future Annex VII tribunal in accordance with
15 article 294 of the Convention. Unfortunately, distinguished Members of the Tribunal,
16 that provision does not give you jurisdiction to rule in that respect.

17
18 Mr President, there is another ground absolutely excluding *prima facie* the
19 jurisdiction of the tribunal to be set up under Annex VII . and which will of course be
20 called upon to rule definitively in this respect in due course.

21
22 Under the terms of article 295 of the United Nations Convention on the Law of the
23 Sea

24
25 (Read in English)

26 Any dispute between States Parties concerning the interpretation or
27 application of this Convention may be submitted to the procedures provided
28 for in this section

29
30 . (Interpretation from French) this being the section on compulsory procedures
31 entailing binding decisions .

32
33 (Read in English)

34 only after local remedies have been exhausted where this is required by
35 international law.

36
37 (Interpretation from French) In the case before us two compelling reasons require
38 the exhaustion of local remedies by Italy.

39
40 Although Italy claims otherwise,²⁵ in reality it is acting to protect rights of its nationals:
41 the two accused on the one side, and the Italian-flagged tanker *Enrica Lexie* on the
42 other. The words used by Italy leave no room for doubt. Its intention is clear in the
43 Notification of 26 June, whereby in its first submission Italy requests the Annex VII
44 tribunal to adjudge and declare that . and I quote:

45
46 (Read in English)

47 India has acted and is acting in breach of international law by asserting and
48 exercising jurisdiction over the *Enrica Lexie* and the Italian Marines in
49 connection with the *Enrica Lexie* Incident.

50

25 V. N., pars. 43-46.

1 *(Interpretation from French)* That the sole intent is to protect the Italian nationals
 2 becomes crystal clear when we consider the two provisional measures Italy asks you
 3 to prescribe . and let us recall that provisional measures are exclusively destined to
 4 preserve the rights of the parties to the dispute, the rights to be ruled upon by the
 5 body hearing the case on the merits. Those are the rights that Italy seeks to protect.

6
 7 *(Read in English)*

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

12
 13 *(Interpretation from French)* That is Italy's first submission.

14
 15 Here is the second:

16
 17 *(Read in English)*

18 India shall take all measures necessary to ensure that restrictions on the
 19 liberty, security and movement of the Marines be immediately lifted to
 20 enable Sergeant Girone to travel to and remain in Italy and Sergeant
 21 Latorre to remain in Italy throughout the duration of the proceedings before
 22 the Annex VII Tribunal.

23
 24 *(Interpretation from French)* I repeat:

25
 26 *(Read in English)*

27 to ensure that restrictions on the liberty, security and movement of the
 28 Marines be immediately lifted to enable Sergeant Girone to travel to and
 29 remain in Italy and Sergeant Latorre to remain in Italy.

30
 31 *(Interpretation from French)* I could also refer to what Professor Verdirame said this
 32 morning and I quote:

33
 34 *(Read in English)*

35 The Marines, and in consequence Italy, would have suffered irreparable
 36 damage.

37
 38 *(Interpretation from French)* It is indeed, to use the well-known expression from
 39 *Mavrommatis* concerning diplomatic protection, ~~to~~ the person of its nationals²⁶ that
 40 Italy seeks to ensure respect for international law.

41
 42 It is clearly the marines, Sergeant Girone and Sergeant Latorre, who are to be
 43 protected. Thus this is about diplomatic protection. However, as we know, the
 44 exercise of diplomatic protection is subject to two indispensable conditions.²⁷ First,
 45 that the beneficiaries of the protection must have the nationality of the protecting
 46 State . this condition is met . and that local remedies must have been exhausted.
 47 As the Solicitor General has underlined, they have assuredly not been. We have

²⁶ V. C.P.J.I., arrêt, 30 août 1924, *Affaire des concessions Mavrommatis en Palestine*, p. 12.

²⁷ V. les articles 3, 4, 5 et 14 du Projet d'articles sur la protection diplomatique de la C.D.I. annexé à la résolution 62/67 de l'Assemblée générale des Nations Unies, du 6 décembre 2007.

1 already said so and we will return to this. As the ICJ has underlined, this is ~~%a~~ well-
 2 established rule of customary law²⁸ and even ~~%an~~ important principle~~+of that law.~~²⁹

3
 4 Granted, as the ILC has pointed out in its commentary to article 14 of its draft articles
 5 on diplomatic protection, it is not always easy

6
 7 *(Read in English)*

8 to decide whether the claim is ~~%direct+or %indirect+~~where it is ~~%mixed+~~ in the
 9 sense that it contains elements of both injury to the State and injury to the
 10 nationals of the State.³⁰

11
 12 *(Interpretation from French)* However, in the instant case, as demonstrated by the
 13 passages I have quoted from Italy's written pleadings, there can be no doubt that the
 14 criterion of preponderance laid down in paragraph 3 of article 14 of the ILC draft
 15 articles . the only criterion by which according to the ILC the distinction can be
 16 made³¹ . is met:

17
 18 The claim [here] is brought preponderantly on the basis of an injury to a
 19 national.

20
 21 Here, as in *ELSI*, for example,

22
 23 *(Read in English)*

24 the matter which colours and pervades the claim as a whole, is the alleged
 25 damage to [the two Italian nationals] said to have resulted.³²

26
 27 *(Interpretation from French)* Therefore, an Annex VII tribunal can only exercise its
 28 jurisdiction and rule on the claims of Italy once all remedies available to the two
 29 accused have been exhausted. But they have not been and it cannot reasonably be
 30 claimed that they would not be effective, first, because India has a judicial tradition of
 31 independence and impartiality which is beyond challenge and, second, because the
 32 Indian courts have evidenced a remarkably benevolent disposition over the course of
 33 the extremely numerous delaying applications submitted to them by the two accused
 34 and by Italy. If the result is that the domestic remedies have not been exhausted,
 35 they have only themselves to blame.

36
 37 However, there is something else, Mr President, another reason why the referral to
 38 an Annex VII arbitral tribunal is doomed to failure. This is due precisely to the judicial
 39 strategy Italy has adopted. Indeed, instead of encouraging its nationals to exhaust
 40 those domestic remedies as swiftly as possible, remedies offering all the guarantees
 41 to be desired, in order to be able, if need be, to exercise its protection on their behalf,
 42 Italy itself has brought actions in the Indian courts in support of the numerous stalling
 43 claims its nationals have submitted.

28 C.I.J., arrêt, 21 mars 1959, *Affaire de l'Interhandel*, Exceptions préliminaires, *Recueil* 1959, p. 27.

29 C.I.J., arrêt, 20 juillet 1989, *Elettronica Sicala S.P.A. (ELSI)*, *Recueil* 1989, p. 42, par. 50.

30 Article 14 du Projet d'articles sur la protection diplomatique de la C.D.I., *ibid.*, par. 10) du commentaire.

31 *Ibid.*, par. 11.

32 C.I.J., arrêt, 20 juillet 1989, *Elettronica Sicala S.P.A. (ELSI)*, *Recueil* 1989, p. 43, par. 52. V. aussi C.I.J., arrêt, 21 mars 1959, *Affaire de l'Interhandel*, Exceptions préliminaires, *Recueil* 1959, p. 28

1 Mr President, I am not going to go into the detail of these interventions by Italy in the
 2 various proceedings concerning the ~~%Enrica Lexie~~ incident+or rather the case of the
 3 murder of the two fishermen on board the *St. Antony*, first of all, because common
 4 law criminal proceedings are for me impenetrable mysteries and also because these
 5 technicalities are hardly of any importance. The facts are as follows:

6
 7 First, to attempt to obtain the adjournment or discontinuance of the prosecution
 8 against Messrs Latorre and Girone, Italy petitioned the Indian courts.³³ The Solicitor
 9 General explained this and Mr Bundy is going to revisit it shortly.

10
 11 Second, these proceedings have not run their full course: they remain pending. This
 12 is specifically the case of the proceedings before the Special Court; as we have just
 13 heard from the Solicitor General, this is not some exceptional court, contrary to what
 14 our friends on the other side insinuate. This court has jurisdiction to rule on all
 15 aspects of the case, including on the question of jurisdiction of the Indian courts. This
 16 is a key element of the matter as a whole and of the instant proceedings in particular.
 17 Let me refer to the judgment of the Supreme Court of India dated 18 January 2013
 18 transferring the case to a special court so that:

19
 20 *(Read in English)*

21 the same shall be disposed of expeditiously.³⁴

22
 23 *(Interpretation from French)* You can find the relevant passage under tab 13 of your
 24 Judgesqfolders. It follows . and I am still quoting paragraph 101 . that:

25
 26 *(Read in English)*

27 the question of jurisdiction of the Union of India to investigate into the
 28 incident and for the Courts in India to try the accused may be reconsidered.

29
 30 *(Interpretation from French)* %may be reconsidered+. And even more neatly at
 31 paragraph 102, which I quote:

32
 33 *(Read in English)*

34 once the evidence has been recorded, it will be open to the Petitioners to
 35 re-agitate the question of jurisdiction before the Trial Court which will be at
 36 liberty to reconsider the matter in the light of the evidence which may be
 37 adduced by the parties and in accordance with law.

38
 39 *(Interpretation from French)* %which will be at liberty to reconsider the matter in the
 40 light of the evidence+.

41
 42 Third, it is both paradoxical and very regrettable that, after it had succeeded in
 43 ensuring that its concerns would be fully met, Italy did everything in its power . and
 44 apparently Indian judicial procedure offers a raft of possibilities so to do . to retard,
 45 indeed to prevent, the expeditious decision envisaged by the Supreme Court. It is
 46 particularly inapt that Italy decries today those delays for which Italy alone is
 47 responsible.

