IT-35

THE "ENRICA LEXIE" INCIDENT (ITALY V. *INDIA), PROVISIONAL MEASURES, ORDER OF 24 AUGUST 2015* (**"ITLOS ORDER"**)

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

YEAR 2015

24 August 2015

List of Cases:
No. 24

THE "ENRICA LEXIE" INCIDENT

(ITALY *v.* INDIA)

Request for the prescription of provisional measures

ORDER

Present: *President* GOLITSYN; *Vice-President* BOUGUETAIA; *Judges* CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, PAIK, KELLY, ATTARD, KULYK, GÓMEZ-ROBLEDO, HEIDAR; *Judge* ad hoc FRANCIONI; *Registrar* GAUTIER.

THE TRIBUNAL,

composed as above,

after deliberation,

Having regard to article 290 of the United Nations Convention on the Law of the Sea (hereinafter "the Convention") and articles 21 and 25 of the Statute of the Tribunal (hereinafter "the Statute"),

Having regard to articles 89 and 90 of the Rules of the Tribunal (hereinafter "the Rules"),

Having regard to the fact that the Italian Republic (hereinafter “Italy”) and the Republic of India (hereinafter “India”) are States Parties to the Convention,

Having regard to the fact that Italy and India have not accepted the same procedure for the settlement of disputes concerning the interpretation or application of the Convention referred to in article 287, paragraph 1, of the Convention and may therefore submit their dispute only to arbitration in accordance with Annex VII to the Convention, unless they agree otherwise,

Having regard to the “Notification under article 287 and Annex VII, article 1 of UNCLOS” and the “Statement of claim and grounds on which it is based” (hereinafter “the Statement of Claim”) dated 26 June 2015, addressed by Italy to India, instituting arbitral proceedings under Annex VII to the Convention in respect of “the dispute concerning the *Enrica Lexie* incident”,

Having regard to the request for provisional measures contained in the Statement of Claim,

Makes the following Order:

1. *Whereas*, on 21 July 2015, Italy filed with the Tribunal a Request for the prescription of provisional measures (hereinafter “the Request”) under article 290, paragraph 5, of the Convention in the above-mentioned dispute;

2. *Whereas*, on the same date, the Registrar transmitted copies of the Request electronically to the Minister of External Affairs of India and the Ambassador of India to the Federal Republic of Germany;

3. *Whereas*, by letter dated 21 July 2015 addressed to the Registrar, the Minister of Foreign Affairs and International Cooperation of Italy notified the Tribunal of the appointment of Mr Francesco Azzarello, Ambassador of Italy to the Kingdom of the Netherlands, as Agent for Italy;

4. *Whereas* the Tribunal does not include upon the bench a judge of Italian nationality, Italy, pursuant to article 17, paragraph 2, of the Statute, in its Request chose Mr Francesco Francioni to sit as judge *ad hoc* in this case;

5. *Whereas*, in a Confidential Addendum to the Request relating to medical matters, Italy made a request to the Tribunal that the information contained therein should "not be publicly disclosed, including in any Order of the Tribunal";

6. *Whereas* a certified copy of the Request was transmitted by the Registrar to the Minister of External Affairs of India by courier on 22 July 2015;

7. *Whereas*, pursuant to the Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea of 18 December 1997, the Secretary-General of the United Nations was notified of the Request by a letter from the Registrar dated 22 July 2015;

8. *Whereas*, on 23 July 2015, pursuant to articles 45 and 73 of the Rules, the President, by telephone conference, held consultations with the Agent of Italy and Mr Choudhary, Joint Secretary, Head of the Legal and Treaties Division, Ministry of External Affairs of India, and Ms Singla, Joint Secretary, Ministry of External Affairs of India, to ascertain the views of Italy and India (hereinafter "the Parties") with regard to questions of procedure;

9. *Whereas*, during these consultations, it was agreed that documentation relating to the Confidential Addendum submitted by Italy would be kept confidential and that any request from the Parties that the hearing or part of the hearing be held in camera should be submitted to the Tribunal not later than 6 August 2015;