³³ V. OE, pars. 1.16-1.20, 2.9-2.13 et 3.22-3.28.

³⁴ *Republic of Italy & Ors v. Union of India & Ors*, Supreme Court of India Judgment of 18 January 2013, (N., annexe 19, p. 83, par. 101).

Let me be clear, Mr President, the objection here is not about the non-exhaustion of domestic remedies . that is another objection . but about the fact that Italy *chose* to seize Indian courts and now turns away from them and seeks to remove the case to the international level, even though there is no new element, such as for example one raising doubt as to the impartiality of Indian courts. It is the principle of good faith that is at issue here . let us not even mention estoppel . the fundamental international law principle that you cannot blow both hot and cold.

What that means in the kind of situation before us is that there is an obligation not to change judicial forum. Once you have elected one, you have to stick to it. Of course this does not mean that you cannot subsequently appeal to another forum, if that is open to you. Like many elementary principles of international law, this one can be said in Latin. In short,

electa una via

and if you want to appear more learned you might say:

electa una via, non datur recursus ad alteram

which sounds particularly felicitous in Italian:

Scelta una via, non è ammesso il ricorso ad un'altra

This principle is more commonly applied in investment law,³⁵ for example, than in public international law because it is rare for a State to appear before a domestic court of another State, as Italy has done, at the risk of losing its immunity from jurisdiction (as Italy has done in our case).

This being said, the reasons of procedural economy and fairness which justify application of the *electa una via* principle in transnational frameworks are equally if not more cogent in inter-State disputes.

In the instant case Italy has chosen to have recourse to Indian courts. These courts have announced their intention to examine the question of their jurisdiction or lack thereof to judge the two accused. Italy cannot now, without acting in bad faith, turn her back on those courts, those courts that Italy itself seized, and now request an international judicial body to rule, whereas the cases brought by Italy are still pending in India and there is nothing . were it not for the dilatory tactics of the persons concerned and of Italy herself . to give reason to think that the cases will not be concluded in a reasonably short time.

Distinguished Members of the Tribunal, the murder case before you cannot be settled by the application of the law of the sea, of which you are the watchful guardians. And thus you cannot entertain this case, no more than can the Annex VII

³⁵ Pour un exemple ancien, v. Commission mixte Venezuela-Etats-Unis, *Woodruff case* (1903), *R.S.A.*, Vol. IX, pp. 222-223 ; plus récemment, v. par ex. : *Pantechniki S.A. Contractors & Engineers c. Albanie*, Aff. CIRDI n° ARB/07/21, sentence, 10 juillet 2009, pars. 31 et 64 ; ou *Getma International c. Guinée*, aff. CIRDI n° ABR/11/29, décision sur la compétence du 29 décembre 2012, pars. 129 and 134.

1 tribunal whose constitution Italy seeks. Neither that tribunal nor you have any reason
 2 to take the place of the Indian courts to which Italy first turned to settle the matter
 3 which it now seeks to put before an international tribunal without the Indian courts
 4 having been allowed to rule on their own jurisdiction or lack thereof. In any event .
 5 and this is a different argument . as it is mainly a case of protecting the rights and
 6 interests of Messrs Girone and Latorre, no international court anywhere could have
 7 jurisdiction at this time given that the local remedies have not been exhausted.

8
 9 Mr President, the *prima facie* jurisdiction of the Annex VII tribunal is far from being
 10 established. By the same token, distinguished Members of the Tribunal, it is
 11 impossible for you to uphold Italy's request for the prescription of provisional
 12 measures.

13
 14 I would like to thank you very much for your kind attention. Mr President, the next
 15 representative of India to take the floor, if you would like to give it to him, will be Mr
 16 Rodman Bundy. Thank you.

17
 18 **THE PRESIDENT:** Thank you, Mr Pellet. As we are approaching the break, I do not
 19 want Mr Bundy to start and then be interrupted, so I suggest we withdraw for 30
 20 minutes and reconvene at five to five, when Mr Bundy will have the floor.

21
 22 (*Short adjournment*)

23
 24 **THE PRESIDENT:** We will now begin the hearing. I give the floor to Mr Rodman
 25 Bundy.

26
 27 **MR BUNDY:** Thank you very much, Mr President, distinguished Members of the
 28 Tribunal. It is indeed an honour to appear before you today and to represent the
 29 Republic of India in this important case.

30
 31 In this portion of India's pleadings, we will turn to the inadmissibility of the two
 32 submissions that appear at the end of Italy's Request for provisional measures. I
 33 shall start by addressing Italy's first submission, its requests that the Tribunal order
 34 India to refrain from taking or enforcing any judicial or administrative measures
 35 against the two Italian marines in connection with the *Enrica Lexie* incident, and from
 36 exercising any other form of jurisdiction over that incident. Following me, Professor
 37 Pellet will deal with Italy's second submission, in which Italy asks the Tribunal to take
 38 all measures necessary to ensure that the restrictions on the liberty, security and
 39 movement of the marines be immediately lifted so as to enable the marines to travel
 40 to and remain in Italy throughout the duration of the proceedings before the Annex
 41 VII arbitral tribunal.

42
 43 It is undisputed that both requests depend on a showing by Italy that, as provided in
 44 article 290, paragraph 5, of the Convention, the urgency of the situation so
 45 requires+.

46
 47 Thus, the urgency+is a critical condition for the Tribunal to prescribe any provisional
 48 measures.
 49

1 I will not belabour the point because the Tribunal's jurisprudence on the issue is well-
 2 known. What I would recall is that the Tribunal has made it clear that provisional
 3 measures shall not be prescribed unless there is a

4
 5 need to avert a real and imminent risk that irreparable prejudice may be
 6 caused to the rights in issue before the final decision is delivered.

7
 8 The Special Chamber recently reiterated that in the *Ghana/Côte d'Ivoire* case.³⁶

9
 10 There is a further element to the notion of urgency which arises out of article 290,
 11 paragraph 5. Ordinarily, I should not have to mention it but the manner in which Italy
 12 has cast its requests for provisional measures reveals that Italy is oblivious to the
 13 point, despite Sir Michael's attempt to repair the damage this morning. Let me place
 14 Italy's submissions on the screen so that you can see the problem.

15
 16 The Tribunal will observe that, with respect to Italy's first submission, Italy places no
 17 time limit on its request. Italy simply seeks a blanket injunction of India's right to take
 18 or enforce any judicial or administrative measures against the two marines or other
 19 form of jurisdiction over the incident. If we turn to Italy's second submission, it
 20 requests that the restrictions on the marines be immediately lifted

21
 22 throughout the duration of the proceedings before the Annex VII Tribunal.

23
 24 Presumably, Italy's first submission should also be read as a request for a
 25 provisional measure to last up until the time the Annex VII tribunal renders its final
 26 decision, although Italy does not specifically say that in its first submission; it leaves
 27 the time completely open.

28
 29 But that is not what article 290, paragraph 5, says. It provides that,

30
 31 [p]ending the constitution of an arbitral tribunal to which a dispute is being
 32 submitted,

33
 34 this Tribunal may prescribe provisional measures, and that,

35
 36 [o]nce constituted, the tribunal to which the dispute has been submitted
 37 may modify, revoke or affirm those provisional measures

38
 39 Given that Italy has submitted the dispute to Annex VII arbitration with its Notification
 40 of 26 June, it follows that there is a temporal limitation to the duration of any
 41 provisional measures that may be prescribed by this Tribunal. By the same token,
 42 there is a temporal element to the question of whether there is a situation of urgency.
 43 As your Tribunal stated in its Order in the *Land Reclamation* case:

44
 45 the urgency of the situation must be assessed taking into account the
 46 period during which the Annex VII arbitral tribunal is not yet in a position to
 47 modify, revoke or affirm those provisional measures.³⁷

³⁶ *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.

1
2 In other words, contrary to Italy's submissions, recourse to this Tribunal before the
3 Annex VII arbitral tribunal is constituted is an exceptional procedure. With respect,
4 your Tribunal is not called on to consider any provisional measures that will remain in
5 force throughout the duration of the Annex VII arbitration. To do so would trespass
6 on the competence of the Annex VII arbitral tribunal. The question is only whether
7 there is any urgency over the next few months, after which the Annex VII arbitral
8 tribunal will have been constituted and will be in a position to deal with the matter.

9
10 In addition to the requirement of urgency, article 290, paragraph 1, of the Convention
11 states that a court or tribunal may prescribe any provisional measures that it
12 considers appropriate under the circumstances to preserve the rights of the Parties
13 to the dispute . in other words, it is the rights of both Parties that must be preserved.
14 Again, I need to emphasize this point because of the one-sided nature of Italy's
15 requests. Italy assumes that it is the only party that has rights that need to be
16 preserved. That was repeated by Mr Busco this morning when he said that Italy's
17 rights are at issue, without even mentioning the rights that India possesses.

18
19 As we will show, India has even more fundamental rights that need to be preserved.
20 After all, as Professor Pellet and the Agent of India described, the entire dispute
21 arose because of the killing of two innocent and unarmed Indian fishermen off India's
22 coast in its exclusive economic zone. That is the key fact, constantly ignored by our
23 opponents, that has given rise to the exercise of jurisdiction by India's courts over
24 the matter. Italy and its marines have taken full advantage of the rights they possess
25 in those proceedings before the Indian courts, and have been treated with the utmost
26 fairness by the Indian Supreme Court.

27
28 The allegation, unfortunately repeated by both Sir Daniel and Professor Verdirame,
29 that there has been a failure of due process before the Indian courts is as offensive
30 as it is wrong. The Tribunal need only examine the record before India's Supreme
31 Court, which has been placed on file in these proceedings, to appreciate the
32 irresponsible character of the allegation. As I will explain, the marines have even
33 gone so far before the Indian courts as to request the Supreme Court of India to rule
34 on the question of jurisdiction and their own alleged immunity. The fact that just one
35 month ago the marines changed their mind and asked the Supreme Court for a
36 deferral of those proceedings, proceedings which they had introduced, is prejudicial
37 to India's rights to exercise a jurisdiction that the marines themselves resorted to,
38 and it is fatal to the present application for provisional measures.

39
40 Lastly, of course, it is well settled that the prescription of provisional measures is not
41 appropriate where they would tend to prejudice the merits of the case, which, in this
42 case, are reserved for the Annex VII arbitral tribunal.

43
44 As Professor Pellet and I will show, there is no urgency whatsoever justifying the
45 prescription of provisional measures, and no real and imminent risk that irreparable
46 prejudice may be caused to Italy's alleged rights before the Annex VII arbitral tribunal
47 is in a position to take up the case. To the contrary, it is India's right to see that

³⁷ *Case concerning Land Reclamations by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures. Order of 8 October 2003, para. 68.

1 justice is done for the two dead fishermen, to see that the proceedings which Italy
2 and its marines itself have launched before the Indian courts are allowed to see out
3 their course, and that the families of the fishermen would be seriously prejudiced by
4 the granting of Italy's request in joining the continuation of India's jurisdiction in the
5 matter.

6
7 With that brief overview of the legal principles that govern consideration of Italy's
8 Request, let me now turn to the facts, for it is only in the light of the particular
9 circumstances of the case that the question whether there is a situation of urgency,
10 in the sense of a real and imminent risk that irreparable prejudice may be caused to
11 the Parties' rights, can be assessed.

12
13 The essence of Italy's claim is based on the following assertions: the marines have
14 been subjected to the jurisdiction of the Indian courts for over three years (Request,
15 para. 24); this is due to delays and complications resulting from the actions of India
16 (Request, para. 24); the Indian legal process has failed throughout this period
17 properly to address the position on jurisdiction to try the marines and their alleged
18 immunity from prosecution (Request, para. 25); India has refused to cooperate with
19 the Italian investigating authorities (Request, para. 35(d)); and the situation has now
20 reached a level of critical urgency (Request, para. 25).

21
22 Those assertions are simply untrue. They are based on a highly selective and
23 misleading account of what has actually happened before the Indian courts and in
24 connection with the investigation of the incident. Any delays in the Indian
25 investigative and judicial process, and thus delays in bringing charges against the
26 Italian marines before the Special Court, are entirely the result of Italy's and its
27 marines' tactics in constantly submitting new applications before the Indian Supreme
28 Court, challenging the right of India's National Investigation Agency (NIA) to carry out
29 the investigation of the incident, challenging the jurisdiction of the Special Court, and
30 preventing the NIA providing their findings to the prosecutor. Receipt by the
31 prosecutor who will be responsible in the Special Court proceedings of the
32 investigation report, which has been blocked by Italy and the marines' tactics, is a
33 precondition to the ability to bring charges against the marines. There has been no
34 failure of due process for failure to bring charges; the reason the charges have not
35 been brought before the Special Court is because Italy and the marines have filed
36 applications blocking that process.

37
38 Notwithstanding that, India's Supreme Court has gone out of its way to consider
39 favourably many of the marines' applications, whether for the relaxation of bail
40 conditions, which Professor Pellet will address later, or for other forms of relief. Far
41 from India interfering with Italy's purported investigation of the matter, it was Italy
42 which obstructed the investigation that was entrusted to the NIA, first, by reneging on
43 a solemn undertaking it made to ensure that certain key witnesses – the four other
44 marines who were stationed on the *Enrica Lexie* – would be made available for
45 questioning in India, and, second, by challenging the legality of the investigation and
46 the NIA's investigation.

47
48 But perhaps the most striking example of Italy's abusive behaviour came one month
49 ago, when the two marines filed an application before India's Supreme Court asking
50 for the deferral of a petition that they themselves had lodged in March 2014,

1 requesting the Supreme Court . not you, not an Annex VII arbitral tribunal . to rule
2 on the question of India's jurisdiction over the marines and whether they enjoyed
3 immunity, and seeking to suppress not only the NIA investigation, but also the entire
4 proceedings before the Special Court. How that conduct . the marines desire to
5 defer proceedings that they themselves commenced . can possibly give rise to a
6 situation of urgency that justifies the prescription of the provisional measures
7 requested by Italy is left unexplained by our opponents.

8
9 Let me summarize some of the key elements of the story that Italy has failed to bring
10 to the Tribunal's attention, but which place the misguided nature of its Request in
11 proper perspective.
12

13 As the distinguished Additional Solicitor General has explained earlier, in April 2012
14 Italy together with the two marines filed a writ (Writ No. 135) before India's Supreme
15 Court requesting a ruling that the courts of the State of Kerala, which had been
16 exercising jurisdiction over the marines, did not have jurisdiction, and that the Union
17 of India . that is the State itself . should take custody of the two marines.
18

19 While the application also requested that India should then hand the marines over to
20 Italy, it argued, as you will see from the extract from the petition (paragraph D) that is
21 attached under tab 15 of your folders, that, at the least, India should retain custody
22 over the marines until India and Italy had made a final decision as to the jurisdictional
23 principles and immunities that should apply. The application then went on to request
24 the Supreme Court to pass any further orders that the Court deemed appropriate in
25 the facts and circumstances of the case.
26

27 The Supreme Court acted favourably on these requests in its order of 18 January
28 2013, which has been referred to by both Parties today (tab 13). The Supreme Court
29 ordered that custody over the two marines be transferred from the courts of Kerala to
30 those of Delhi. It also ruled that, in the light of the circumstances and legal issues
31 involved, the Kerala courts did not have jurisdiction. India was therefore directed by
32 the Supreme Court to establish a Special Court, in consultation with the Chief Justice
33 of India, to try the matter. Investigation of the incident was also left to an agency to
34 be designated by the Government of India.
35

36 As you have heard, in its order the Supreme Court emphasized that Italy's right to
37 argue the jurisdiction question before the appropriate forum remained preserved.
38 What should also be recalled is that the action that led to the establishment of the
39 Special Court, and transferring custody over the marines to Delhi, did not come from
40 India. It was the result of the application Italy had made requesting that India secure
41 custody over the latter, and that the Supreme Court pass any other measures it
42 deemed appropriate. Thus Italy, in its formal petition to the Supreme Court left it to
43 the discretion of the Supreme Court how to proceed.
44

45 Following this order, India took the necessary steps to set up the Special Court. On
46 1 April 2013, it also entrusted the NIA with responsibility to conduct the investigation
47 of the incident, and it notified the Special Court and the Special Public Prosecutors
48 accordingly. However, it was at this point, in the spring of 2013, that Italy and the two
49 marines embarked on a concerted effort to thwart the judicial process that they
50 themselves had put in motion.

1
2 First, Italy approached the Supreme Court challenging the decision of the
3 Government of India to entrust the NIA with the investigation. The Supreme Court
4 declined to intervene in the matter because it considered that it had already given
5 appropriate directions in its order of 18 January 2013. After rehearsing the substance
6 of the order it had given at that time, the Supreme Court noted that steps had been
7 taken pursuant to its order to appoint the court of competent jurisdiction . the Special
8 Court. In respect to the investigation, the Supreme Court indicated that it was for the
9 Government of India to take a decision on the matter with the important caveat that,
10 if there was any jurisdictional error on the matter, the accused marines could
11 question it before the appropriate forum. Once again, Italy's and the marines' rights
12 were fully preserved.

13
14 During this period, Italy threw down two further roadblocks, which significantly
15 delayed the investigative and judicial process. The first roadblock involved Italy's
16 initial refusal to honour its commitment to return the two marines to India after they
17 had been granted leave by the Indian courts to return to Italy for four weeks,
18 ostensibly to vote in the Italian elections. That happened in early 2013. Professor
19 Pellet will come back to that incident in a moment. The second involved Italy's failure
20 to live up to another undertaking it made to India to return the four other marines that
21 had been stationed on the vessel to India in the event they were needed as part of
22 the investigation of the incident.

23
24 Let me explain what happened in this connection. In 2012, the year the incident took
25 place, the Government of Italy had provided India with a formal Statement as part of
26 the arrangements for securing the release of the *Enrica Lexie*, its crew and the other
27 four marines that had been stationed on the ship. That Statement at tab 16, which
28 was annexed in our Written Observations contained the following commitment, which
29 is on the screen:

30
31 The Republic of Italy is agreeable to give an assurance to the Supreme
32 Court of India that if the presence of these marines is required by any Court
33 or in response to any summons issued by any Court or lawful authority,
34 then (subject to their right to challenge such summons or the legality of any
35 such order for production) the Republic of Italy *shall ensure their presence*
36 *before an appropriate court or authority.*

37
38 On 10 May 2013, the NIA sent a note to the Indian Ministry of External Affairs
39 requesting the Ministry to issue notices to Italy via diplomatic channels for the four
40 marines to come to India to give statements in connection with the shooting of the
41 fishermen. The Ministry, in turn, sent a Note Verbale to Italy three days later
42 enclosing the Notices to Witness that had been issued by the NIA.