10. *Whereas*, pursuant to article 90, paragraph 2, of the Rules, the President, by Order dated 24 July 2015, fixed 10 August 2015 as the date for the opening of the hearing, notice of which was communicated to the Parties on the same date;

11. *Whereas* the Registrar, in accordance with article 24, paragraph 3, of the Statute, by a note verbale dated 24 July 2015, notified the States Parties to the Convention of the Request;

12. *Whereas*, by letter dated 28 July 2015, the Minister of External Affairs of India notified the Registrar of the appointment of Ms Neeru Chadha, former Additional Secretary and Legal Adviser, Ministry of External Affairs, as Agent for India, of Mr Vijay Gokhale, Ambassador of India to the Federal Republic of Germany, as Co-Agent for India, and of Mr Vishnu Dutt Sharma, Director of the Legal and Treaties Division, Ministry of External Affairs, as Deputy Agent for India;

13. *Whereas,* on 30 July 2015, the Deputy Registrar sent a letter to the Agent of Italy requesting further documents, and *whereas* the Agent of Italy submitted the requested documents on 31 July 2015;

14. *Whereas*, by letter from the Agent of Italy to the Registrar dated 6 August 2015, Italy requested the holding in camera of the part of the hearing concerning confidential information it had submitted in its Request;

15. *Whereas*, on 6 August 2015, by electronic mail, India filed with the Tribunal its Written Observations, a certified copy of which was transmitted electronically by the Registrar to the Agent of Italy on the same date, and *whereas* the original of the Written Observations was filed with the Registry on 9 August 2015;

16. *Whereas*, since no objection to the choice of Mr Francioni as judge *ad hoc* was raised by India, and none appeared to the Tribunal itself, Mr Francioni was admitted to participate in the proceedings as judge *ad hoc* after having made the solemn declaration required under article 9 of the Rules at a public sitting of the Tribunal held on 8 August 2015;

17. *Whereas,* in accordance with article 68 of the Rules, the Tribunal held initial deliberations on 8 August 2015 concerning the written pleadings and the conduct of the case;

18. *Whereas,* on 8 August 2015, the Registrar sent a letter to the Agent of India requesting further documents, and *whereas* India submitted the requested documents on 20 August 2015;

19. *Whereas*, pursuant to paragraph 14 of the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal, materials were submitted to the Tribunal by Italy and India on 9 August 2015;

20. *Whereas*, on 9 August 2015, in accordance with article 45 of the Rules, the President held consultations with the Agents and counsel of the Parties with regard to questions of procedure;

21. *Whereas* during these consultations, it was agreed that Italy would present its oral arguments dealing with confidential information in camera, in accordance with article 26 of the Statute and article 74 of the Rules;

22. *Whereas*, pursuant to article 67, paragraph 2, of the Rules, copies of the Request and the Written Observations and documents annexed thereto, except for the documents referred to in paragraph 5, were made accessible to the public on the date of the opening of the oral proceedings;

23. *Whereas* oral statements were presented at four public sittings held on 10 and 11 August 2015 by the following:

On behalf of Italy:

Mr Francesco Azzarello, Ambassador of Italy to the Kingdom of the Netherlands,

as Agent,

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

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

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

Mr Paolo Busco, Member of the Rome Bar,

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,

as Counsel and Advocates;

On behalf of India: Ms Neeru Chadha, former Additional Secretary and Legal Adviser, Ministry of External Affairs,

as Agent,

Mr P.S. Narasimha, Additional Solicitor General, Government of India,

Mr Alain Pellet, Professor emeritus, Université Paris Ouest Nanterre La Défense, France, former Chairperson of the International Law Commission, Member of the Institut de droit international,

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

as Counsel and Advocates;

24. *Whereas*, in the course of the oral proceedings, a number of exhibits, including photographs and extracts from documents, were displayed by the Parties on video monitors;

25. *Whereas*, further to the request by Italy in its letter dated 6 August 2015, referred to in paragraphs 14 and 21, and as agreed by the Parties, part of the hearing on 10 August 2015 was held in camera, in accordance with article 26 of the Statute and article 74 of the Rules;

26. *Whereas*, during the hearing on 11 August 2015, Judge Cot put a question to the Agents of Italy and India, in accordance with article 76, paragraph 3, of the Rules;

27. *Whereas* India responded to the question put by Judge Cot during the hearing on 11 August 2015, and *whereas* Italy submitted a written response to that question on 12 August 2015;

* *

28. *Whereas*, in paragraph 33 of the Statement of Claim, Italy requests the arbitral tribunal to be constituted under Annex VII to the Convention (hereinafter "the Annex VII arbitral tribunal") to adjudge and declare that:

> (a) India has acted and is acting in breach of international law by asserting and exercising jurisdiction over the *Enrica Lexie* and the Italian Marines in connection with the Enrica Lexie Incident.
>
> (b) The assertion and exercise of criminal jurisdiction by India is in violation of India's obligation to respect the immunity of the Italian Marines as State officials exercising official functions.
>
> (c) It is Italy that has exclusive jurisdiction over the *Enrica Lexie* and over the Italian Marines in connection with the Enrica Lexie Incident.
>
> (d) India must cease to exercise any form of jurisdiction over the Enrica Lexie Incident and the Italian Marines, including any measure of restraint with respect to Sergeant Latorre and Sergeant Girone.
>
> (e) India has violated its obligation under the Convention to cooperate in the repression of piracy;

29. *Whereas,* at the public sitting held on 11 August 2015, the Agent of Italy made the following final submissions, which reiterate the submissions contained in paragraph 57 of the Request:

> … Italy requests that the Tribunal prescribe the following provisional measures:
>
> (a) India shall refrain from taking or enforcing any judicial or administrative measures against Sergeant Massimiliano Latorre and Sergeant Salvatore Girone in connection with the Enrica Lexie Incident, and from exercising any other form of jurisdiction over the Enrica Lexie Incident; and
>
> (b) India shall take all measures necessary to ensure that restrictions on the liberty, security and movement of the Marines be immediately lifted to enable Sergeant Girone to travel to and remain in Italy and Sergeant Latorre to remain in Italy throughout the duration of the proceedings before the Annex VII Tribunal;

30. *Whereas,* at the public sitting held on 11 August 2015, the Agent of India made the following final submissions, which reiterate the submissions contained in paragraph 3.89 of the Written Observations:

> [T]he Republic of India requests the International Tribunal for the Law of the Sea to reject the submissions made by the Republic of Italy in its Request for the prescription of provisional measures and [to] refuse prescription of any provisional measure[s] in the present case;

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31. *Considering* that, in accordance with article 287 of the Convention, Italy, on 26 June 2015, instituted proceedings under Annex VII to the Convention against India in a dispute concerning "an incident … involving the *MV Enrica Lexie*, an oil tanker flying the Italian flag, and India's subsequent exercise of jurisdiction over the incident";

32. *Considering* that, on 21 July 2015, after the expiry of the time-limit of two weeks provided for in article 290, paragraph 5, of the Convention, and pending the constitution of the Annex VII arbitral tribunal, Italy submitted the Request to the Tribunal;

33. *Considering* that article 290, paragraph 5, of the Convention provides that, pending the constitution of an arbitral tribunal, the Tribunal may prescribe, modify or revoke provisional measures in accordance with that article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires;

34. *Considering* that the Tribunal needs to satisfy itself that there is a dispute between the Parties;

35. *Considering* that, before prescribing provisional measures under article 290, paragraph 5, of the Convention, the Tribunal must first satisfy itself that the dispute between the Parties relates to the interpretation or application of the Convention and that *prima facie* the Annex VII arbitral tribunal would have jurisdiction;

36. *Considering* that Italy maintains that

> [t]he dispute submitted to an Annex VII arbitral tribunal concerns an incident that occurred [on 15 February 2012] approximately 20.5 nautical miles off the coast of India involving the *MV Enrica Lexie,* an oil tanker flying the Italian flag, and India's subsequent exercise of jurisdiction over the incident, and over two Italian Marines from the Italian Navy ... who were on official duty on board the *Enrica Lexie* at the time of the incident;

37. *Considering* that Italy argues "that the law and the facts of the present case manifestly show that the Annex VII tribunal under constitution will have more than simply *prima facie* jurisdiction over the merits of this dispute";