43
44 Italy responded by a Note Verbale dated 15 May 2013. In its response, Italy referred
45 to the request by the NIA and expressed

46
47 its willingness and commitment to extend all possible co-operation to the
48 investigation in order to establish the unvarnished true and complete facts
49 in the case.
50

1 Italy also stated in the Note that it was fully committed to an expeditious completion
 2 of the investigation . fully committed to an expedition completion of the investigation.
 3 However, the Italian Note went on to say that the Italian Embassy had been informed
 4 that the four marines were presently deputed on sensitive postings and that it would
 5 be difficult to relieve them of their duties immediately in order to present them for
 6 examination by the NIA. Italy in the Note thereafter proposed alternatives for
 7 examining the four marines that would not involve their return to India.

8
 9 India objected by its own Note Verbale of 5 June 2013, in which it informed Italy that
 10 its proposals were contrary to its earlier undertaking . the Italian Statement. The
 11 matter went back and forth for several months without being resolved. Despite its
 12 previous assurance that Italy shall ensure the presence of the marines, and the
 13 Italian Note that said that the marines could not be delivered immediately, Italy
 14 refused to budge. Yet, it defies belief that the marines could not be made available at
 15 any point during the six-month period from May 2013 to November 2013. In those
 16 circumstances, when six months had passed and Italy had still not lived up to its
 17 commitment to ensure the presence of the marines, the NIA was left with no
 18 alternative but to question the marines by videoconference in November 2013. Not
 19 only did that disrupt and delay the investigation, but it constituted another example of
 20 a broken promise on Italy's part.

21
 22 This morning, Sir Daniel argued that Italy had fulfilled its undertaking because
 23 interview by videoconferencing is a legally acceptable procedure under Indian law.
 24 That misses the point. Italy had committed to ensure the presence of the four
 25 marines in India. Italy did not honour that commitment.

26
 27 This development also shows the cynicism on Italy's part with respect to India's
 28 investigation. None of the Italian Notes concerning the questioning of the four
 29 marines ever questioned the authority of the NIA to carry out the investigation. To
 30 the contrary, Italy said it was committed to the expeditious completion of the
 31 investigation and it eventually allowed the four marines to be questioned by
 32 investigating officers from the NIA by videoconference. There was no problem with
 33 the NIA questioning these marines and carrying out the investigation, at least when
 34 you read the Notes Verbales of Italy during this period in 2013. However, what our
 35 opponents do not tell you is that at the very same time this was happening Italy and
 36 the two other marines were challenging the NIA's authority and right to conduct the
 37 investigation before the Indian Supreme Court; and by doing so, it was Italy and the
 38 marines who were responsible for the fact that charges could not be brought against
 39 the marines. Charges could only be brought after the investigative report was
 40 submitted to the prosecutor; but the NIA was prevented from submitting that report
 41 because the matter was being challenged by Italy and the marines before the
 42 Supreme Court. To attempt to lay the blame for that situation at India's door, as
 43 Counsel tried to do this morning, is, I suggest, perverse.

44
 45 Mr President, Members of the Tribunal, I now come to another critical element of the
 46 proceedings before the Indian Supreme Court that Italy's written pleadings avoided
 47 discussing. This concerns an important application that the two marines filed with the
 48 Supreme Court in March 2014, and which the two marines subsequently decided to
 49 ask the Supreme Court to defer consideration of just a month ago, on 4 July 2015,
 50 shortly before Italy filed its Request for provisional measures. As I shall show, the

1 manner in which the marines framed their application, and then 16 months later
 2 asked the Supreme Court to defer consideration of it, totally undermines Italy's
 3 argument that a situation of urgency exists that risks causing it irreparable prejudice
 4 if India's judicial proceedings are not enjoined. The salient facts of this episode are
 5 as follows:

6
 7 On 6 March 2014, the two marines filed a petition under article 32 of India's
 8 Constitution before the Supreme Court. This petition came to be known as Writ
 9 No. 236. It is a very important document. While Italy did not deem fit to produce it in
 10 its written pleadings, the Tribunal will find a copy filed under Annex 40 of India's
 11 Written Observations.

12
 13 In the petition, the applicants, the marines, complained that it had been over one
 14 year since the 18 January 2013 judgment of the Supreme Court ordering the
 15 establishment of a Special Court, during which time the investigating agency, the
 16 NIA, had not been able to submit its report before any court. As a result, so the
 17 Petition asserted, the two marines had been detained in India without any case being
 18 presented against them. This is what they said in March 2014, and it sounds rather
 19 similar to what we heard this morning.

20
 21 Significantly, Italy apparently did not consider that this presented a sufficiently urgent
 22 situation to warrant filing of an Annex VII notification against India or a request for
 23 provisional measures.

24
 25 That being said, what is even more striking about the petition is the relief that the two
 26 marines sought from the Supreme Court, which you will find under tab 17 of your
 27 folders, which is an extract of their petition under Writ 236.

28
 29 First, the petitioners asked the Supreme Court to declare that the investigation and
 30 prosecution by the NIA of the two marines was illegal, invalid and null and void. This
 31 was no more than a repeat of what Italy had submitted to the Court earlier in 2013.
 32 However, the petition failed to point out that the reason why the NIA had not been
 33 able to file its report was because Italy had delayed its preparation by refusing to
 34 make the four marines available for questioning in India as Italy had earlier
 35 undertaken to do, and because Italy and the marines had also earlier challenged the
 36 right of the NIA to carry out the investigation.

37
 38 In the petition the marines also asked the court to declare that the designation of the
 39 Special Court to try the case by the Ministry of Home Affairs was illegal and without
 40 jurisdiction, and somehow in conflict with the Supreme Court's Order of 18 January
 41 2013. But the Ministry had acted in full compliance with the instructions of the
 42 Supreme Court in that 2013 order.

43
 44 In addition, the marines requested the Supreme Court to declare that they . the
 45 marines . had functional and sovereign immunity from being prosecuted in India,
 46 and thus to order their discharge.

47
 48 Let me pause here for a moment so that the Tribunal can appreciate the significance
 49 of this application, and the repercussions it has for Italy's request that the Tribunal
 50 enjoin India from exercising any further jurisdiction in the matter.

1
2 In its Writ 236, the two marines first asked the Supreme Court of India to quash,
3 suppress, the NIA investigation. Yet, in 2013, Italy had said just the opposite. In its
4 Notes Verbales to India, Italy had assured India of its willingness and commitment to
5 extend all possible cooperation in the investigation so that it could be expeditiously
6 completed. A complete *volte face*. Second, the marines asked the Supreme Court to
7 rule on the question whether the Special Court had jurisdiction to hear the case
8 against them. Now, however, in these proceedings Italy is asking your Tribunal to
9 order the opposite: namely, that India refrain from exercising any jurisdiction to
10 decide that question of jurisdiction, when it was the marines themselves who had
11 asked the Supreme Court to do so. Third, the marines also asked the Supreme
12 Court to decide the question whether the marines had immunity. Yet, once again, in
13 its Request for provisional measures, Italy is now seeking the reverse: that the courts
14 of India should abstain from exercising any further jurisdiction over this question .
15 over a question that the marines themselves had asked the court to decide. That
16 borders on bad faith; and it certainly does not justify the prescription of provisional
17 measures.

18
19 But that is not the end of the story, for in response to Writ No. 236 introduced by the
20 marines, on 28 March 2014, the Supreme Court ordered the Special Court
21 proceedings to be placed in abeyance so that the Writ could be fully considered. You
22 will find the relevant order of the Supreme Court staying the Special Court
23 proceedings under tab 3 of your folders.

24
25 That remains the case today. The proceedings before the Special Court are in
26 abeyance. There is no prospect that the stay of those proceedings will be lifted, or
27 that the prosecution will present the results of the NIA investigation, which has been
28 blocked by the application of Italy and the marines, that it will present that report to
29 the Special Court, or that the defendants will have their opportunity to answer that
30 case. There is no chance that that is going to happen in the near future, and certainly
31 not before the Annex VII arbitral tribunal is set up and running.

32
33 Sir Daniel's alarmist statement this morning that criminal proceedings against the
34 marines are imminent and that this has crystallized the situation of urgency is entirely
35 untrue. It is not what the situation is, and it is not what the situation is because of
36 Italy's and the marines' applications before the Indian courts. Apart from the dilatory
37 tactics that Italy and the marines have engaged in over the past two and a half years,
38 there is no risk that irreparable prejudice will be caused to Italy's rights by the
39 continued exercise of jurisdiction by India's judicial and administrative authorities.

40
41 And there is still more. For, at the marines' urging, a hearing had been scheduled for
42 13 July 2015 to hear arguments on Writ No. 236. On 4 July, however, the marines
43 filed a new application before the Supreme Court asking the Court to defer hearing
44 the Writ until after the Annex VII arbitral tribunal had decided the case. In other
45 words, having complained of delays and having introduced a petition in 2014 asking
46 the Supreme Court of India to rule on the questions of jurisdiction and immunities,
47 the marines now have changed their mind and want the Supreme Court to abstain
48 from considering that petition.

1 In response to this new application, the Court indulged the marines once more by
 2 cancelling the 13 July hearing and allowing both parties to file pleadings over the
 3 ensuing weeks. But before India could even file its response, Italy introduced its
 4 Request for Provisional Measures before this Tribunal.

5
 6 In short, Italy's position is totally disingenuous. On the one hand, sixteen months ago
 7 the marines asked the Supreme Court of India to decide two of the essential
 8 questions in the case: the questions of jurisdiction and immunity. On the other hand,
 9 just before the Supreme Court was scheduled to convene a hearing on that matter,
 10 the marines came before you and said, "no, we want to defer those proceedings,"
 11 and Italy came with its Request for provisional measures, saying that an injunction is
 12 necessary because these questions should be left to the Annex VII arbitral tribunal.