38. *Considering* that Italy maintains that the dispute with India concerns the interpretation and application of the Convention, including, "in particular Parts II, V and VII, and notably Articles 2(3), 27, 33, 56, 58, 87, 89, 92, 94, 97, 100 and 300 of the Convention";

39. *Considering* that Italy argues that India breached the Convention by its "unlawful arrest and detention of the *Enrica Lexie*" and its "interference with Italy's freedom of navigation";

40. *Considering* that Italy further argues that India breached the Convention by its "exercise of jurisdiction over the Enrica Lexie Incident and the Marines notwithstanding Italy's exclusive jurisdiction over the same by virtue of the undisputed fact that the Incident took place beyond India's territorial sea";

41. *Considering* that Italy maintains that, pursuant to article 97, paragraph 1, of the Convention, "in the event of an incident of navigation which gives rise to the penal responsibility of any person in the service of the ship, no penal proceedings may be instituted against such a person 'except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national'" and that, "[i]n the present dispute, Italy is both the flag State and the State of nationality";

42. *Considering* that Italy further maintains that India also breached the Convention by its "exercise of criminal jurisdiction over the Italian Marines who, as State officials exercising official functions pursuant to lawful authority, are immune from criminal proceedings in India" and by its "failure to cooperate in the repression of piracy by exercising criminal jurisdiction over the Enrica Lexie Incident and the Italian Marines";

43. *Considering* that India maintains that the *Enrica Lexie* incident arose "from the killing of two innocent Indian fishermen on board an Indian fishing vessel, *St. Antony*", which on 15 February 2012 was "engaged in fishing at a distance of about 20.5 nautical miles from the Indian coast";

44. *Considering* that India admits that "the event which is at the origin of the dispute took place in the Indian EEZ and involved the *MV Enrica Lexie*, an oil tanker flying the Italian flag" and that "India *envisages* to exercise jurisdiction over the Marines";

45. *Considering* that India contends that "the Annex VII tribunal that Italy requests be constituted does not have jurisdiction to rule on the case that it seeks to submit to it" and that "the subject-matter of the dispute does not fall within the ambit of the Convention";

46. *Considering* that India argues that "this case is not covered by Article 97" of the Convention, contending that "there was in reality no 'incident of navigation', nor any collision between the two ships", and that "[t]hey had no physical contact and Article 97 of the UNCLOS … is irrelevant by any means";

47. *Considering* that India further argues that "[t]he real question is to know whether or not the dispute between the Parties is covered by one or more provisions of the Convention", that "*[p]rima facie* this is not the case if you focus on the real subject-matter of the dispute", and that "the Convention does not contemplate the situation that is before" the Tribunal;

48. *Considering* that India maintains that "[t]he only legal issue is to know what State … has the jurisdiction to try the perpetrators of this shooting, which led to the death of two Indian fishermen", and that "[o]n this point the … Convention is silent";

49. *Considering* that India contends that "[l]egal proceedings ... commenced in Indian courts under the relevant provisions of Indian law, as the victims were Indian nationals and they were killed on board an Indian fishing vessel", and that the "early assertion of jurisdiction by Italy does not preclude India from exercising jurisdiction over the killing of its nationals who were fishing in India's exclusive economic zone";

50. *Considering* that India further contends that "the Italian marines were on board a merchant vessel, therefore, the Government of India was not obliged to recognize their claim of immunity under the Convention or any other principle of international law" and that "there was no piracy attack or threat thereof that could justify the killing of two Indian fishermen so as to attract the application of the Convention and thus the *prima facie* jurisdiction of an Annex VII tribunal";

51. *Considering* that both Parties agree that there is a dispute between them on matters of fact and law relating to the *Enrica Lexie* incident;

52. *Considering* that, at the stage of the proceedings under article 290, paragraph 5, of the Convention, the Tribunal must satisfy itself that any of the provisions invoked by the Applicant appears *prima facie* to afford a basis on which the jurisdiction of the Annex VII arbitral tribunal might be founded;