13
 14 At its most generous, these manoeuvres demonstrate that the timing of Italy's
 15 Request for provisional measures is totally arbitrary and that there is no situation of
 16 urgency justifying Italy's first submission. Looked at more objectively, they constitute,
 17 really, an abuse of the Indian judicial process and they put the lie to Italy's
 18 accusation that there has been a failure of the Indian judicial process or somehow a
 19 failure in due process. That is simply not the case.

20
 21 To sum up on the question of urgency with respect to the first submission, nothing
 22 has changed since March 2014 that has created a situation of urgency. The Special
 23 Court proceedings have been in abeyance for 16 months. The last diplomatic note
 24 that Italy sent to India was in April 2014. There is absolutely no evidence to support
 25 Counsel's allegation that it was only in May of this year that it became apparent that
 26 a diplomatic settlement of the dispute was not possible. Nothing happened in May to
 27 change what had been the status quo over the previous 14 months. Moreover, the
 28 recent *démarche* created on behalf of the marines in connection with their request to
 29 the Supreme Court to defer a hearing on the issues that the marines had themselves
 30 introduced is entirely of their own making. The timing of Italy's Notification as well as
 31 its Request for provisional measures is thus entirely arbitrary; it is contrary to the
 32 requests that the marines themselves had made to the Supreme Court; and it is
 33 artificial in asserting urgency when none exists.

34
 35 In the last few minutes I have, Mr President, I need to say a few words about the
 36 question of irreparable prejudice and the need to preserve the rights of the Parties,
 37 including the rights of India.

38
 39 Italy's Request is premised on the assumption that Italy's rights will suffer
 40 irreversible damage if India is allowed to continue to exercise jurisdiction over the
 41 marines and the incident. I have shown that this is simply not the case. Italy and its
 42 marines have used over and over again . indeed one might say abused . the Indian
 43 judicial process. Given the impartial way in which India's Supreme Court has treated
 44 their applications, coupled with the nature of the applications that the marines have
 45 themselves made to the Court, there is no failure of due process whatsoever and no
 46 risk of irreparable harm to Italy's rights and no need to enjoin India from the ability to
 47 continue exercising its jurisdiction, despite the impediments that Italy and the
 48 marines have sought to place into the Indian proceedings.

1 What Italy blithely ignores is that, if anything, India possesses even more important
 2 rights that need to be preserved. The two fishermen have already suffered the most
 3 irreversible prejudice that can be imagined. They have been killed as a result of the
 4 actions of the marines. This morning Sir Daniel suggested that that was prejudging
 5 the issue. Where does my learned friend think that the gunfire came from? And why
 6 did Italy open criminal proceedings against the marines for the crime of murder? No
 7 amount of reparation can bring back the dead fishermen or bring solace to their
 8 families and loved ones. We do not need medical certificates to make that point quite
 9 obvious. The families and the loved ones of the victims will continue to suffer severe
 10 emotional harm until the case is tried and decided. What can be preserved and what
 11 should be preserved, India submits, is the expectation of these individuals that
 12 justice is done and that the Indian courts will be able to continue the judicial process
 13 that has been set in motion despite Italy's and the marines' repeated attempts to
 14 disrupt it. The right to see through this process is a fundamental right of India, and a
 15 responsibility it owes to the victims of this tragic event, and Italy's first submission
 16 has the effect of trampling on those rights. India respectfully submits that it should be
 17 rejected.

18
 19 Italy argues that if India's courts and administrative authorities are allowed to
 20 continue exercising jurisdiction, Italy will suffer irreversible harm because of the .
 21 and I quote from Italy's written pleadings .

22
 23 risk of prejudice to the carrying out of future decisions of the Annex VII
 24 arbitral tribunal.

25
 26 That assertion is offensive to India and has no merit. India's courts have acted in an
 27 exemplary fashion. The same really cannot be said of Italy's and the marines' own
 28 conduct. There are no grounds for the spectre raised by Italy that India and its courts
 29 will not act appropriately in the future. India respects international law. That includes
 30 the commitments India has entered into under the provisions of UNCLOS, including
 31 Annex VII. As the Tribunal is well aware, article 11 of Annex VII provides that the
 32 award of the arbitral tribunal will be final and binding, and that it shall be complied
 33 with by the Parties to the dispute. That is more than sufficient to meet Italy's concerns.

34
 35 Mr President, distinguished Members of the Tribunal, that brings me to the end of my
 36 presentation. I have shown why Italy's first submission does not meet the
 37 requirements for the prescription of provisional measures or result in the
 38 preservation of India's rights, not to mention the rights of the victims, the real victims
 39 here, the fishermen and their families.

40
 41 I thank the Tribunal for its attention, and would ask, Mr President, that the floor now
 42 be given to Professor Pellet.

43
 44 **MR PRESIDENT:** Thank you, Mr Bundy. I now give the floor again to Mr Pellet to
 45 continue the oral argument of India.

46
 47 **MR PELLET** (Interpretation from French): Mr President, distinguished Members of
 48 the Tribunal, in its second request Italy would have the Tribunal
 49

1 (Read in English)

2 ensure that restrictions on the liberty, security and movement of the
3 Marines be immediately lifted to enable Sergeant Girone to travel to and
4 remain in Italy and Sergeant Latorre to remain in Italy throughout the
5 duration of the proceedings before the Annex VII Tribunal.
6

7 (*Interpretation from French*) Quite apart from the Annex VII tribunal's *prima facie* lack
8 of jurisdiction to entertain it, which I mentioned just before the break, this request is
9 subject to a number of objections which prevent you from granting it, distinguished
10 Members of the Tribunal. Like the first measure, it cannot be justified on grounds of
11 urgency. It is not necessary in order to preserve the rights claimed by Italy in this
12 case, but it would prejudice those of India most seriously and it would constitute a
13 pre-judgment, made all the more invidious by this Tribunal's lack of jurisdiction to
14 rule on the merits.
15

16 Mr President, the relaxation of the benign and benevolent bail conditions imposed on
17 Messrs Girone and Latorre cannot be justified and quite clearly there is nothing
18 urgent involved at all.
19

20 I am going to demonstrate that point, but before doing so I would like to go back to
21 what we heard this morning. Mr President, these two individuals stand accused of
22 murder and no one has yet claimed that that accusation was brought lightly . not
23 even Italy, which claims without proof that it has conducted a criminal investigation.
24 The imposition of bail conditions is the absolutely normal consequence of such a
25 situation. It is inevitable that such conditions lead to a modicum of discomfort and
26 stress for those concerned and their family and friends. The killing of the two Indian
27 fishermen also caused discomfort and stress. It is always unwise to compare the
28 sufferings of different persons, but may I suggest that death, which is irreversible, is
29 far more tragic than the threat of being brought to trial.
30

31 Before demonstrating that the urgency claimed by Italy is a figment of its
32 imagination, I think it would not be a bad thing to go back to the facts. After the
33 preliminary investigation of the killing of the two Indian fishermen, Messrs Girone and
34 Latorre were arrested by the Kerala State Police on 19 February 2012.³⁸ On 19 April,
35 before the investigation had been completed, the accused and Italy challenged the
36 legality of the investigation before the Supreme Court.³⁹
37

38 The final report of the investigation, which confirmed the charges, was completed on
39 15 May 2012.⁴⁰
40

41 The accused then appeared on 30 May before the High Court of Kerala, which
42 ordered their release on bail.⁴¹
43

44 The accused, having once been let out of prison, could and should have been tried
45 very promptly if, along with Italy, they had not challenged the jurisdiction of the High
46 Court of Kerala and brought proceedings before the Supreme Court on 19 April.⁴²

³⁸ V. Observations écrites de l'Inde (ci-après: « OE »), par. 2.5.

³⁹ V. Writ Petition No. 135 of 2012, 19 April 2012 (Notification (ci-après « N »), annexe 16).

⁴⁰ V. Kerala Police Charge Sheet, 15 February 2012 (OE, annex 3). V. aussi OE, par. 2.5.

⁴¹ V. High Court of Kerala, Order, 30 May 2012 (OE, annexe 11). V. aussi OE, par. 2.5.

1
2 This did not prevent them from requesting of the High Court a relaxation of their bail
3 conditions and permission to go and spend two weeks in Italy for the Christmas
4 holidays. The court granted that request on 20 December.⁴³ They returned to India
5 on 3 January 2013, as agreed and expected.

6
7 That, however, was not the case following the decision, this time by the Supreme
8 Court, on 22 February, granting their requests for leave to go to Italy for four weeks
9 in order to vote, on the express condition that they return to India on the expiry of
10 that rather generous period accorded,⁴⁴ and yet, despite the undertaking given to
11 that effect by the Italian ambassador, they returned only after a strenuous diplomatic
12 tug of war between the two countries.⁴⁵

13
14 This did not prevent the Supreme Court once again from granting Mr Latorre's
15 request that his obligation to report periodically to the police station be waived due to
16 his health problems.⁴⁶

17
18 The Supreme Court also granted the request of the same accused to go to Italy for
19 medical reasons for four months. This was granted in the form of an order of 12
20 September 2014.⁴⁷

21
22 The same thing for the next two requests from Mr Latorre that the period of his stay
23 in Italy be extended. A three-month extension was granted by a Supreme Court
24 order of 14 January 2015,⁴⁸

25
26 A further three-month extension was granted on 9 April 2015.⁴⁹

27
28 Even after the filing of the Notification of 26 June, the Supreme Court further
29 extended this authorization for an additional six months.⁵⁰

30
31 In none of these circumstances did India oppose a relaxation of the bail conditions
32 imposed on the accused.