53. *Considering* that, having examined the positions of the Parties, the Tribunal is of the view that a dispute appears to exist between the Parties concerning the interpretation or application of the Convention;

54. *Considering* that, for the above reasons, the Tribunal finds that the Annex VII arbitral tribunal would *prima facie* have jurisdiction over the dispute;

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55. *Considering* that article 283, paragraph 1, of the Convention reads as follows:

> When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means;

56. *Considering* that Italy contends that the requirements of article 283 of the Convention have been satisfied in light of "[e]xtended attempts to negotiate a solution ... with Ministers and other high-level government representatives of both States meeting several times to discuss possible solutions";

57. *Considering* that Italy maintains that "[i]t was only in late May of this year [2015] that it became clear beyond doubt that a negotiated settlement would not be possible";

58. *Considering* that India states that "[n]othing happened in May [2015] to change what had been the status quo over the previous 14 months" and recognizes that "in the spring of 2014, it was apparent that a diplomatic impasse had been reached";

59. *Considering* that both Parties agree that an extensive exchange of views has taken place and that this did not lead to an agreement between the Parties regarding the settlement of the dispute by negotiation or other peaceful means;

60. *Considering* that, having examined the circumstances of the present case, the Tribunal is of the view that the requirements of article 283, paragraph 1, of the Convention are satisfied;

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61. *Considering* that article 295 of the Convention provides:

> Any dispute between States Parties concerning the interpretation or application of this Convention may be submitted to the procedures provided for in this section only after local remedies have been exhausted where this is required by international law;

62. *Considering* that India contends that the procedures required by article 295 of the Convention are applicable in this case;

63. *Considering* that India argues that although Italy "pretends to act in order to protect its own alleged rights, Italy in reality behaves as if it were espousing its nationals' rights while clearly the conditions for exercising its diplomatic protection are not fulfilled";

64. *Considering* that India maintains that "Italy should have exhausted the local remedies available before the Indian courts" and that "an Annex VII tribunal can only exercise its jurisdiction and rule on the claims of Italy once all remedies available to the two accused have been exhausted";

65. *Considering* that Italy states that "the rights claimed by Italy are rights of Italy, rights which have been directly infringed by India" and that "[n]o question of exhaustion of local remedies arises";

66. *Considering* that Italy further maintains that the requirement of exhaustion of local remedies "does not apply where the individual injured was a State official engaged in official business" and that "the invocation of the exhaustion of local remedies rule is not a matter for a provisional measures hearing…in any event the local remedies rule does not apply here";

67. *Considering* that, in the view of the Tribunal, since the very nature of the dispute concerns the exercise of jurisdiction over the *Enrica Lexie* incident, the issue

of exhaustion of local remedies should not be addressed in the provisional measures phase;

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68. *Considering* that article 294, paragraph 1, of the Convention provides:

> A court or tribunal provided for in article 287 to which an application is made in respect of a dispute referred to in article 297 shall determine at the request of a party, or may determine *proprio motu*, whether the claim constitutes an abuse of legal process or whether *prima facie* it is well founded. If the court or tribunal determines that the claim constitutes an abuse of legal process or is *prima facie* unfounded, it shall take no further action in the case;

69. *Considering* that India states that "Italy's initiative constitutes an abuse of legal process, an abuse which India reserves its right in due course to draw the attention of the future Annex VII tribunal in accordance with article 294 of the Convention";

70. *Considering* that India also states that "Italy *chose* to seise Indian courts and now turns away from them and seeks to remove the case to the international level" and that "a party cannot claim irreparable prejudice or undue burden if it voluntarily submits to the jurisdiction of one court (in this case, India's Supreme Court) and asks that court to decide the essential questions in dispute – jurisdiction and immunity – and then later turns around and argues that actually those questions should be heard and decided by another court or tribunal, the Annex VII arbitral tribunal and that the first court, the Supreme Court, should be enjoined from proceeding further";

71. *Considering* that Italy, in response to these allegations, states that "[i]t is Italy's right to start proceedings under UNCLOS in connection to a dispute which India's own Supreme Court accurately characterizes as concerning the interpretation of UNCLOS provisions";

72. *Considering* that Italy also maintains that “Italy objected promptly” to the Indian domestic proceedings, and that

> [a]s for the idea that there was some kind of “fork in the road” here and that Italy opted for the domestic process, this is so completely unfounded that it barely warrants attention. Italy did not opt for domestic proceedings. Its marines were subjected to them; and, in any event, there is no basis or precedent for the notion of “fork in the road” in the context of inter-State proceedings;

73. *Considering* that the Tribunal is of the view that article 290 of the Convention applies independently of any other procedures that may have been instituted at the domestic level and Italy is therefore entitled to have recourse to the procedures established in that article and, if proceedings are instituted at the domestic level, this does not deprive a State of recourse to international proceedings;

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74. *Considering* that article 290, paragraph 5, of the Convention has to be read in conjunction with article 290, paragraph 1, of the Convention;

75. *Considering* that, under article 290, paragraph 1, of the Convention, the Tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute;

76. *Considering* that, in this regard, Italy invokes its rights under the Convention and customary international law, in particular “(a) Italy's right of exclusive jurisdiction over the Enrica Lexie Incident, including in relation to the exercise of criminal jurisdiction over the Marines; and (b) Italy's rights in relation to its own immunity and the immunity of its officials”;

77. *Considering* that Italy argues that as the flag State it has the right to exercise exclusive jurisdiction over vessels flying its flag as set out in article 92, paragraph 1, of the Convention, which is applicable to the exclusive economic zone by virtue of

article 58, paragraph 2, of the Convention, and that none of the exceptions provided for in the Convention or in other treaties applies in the present instance;

78. *Considering* that Italy states that it promptly "asserted its jurisdiction over the *Enrica Lexie*, over the incident and over the *Enrica Lexie* crew, including the Italian Marines" and subsequently attempted to exercise and defend its exclusive jurisdiction;

79. *Considering* that India argues that, since two of its unarmed fishermen were killed, the right "to inquire, investigate and try the accused" is a fundamental right of India;

80. *Considering* that India maintains that under the Convention "immunity from the jurisdiction of any State other than the flag State is available only to warships and Government ships operated for non-commercial purposes" and notes that "no bilateral agreement exists between India and Italy for granting such immunity to armed forces personnel of Italy";

81. *Considering* that India claims that its right "to continue the judicial process that has been set in motion" should be preserved and that if the first provisional measure requested by Italy was granted, "the right of India to pursue its judicial review of the case would be severely prejudiced and effectively prejudged";

82. *Considering* that India argues that "[i]f granted, Italy's second requested provisional measure … would prejudge the decision of the Annex VII Tribunal or preclude its implementation";

83. *Considering* that, in provisional measures proceedings, the Tribunal is not called upon to settle the claims of the Parties in respect of the rights and obligations in dispute and to establish definitively the existence of the rights which they each seek to protect (see *Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015*, para. 57);

84. *Considering* that, before prescribing provisional measures, the Tribunal does not need to concern itself with the competing claims of the Parties, and that it needs only to satisfy itself that the rights which Italy and India claim and seek to protect are at least plausible;

85. *Considering* that the Tribunal finds that both Parties have sufficiently demonstrated that the rights they seek to protect regarding the *Enrica Lexie* incident are plausible;

86. *Considering* that, pursuant to article 290, paragraph 5, of the Convention, the Tribunal "may prescribe, modify or revoke provisional measures … if it considers that … the urgency of the situation so requires";

87. *Considering* that article 290, paragraph 1, of the Convention stipulates *inter alia* that the Tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties, which implies that there is a real and imminent risk that irreparable prejudice could be caused to the rights of the parties to the dispute pending such a time when the Annex VII arbitral tribunal to which the dispute has been submitted is in a position to modify, revoke or affirm the provisional measures (see *M/V "Louisa" (Saint Vincent and the Grenadines* v*. Kingdom of Spain), Provisional Measures, Order of* 23 December *2010, ITLOS Reports 2008-2010,* p. 58, at p. 69, para. 72);

88. *Considering* that, as provided for in article 290, paragraph 5, of the Convention, the tribunal to which the dispute has been submitted may modify, revoke or affirm the provisional measures prescribed by the Tribunal;