33
34 Contrary to what Italy would have us believe,⁵¹ the Union of India did not take
35 exception to Mr Girone's request of 9 December 2014,⁵² and for the most compelling

⁴² V. Writ Petition No. 135 of 2012, 19 April 2012 (N, annexe 16).

⁴³ V. 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 (OE, annexe 13). V. aussi OE, par. 2.15.

⁴⁴ 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 (OE, annexe 16).

⁴⁵ V. OE, pars. 2.16-2.18.

⁴⁶ Supreme Court of India, Order, 8 September 2014 (OE, annexe 42). V. aussi OE, par. 2.19.

⁴⁷ Supreme Court of India, Order permitting Mr Latorre to return to Italy for a period of four month for medical treatment, 12 September 2014 (OE, annexe 43). V. aussi OE, par. 2.20.

⁴⁸ Supreme Court of India Order of 14 January 2015 granting an extension to Sergeant Latorre (N, annexe 30). V. aussi par. 2.22.

⁴⁹ Supreme Court of India Order of 9 April 2015 granting a further extension to Sergeant Latorre (N, annexe 31). V. aussi par. 2.23.

⁵⁰ V. Supreme Court of India, Order of 13 July 2015 (Requête de l'Italie (ci-après: « R »), annexe F) et OE, pars. 2.24-2.25.

⁵¹ V. R, par. 49.

1 of reasons. The request was officially withdrawn, as noted in the Supreme Court
 2 Order of 16 December 2014.⁵³ As to Girone's request of 4 July 2015, India was
 3 invited to respond by an order of the same court of 13 July, which provides for a
 4 hearing to be held on 26 August for that purpose . the 26th of this month, in other
 5 words.

7 These facts speak for themselves. There was no urgency to lift the (very lenient) bail
 8 conditions of the two Italian marines accused of murder, including an indefinite stay
 9 in Italy in the case of Mr Latorre or a return to Italy in the case of Mr Girone.

11 Regarding the former, Mr Latorre, he, of course, is already in Italy. The leave to
 12 remain there was extended by the Supreme Court on 13 July, admittedly only for an
 13 additional six months,⁵⁴ whereas he and Italy were requesting that he be allowed to
 14 stay there until the end of proceedings before the Annex VII tribunal⁵⁵ . which,
 15 incidentally, does not seem to show a burning desire on the part of Italy for a rapid
 16 conclusion of the proceedings. Sir Michael's remarks this morning are not reassuring
 17 on this point. Let me quote

18
 19 *(Read in English)*

20 we do not know when the Annex VII tribunal will be constituted, or when it
 21 will be in a position to act.

23 *(Interpretation from French)* Such pessimism is unjustified. My hardworking
 24 assistant, Benjamin Samson, has done his maths and he says that it takes on
 25 average barely three months to set up an Annex VII tribunal. Nothing, incidentally,
 26 would justify such an extension, and certainly not urgency. Mr Latorre is allowed to
 27 remain in Italy until 15 January next, in other words far beyond the time it will take to
 28 constitute the Annex VII tribunal, and, from all indications, the Supreme Court will be
 29 agreeable to an extension of his stay in Italy if and as required by his state of health.
 30 I would not want to discuss the contents of the confidential medical file that Italy has
 31 appended to its submissions, but I would like to refer you, Members of the Tribunal,
 32 to a few excerpts from that file, as copied in paragraph 3.43 of our Written
 33 Observations, which establish that, contrary to what you have been told, the state of
 34 health of the accused is not only changing, as confirmed by Sir Daniel this morning,

36
 37 *(Read in English)*

38 as a static consideration,

39 *(Interpretation from French)* but additionally his health is on the mend.⁵⁶ This
 40 obviously would justify a medical check every now and again. It certainly does not
 41 justify an indefinite extension on the grounds of urgency.

⁵² V. Application for Directions and Relaxation of Bail Conditions on Behalf of Sergeant Major Salvatore Girone, 9 December 2014 (N, annexe 22).

⁵³ V. Application for Directions and Relaxation of Bail Conditions on Behalf of Sergeant Major Salvatore Girone, 9 December 2014 (N, annexe 22).

⁵⁴ Supreme Court of India Order of 13 July 2015 (R, annexe F).

⁵⁵ Interim Application No. 13 of 2015 in SLP (C) No. 20370/2012 (OE, annexe 55).

⁵⁶ V. OE, par. 3.43, note 138 renvoyant notamment à Application for Directions and Relaxation of Bail Conditions on Behalf of Chief Master Sergeant Massimiliano Latorre dated 5 September 2014, pp. 28 and 31 (N, annexe 21); Medical Case Summary of Dr. Rajashekar Reddi, Principal Consultant and Head of Unit Neurology, Max Institute of Neurosciences, Max Super Speciality Hospital, 9 September 2014, p. 4 (R, annexe K); Reports of Dr. Mendicini, Specialist Neurologist, Military Hospital in Taranto,

1
2 As to Mr Girone, his fate is infinitely less tragic and pathetic than Italy would have us
3 believe. Subject only to the obligation to report once weekly to the police station
4 three kilometres down the road from the Italian Ambassador's residence,⁵⁷ he is
5 having a pleasant time at the residence. His family are entitled to visit him. They
6 have done so on several occasions. His son and his wife have visited him eight
7 times, his sister six times, his parents five times. As regards family visits to
8 Mr Latorre when he was under house arrest, the numbers are comparable. I would
9 note, moreover, that, since Mr Girone's return to Delhi in March 2013 following the
10 four weeks generously granted, but unduly extended, that he was able to spend in
11 Italy to perform his duties as a citizen, Mr Girone made absolutely no request for any
12 changes in the bail conditions to which he had been subject up to 9 December
13 2014.⁵⁸ On that date he asked for permission to return to Italy, but, contrary to what
14 has been repeatedly stated by the other party, the Supreme Court did not dismiss
15 that request; it was Mr Girone himself who withdrew it during the hearing. The
16 Supreme Court simply noted that withdrawal in its order of 16 December 2014.⁵⁹
17 Neither the 22 months that elapsed between Mr Girone's return to Italy and his
18 request of December 2014, nor the withdrawal of that request before any reaction
19 from India, testify to any particular urgency. Yet nothing has changed since then as
20 regards the status of the accused, except for the Italian Notification of 26 June,
21 which cannot in and of itself reasonably have any impact whatsoever on the urgency
22 of lifting the bail conditions. Yet this did not prevent Mr Girone from filing on 4 July
23 2015 a request that all proceedings be halted until such time as the Annex VII
24 tribunal had reached its decision.⁶⁰ This obviously concerns primarily the first
25 provisional measure, but it certainly can have no impact whatsoever on how urgent it
26 would be for you to rule on the second measure.

27
28 Mr President, Members of the Tribunal, the second measure cannot be justified on
29 the grounds of urgency as requested by Italy, far less can there be any form of
30 aggravated urgency in bringing proceedings before this Tribunal before the Annex
31 VII tribunal can be constituted. That reason alone makes the request inadmissible,
32 but it is not the sole reason.

33
34 If you were to grant that request, Members of the Tribunal, you would prejudice
35 India's rights at issue in this case and prejudice them irreversibly.

36
37 Very briefly, I will once again display the second provisional measure requested by
38 Italy, the one we are interested in for the time being. Its aim is for you to prescribe
39 that India %ake all measures necessary to ensure that restrictions on the liberty, the
40 security+. as if their security were in jeopardy . %and movement of the marines be

14 October 2014 and 14 November 2014, p. 1 (N, annexe 24); Clinical Report of Doctor Mendicini, Head of Neurology, Military Hospital in Taranto, 2 January 2015, p. 1 (R, annexe M) et Clinical Report of Doctor Mendicini, Head of Neurology, Military Hospital in Taranto, 31 March 2015, p. 1 (R, annexe N).

⁵⁷ <http://indianexpress.com/article/india/india-others/the-plight-of-italian-marines-family-visits-cafe-outings/>.

⁵⁸ V. Application for Directions and Relaxation of Bail Conditions on Behalf of Sergeant Major Salvatore Girone, 9 December 2014 (N, annexe 22).

⁵⁹ V. Supreme Court of India Order of 16 December 2014 recording the withdrawal of the applications (N, annexe 29).

⁶⁰ Application for Deferment of Article 32 Writ Petition, 4 July 2015 (R, annexe E).

1 immediately lifted so that they may travel to and remain in Italy throughout the
2 duration of the proceedings before the Annex VII tribunal+.

3
4 In other words, it asks you simply to lift all judicial supervision measures, however
5 mild, imposed on those who are accused . accused of murder, I would remind you.

6
7 In its request under point (d) Italy asks the Tribunal to rule that India must cease to
8 exercise any form of jurisdiction over the *Enrica Lexie* incident and the Italian
9 marines, including any measure of restraint with respect to Sergeant Latorre and
10 Sergeant Girone+. However, if this Tribunal were to grant Italy's request, the
11 Annex VII tribunal would find itself with nothing left to decide. The two accused could
12 enjoy a quiet time in Italy without being subject to any measure of restraint since
13 those measures would have been lifted by your Tribunal. That would be a
14 prejudgment, Mr President, which would entirely nullify Italy's claim on the merits.

15
16 Such a decision would be incompatible with the very purpose of provisional
17 measures, which is to preserve the rights of the Parties pending the judgment on the
18 merits, not to prefigure that judgment or to bring about a situation where, ultimately,
19 there is nothing left to decide. As the Tribunal has repeatedly held, an order
20 prescribing provisional measures . and I quote:

21
22 in no way prejudices the question of the jurisdiction of the Annex VII arbitral
23 tribunal to deal with the merits of the case, or any questions relating to the
24 merits themselves.⁶¹

25
26 The Special Chamber formed in *Ghana/Côte d'Ivoire* made exactly the same point
27 recently:

28
29 the Order must not prejudice any decision on the merits.⁶²

30
31 This requirement is also in line with the settled jurisprudence of the International
32 Court of Justice.⁶³

33
34 Furthermore, Members of the Tribunal, there are two additional factors which I think
35 call you to exercise particular caution in this regard.

36
37 Firstly, and above all, by prescribing the provisional measure requested by Italy, you
38 would prejudice not only the merits of the case in its favour but you would also
39 seriously undermine, perhaps irremediably, the claims that India intends to assert
40 and, secondly, it would not be appropriate for this Tribunal, which is not the natural+
41 forum for deciding this case on the merits, if I may say so, to replace the Annex VII

⁶¹ T.I.D.M., ordonnance, 15 décembre 2012, *Affaire de l'« ARA Libertad » (Argentine c. Ghana), mesures conservatoires*, par. 106 . souligné par moi. V. aussi: Ordonnance, 23 décembre 2010, *Navire « Louisa » (Saint-Vincent-et-les Grenadines c. Royaume d'Espagne), mesures conservatoires*, TIDM Recueil 2008-2010, p. 70, par. 80, ou ordonnance, 22 novembre 2013, *Affaire de l'« Arctic Sunrise » (Royaume des Pays-Bas c. Fédération de Russie), mesures conservatoires*, par. 100.

⁶² T.I.D.M., Chambre spéciale, ordonnance, 25 avril 2015, *Différend relatif à la délimitation de la frontière maritime entre le Ghana et la Côte d'Ivoire dans l'océan Atlantique (Ghana/Côte d'Ivoire)*, par. 98.

⁶³ Citée à la note 100 des OE.

1 tribunal whose constitution has been requested by Italy and which alone is
2 authorized to rule on the merits.

3
4 On the first point, and this is just a reminder but it does concern an important feature,
5 this case has been brought before you, Members of the Tribunal, almost ~~by~~ default+
6 because the instance which in principle has jurisdiction to rule on the case has not
7 yet been constituted. Of course, that does not prevent the Parties from deciding by
8 common agreement to bring the case before this Tribunal, as happened in the
9 *Bangladesh/Myanmar* case, or, as the case may be, before a Special Chamber,
10 which is what Côte d'Ivoire and Ghana decided in the case I have just mentioned,
11 but until that happens . and it has not happened yet . your Tribunal must, I believe,
12 act with particular caution and restraint, all the more so since it is necessary to
13 assess facts which, unless the Parties agree otherwise, will be discussed and
14 adjudged in another forum.

15
16 Without any doubt, under paragraph 5 of article 290 of the Convention on the Law of
17 the Sea, once constituted, the tribunal to which the dispute has been submitted . in
18 our case an Annex VII tribunal . could in principle ~~modify~~, revoke or affirm those
19 provisional measures+.

20
21 But you must admit, Mr President, that is not particularly practical. It would require
22 the Parties (on their own initiative or on the initiative of that tribunal) to plead their
23 case again before the tribunal, making it a sort of appellate body in respect of the
24 decision taken by your esteemed Tribunal. This is not very satisfactory or very
25 healthy and there is all the more reason not to proceed in this way since, as both
26 Rodman Bundy and I have shown, the haste with which Italy has brought this case
27 before you cannot be justified in any way, unless it be for ~~reasons~~+ . ~~reasons~~+in
28 inverted commas . relating to domestic politics or electioneering, on which you, the
29 Members of the Tribunal, are of course not able to focus.

30
31 Furthermore, as I have said, there is another reason which should prompt this
32 Tribunal to show restraint.

33
34 One cannot overstress the fact that provisional measures prescribed by a judicial
35 body, whatever it is, are intended to preserve the rights of both Parties. Like the
36 Special Chamber in *Ghana/Côte d'Ivoire*, the Tribunal

37
38 must be concerned to safeguard the respective rights which may be
39 adjudged in its Judgment on the merits to belong to either Party.⁶⁴

40
41 Sir Michael quoted this passage this morning, and it was also highlighted by Rodman
42 Bundy. By granting Italy's request, you would be going well beyond the preservation
43 of that country's rights. You would be anticipating their recognition in the judgment
44 on the merits and, at the same time, you would be jeopardizing any possibility for
45 India to see its rights recognized or at least effectively enforced.

64 T.I.D.M., Chambre spéciale, ordonnance, 25 avril 2015, *Différend relatif à la délimitation de la frontière maritime entre le Ghana et la Côte d'Ivoire dans l'océan Atlantique (Ghana/Côte d'Ivoire)*, par. 40 . souligné par moi.

1 We have already placed strong emphasis, Mr President, on Italy's repeated failure to
 2 keep its sovereign word, the word of a sovereign State. Believe me, we take no
 3 pleasure in this, but it is a key element, on which Italy kept a total and curious silence
 4 in the Notification of 26 June and in the Request of 21 July, and this morning its
 5 lawyers did what they could to try to get round this problem.

7 I would like to refer first of all to the assurance given in a formal statement made
 8 before the Supreme Court of India, according to which Italy was

10 *(Read in English)*

11 I agreeable to give an assurance to the Supreme Court of India that if the
 12 presence of these marines is required by any Court or in response to any
 13 summons issued by any Court or lawful authority, then (subject to their right
 14 to challenge such summons or the legality of any such order for production)
 15 Italy shall ensure their presence before the appropriate court or authority.⁶⁵

17 *(Interpretation from French)* That statement, displayed on the screen just now by
 18 Rodman Bundy, can be found under tab 16 of your folders, Members of the Tribunal,
 19 and I would draw your attention to the word ~~presence~~, which appears twice. With all
 20 due respect to Sir Daniel, it is not really compatible with simply holding a
 21 teleconference.

23 The other solemn undertaking by Italy which it failed to honour was also given before
 24 the Indian Supreme Court through an affidavit by the Italian ambassador supporting
 25 the commitment by the accused to return to India after four weeks of leave in Italy,
 26 which they had requested in order to be allowed to vote in the February 2013
 27 elections. It was on this express condition, their return, that the Supreme Court,
 28 having full confidence in the word of the ambassador of a foreign State, granted the
 29 request made by Mr Latorre and Mr Girone, and I quote:

31 *(Read in English)*

32 The said respondent [i.e. Daniele Mancini, Ambassador of Italy in India]
 33 has also affirmed an Affidavit of Undertaking on 9th February, 2013,
 34 whereby he has taken full responsibility for the petitioner Nos. 1 and 2 [that
 35 is the two marines] to proceed to Italy in the custody and control of the
 36 Government of Italy and to ensure their return to India in terms of this
 37 Order.⁶⁶

39 And I repeat:

41 to ensure their return to India.

43 *(Interpretation from French)* Italy did not honour its sovereign promises in either of
 44 these two cases. The other four marines did not travel to India to be questioned by
 45 the National Investigation Agency, which was entrusted with the inquiry, Italy having
 46 stated that . and I quote from a Note Verbale:

⁶⁵ 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 (OE, annexe 9) . souligné par moi.

⁶⁶ 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, par. 5 (OE, annexe 16).

the mentioned four Italian Marines [curiously all four of them...] are presently deputed on sensitive postings and it would be difficult to relieve them of their duties.⁶⁷

As to the accused, yes, as Sir Daniel pointed out this morning, they did return to India after their four weeks of ~~vac~~ electoral leave+but only after a period of very high diplomatic tension between the two States⁶⁸ after Italy formally declared . and I quote again:

(Read in English)

the two Italian Marines, Mr Latorre and Mr Girone, will not return to India on the expiration of the permission granted to them.⁶⁹

(Interpretation from French) Sir Daniel did not quote this, and yet it is as clear as it is blunt.

You may well think, Members of the Tribunal, that such a casual attitude to keeping your word cannot happen again, this time not in respect of unilateral undertakings given by Italy but obligations arising from the decision of a high international court, and that India should not be worried about its rights being respected. If the Annex VII tribunal decides, as we believe it should, that India is entitled to try the accused, Italy must ensure that it is able to do so. Unfortunately, I fear that this is a somewhat optimistic view of the situation.

Mr President, nobody disputes that Italy is a State governed by the rule of law, at least in so far as its domestic law is concerned, but when it comes to international law, it is an altogether different matter. As we noted in our Written Observations, the highest Italian courts, the Constitutional Court and the Court of Cassation, systematically allow principles of Italian constitutional law, broadly interpreted, to prevail over Italy's international obligations. In this respect, Judgment 238/2014 of the Italian Constitutional Court, which quotes many rulings from both supreme courts, leaves no room for doubt (the relevant extracts, which are longer than those shown on the screen, are reproduced in tab 20 of your folders. I will read what seem to me to be the most relevant passages:

(Read in English)

As was upheld several times by this Court, there is no doubt that the fundamental principles of the constitutional order and inalienable human rights constitute a ~~limit~~ to the introduction (*di*) of generally recognized norms of international law, to which the Italian legal order conforms under Article 10, paragraph 1 of the Constitution+(*di*).

⁶⁷ 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 (OE, annexe 24); v. aussi les annexes 25 (Note Verbale No. 415/6 from the Ministry of External of India to the Embassy of Italy in India, 5 June 2013) et 26 (Letter from Titus & Co., Counsel for Mr Renato Voglino, Mr Massimo Andronico, Mr Alessandro Conte and Mr Antonio Fontana re. Notice to witnesses, 11 June 2013).

⁶⁸ V. OE, pars. 3.69-3.71 et N, annexe 20 et OE, annexes 16 et 51.

⁶⁹ NV 89/635 of 11 March 2013 (N., annexe 20).

1 It falls exclusively to this Court to ensure the respect of the Constitution and
 2 particularly of its fundamental principles, and thus to review the
 3 compatibility of the international norm (ō) with those principles.

4 (...)

5 [ō S]uch a control is essential in light of Article 10, paragraph 1, of the
 6 Constitution, which requires that this Court ascertain whether the
 7 customary international norm of immunity from the jurisdiction of foreign
 8 States, as interpreted in the international legal order, can be incorporated
 9 into the constitutional order, as it does not conflict with fundamental
 10 principles and inviolable rights. [On the contrary], if there were a conflict,
 11 the referral to the international norm [would] not operate+ (Judgment No.
 12 311/2009). Accordingly, the incorporation, and thus the application, of the
 13 international norm would inevitably be precluded, insofar as it conflicts with
 14 inviolable principles and rights.⁷⁰

15
 16 (*Interpretation from French*) These are fairly long quotations, Mr President, but they
 17 are useful in order to understand why the return of the accused to Italy . at least of
 18 Mr Girone because Mr Latorre is already there . would put an end to India's hope of
 19 being able to try them, particularly since Indian law precludes a trial in absentia in
 20 such a case.

21
 22 I do not doubt, Mr President, that Sir Daniel is sincere in thinking that he can give an
 23 undertaking before you that the accused would return to India if the jurisdiction of its
 24 courts were decided by the Annex VII tribunal. Unfortunately, I do not believe that my
 25 esteemed friend can prevent the jurisprudence that I have just quoted from being
 26 applied to this case as it was in *Germany v. Italy*. Although I do not have time to
 27 dwell on this point, I would add that the judgment of 22 October 2014 is of interest
 28 not only because of these reasons of principle, but specifically:

29
 30 It demonstrates a clear refusal by the supreme Italian Constitutional Court to comply
 31 with a judgment of the International Court of Justice. The same could obviously apply
 32 to the award by an arbitral tribunal, which has even less+enforceability in the
 33 absence of equivalent protection, which is admittedly pretty illusory, to that offered by
 34 article 94 of United Nations Charter for the enforcement of ICJ judgments.

35
 36 The Italian Constitutional Court judgment concerns questions of immunity from
 37 jurisdiction, which are indeed different from those raised by Italy in this instance.
 38 Even so, it does offer some interesting clarifications about the Italian idea of the
 39 notion of immunity and its limits. By way of evidence, I will just give this last quotation
 40 . I will revert to English as I have not found a French translation of the Court's
 41 judgment:

42
 43 (*Read in English*)

44 Immunity from jurisdiction of other States ... can justify on the constitutional
 45 plane the sacrifice of the principle of judicial protection of inviolable rights
 46 guaranteed by the Constitution, only when it is connected . substantially
 47 and not just formally . to the sovereign functions of the foreign State, i.e.
 48 with the exercise of its governmental powers.⁷¹

⁷⁰ Cour constitutionnelle italienne, arrêt, 22 octobre 2014, sections 3.2, 3.3 et 3.4 (extraits) . v. OE, annexe 44.

⁷¹ *Ibid.* section 3.4 . doublement souligné par moi.

1
2 *(Interpretation from French)* I doubt, Mr President, that the murder of unarmed
3 fishermen who pose absolutely no threat is connected with the exercise of
4 governmental powers.

5
6 The rights that were at issue are certainly not unconnected to this case. In that
7 judgment the Court refers to article 2, relating to the guarantee of ~~unalienable~~ human
8 rights, and article 24 of the Italian Constitution, on the right of access to the courts,
9 on which Italy may very well rely in the present case in order to release itself from
10 the obligation to comply with the future award by the arbitral tribunal.

11
12 If, on the one hand, this Tribunal prescribes the second provisional measure that is
13 requested and if, on the other, the Annex VII tribunal upholds India's case, it is highly
14 unlikely . and that is putting it mildly . that Italy will comply with the award and
15 require the two accused to return to India to be tried there . all the more so if the
16 Annex VII tribunal were to find that both States had jurisdiction to try their case. We
17 do not think that to be the case, but the hypothesis, which cannot be dismissed *a*
18 *priori*, shows just how serious the argument of prejudgment is. Ordering India to
19 return the accused . at least Mr Girone, as the chances of Mr Latorre returning to
20 India, even if his health improves, are small (that is also putting it mildly .
21 infinitesimal would be more accurate) . as I was saying, ordering this would amount
22 to holding in advance that India has no jurisdiction to try them or to depriving India in
23 advance of any opportunity to exercise that jurisdiction.

24
25 Does this make Mr Girone a ~~hostage~~, as Italy outrageously claims,⁷² and as Sir
26 Daniel had the audacity to repeat this morning? Of course not. I refer to the
27 Convention Against the Taking of Hostages of 1979:

28
29 *(Read in English)*

30 Any person who seizes or detains and threatens to kill, to injure or continue
31 to detain another person (...) in order to compel a third party, namely, a
32 State, an international intergovernmental organization, a natural or juridical
33 person, or a group of persons, to do or abstain from doing any act as an
34 explicit or implicit condition for the release of the hostage commits the
35 offence of taking of hostages (~~hostage-taking~~) within the meaning of this
36 Convention.⁷³

37
38 *(Interpretation from French)* India has never practised such blackmail and to make
39 that insinuation is odious. What is true, however, is that the presence of Mr Girone
40 on Indian soil provides the guarantee that he will be able to be tried once that time
41 comes; in other words that the rights that India will assert before the Annex VII
42 tribunal, if it is recognized as having jurisdiction, can be exercised effectively. That is
43 the perfectly legitimate aim of any judicial supervision. By prescribing that India
44 should allow him to go to Italy as Italy has requested, you will be ~~guaranteeing~~ (if I
45 may say so) that India will be deprived of that possibility; you would be prescribing a
46 kind of ~~anti-provisional~~ measure.

72 R, pars. 23 et 47.

73 Article 1(1) de la Convention internationale contre la prise d'otages, 17 décembre 1979, *R.T.N.U.*,
vol. 212, 1983, n° 21931, p. 213.

1 It would also be an unjust measure which would be perceived as illegitimate by the
2 Indian public, and understandably so.

3
4 These two individuals, Mr President, are accused of murder.

5
6 Being placed under judicial supervision is the normal consequence of such an
7 accusation, even though this is certainly stressful for those involved and those close
8 to them.

9
10 Having said that, the two marines are benefitting from particularly favourable
11 treatment. I have not heard of any case where people against whom such serious
12 charges have been made are more or less free to move as they wish and lead a
13 fairly pleasant life, aside, of course, from Mr Latorre's health problems.

14
15 However, the Indian courts, whether it be Kerala High Court or the Supreme Court,
16 have demonstrated great indulgence to him on humanitarian grounds, without
17 making him pay for the bad manners of his country.

18
19 It cannot be said that Italy has shown the same compassion towards the victims and
20 their families, who are the forgotten ones in Italy's written submissions. The
21 Notification and the Request, not to mention the oral argument this morning,
22 endeavour to move you to pity the fate of the two accused, but there is no mention of
23 the victims. It is quite simple, Mr President: that word is not used a single time, not
24 once! That goes for the written pleadings and it is also true of this morning's oral
25 argument. I am not in the habit of playing the emotional card, and I am the first one
26 to think that the law must be applied even if it leads to results that may be
27 questionable in human terms . *dura lex, sed lex*. However, that is not the problem
28 here. Italy is using the %compassion argument+by itself, without any connection with
29 the law. Distinguished Members of the Tribunal, what is compassion for one is
30 compassion for all, so I would draw your attention⁷⁴ to the fact that two families are
31 mourning the loss of a son, a husband, a father, and in less emotional terms .
32 although this should not be overlooked . a breadwinner who supported the
33 household (albeit an already fairly poor household) through his work.

34
35 The owner of the *St. Antony* no longer has any income because he cannot use or
36 sell his boat, and the compensation paid by Italy does not make up for the losses
37 incurred or the loss of earnings.⁷⁵

38
39 The nine other fishermen who were on board the boat on the day of the shooting are
40 suffering from long-term trauma.

41
42 Beyond that, the village community, traditionally gearing to fishing, has been and
43 remains in a state of profound shock to the extent that it seems, according to the
44 local archbishop, that the fishermen are reluctant to go out to sea for fear of being
45 shot like rabbits by incompetent or hot-headed guards.⁷⁶

⁷⁴ V. aussi OE, pars. 1.15, 1.25, 3.67 et 3.88.

⁷⁵ V. OE, par. 3.88 et OE, annexe 46.

⁷⁶ V. par ex.: <http://www.hindustantimes.com/india-news/fishermen-shootings-marines-chargesheeted/article1-857699.aspx>.

1 Mr President, Members of the Tribunal, these are not legal considerations; we are
2 fully aware of that; but justice is not necessarily blind, and since Italy has resolutely
3 taken this ground we felt it necessary to give you a more balanced description of the
4 humanitarian situation which Italy shamelessly, but wrongly invokes.

5
6 Members of the Tribunal, my presentation ends the first round of oral arguments
7 from the Republic of India. On behalf of our entire team I would like to thank you for
8 listening so attentively and sympathetically.

9
10 Thank you, Mr President.

11
12 **THE PRESIDENT:** Thank you, Mr Pellet. The first round of arguments by both
13 Parties is concluded. We will continue the hearing tomorrow at 10 a.m. to hear the
14 second round of oral arguments of Italy, and in the afternoon, at 4.30 p.m. of India.

15
16 *(The sitting is closed at 6.27 p.m.)*