89. *Considering* that, as stated in its Request, Italy seeks the prescription of provisional measures on the following two principal grounds:

> (a) the serious and irreversible prejudice that will be caused to its rights under UNCLOS if Indian jurisdiction continues to be exercised over the Enrica Lexie Incident; and
>
> (b) the serious and irreversible prejudice to Italy's rights if its Marines continue to be subjected to Indian jurisdiction, in particular, to measures

> restricting their liberty and movement, notwithstanding the commencement of international arbitration and the irreparable consequences for personal health and well-being that such restrictions will or are likely to cause;

90. *Considering* that Italy further contends in the Request that "India's decision to persist in exercising jurisdiction, notwithstanding the commencement of international proceedings under UNCLOS, creates a clear risk of prejudice to the carrying out of future decisions of the Annex VII arbitral tribunal";

91. *Considering* that Italy also points out that if India "perseveres in the exercise of jurisdiction, even proceeding to a criminal trial while the dispute is still pending, all risks of irreparable prejudice would be on Italy's side";

92. *Considering* that India maintains that it "also possesses fundamental rights that would be prejudiced if the Tribunal were to accede to Italy's submissions", that its rights at stake are "even more important" and that in this case "what is irreparable are not the rights that Italy claims will be prejudiced, but rather the fact that two Indian fishermen are dead ...";

93. *Considering* that, with regard to the first ground on which Italy seeks provisional measures, India contends that "[t]his is pure, unwarranted speculation without a shred of evidence to back it up" and points out in this connection that "the conduct of the Indian courts in the matter over the past three years has been beyond reproach" and that "India's Supreme Court has gone to considerable lengths to preserve Italy's (and the two Marines') rights, including the right to raise any issues of jurisdiction and immunity before the Special Court ";

94. *Considering* that, with reference to Italy's second ground for seeking provisional measures, India further contends that "well-being and humanitarian considerations in favour of persons accused of a serious crime have to be balanced with that of the victims of the crime" and that "[i]t is a generally accepted principle that the latter should prevail in case of conflict";

95. *Considering* that India points out that

> a party cannot claim irreparable prejudice or undue burden if it voluntarily submits to the jurisdiction of one court (in this case, India's Supreme Court) and asks that court to decide the essential questions in dispute – jurisdiction and immunity – and then later turns around and argues that actually those questions should be heard and decided by another court or tribunal, the Annex VII arbitral tribunal;

96. *Considering* that Italy states that under article 290, paragraph 1, of the Convention "the rights which the Annex VII tribunal has not yet adjudged" are to be preserved, that "Italy cannot preserve those rights if India continues to exercise jurisdiction", and that Italy points out that "in its Written Observations, India has left no doubt as to its determination to put the marines on trial" and that "[a]s observed by Italy's Agent, India has seemed to have already decided the outcome of that trial";

97. *Considering* that Italy further states that "[f]or all intents and purposes, therefore, the criminal trial, which India now insists should commence as soon as possible, would be a *fait accompli*, depriving the Annex VII tribunal of any effect if it decides in Italy's favour";

98. *Considering* that Italy contends that "[i]n circumstances where irreparable harm is being suffered by Italy through each and every exercise of jurisdiction, urgency is demonstrated by the fact that the exercise of jurisdiction" by India is "certain and ongoing";

99. *Considering* that Italy points out that "[u]rgency ... is both humanitarian and legal", that "... the status quo in relation to the marines is one where their rights and Italy's rights are suffering irreparable damage on a daily basis" and that "[e]very additional day in which a person is deprived of these rights must be regarded as one day too many";

100. *Considering* that India contends that "[n]either the first nor the second Italian submission fulfils either the 'aggravated urgency' standard resulting from Article 290(5) of the UNCLOS or even the 'basic' standard of urgency";

101. *Considering* that, with reference to the first Italian submission, India states that "[w]hen the facts are placed in their proper context, they show that there is absolutely no situation of urgency that justifies the Tribunal issuing an order restraining India from continuing to take judicial or administrative measures – measures that it has always carried out lawfully and with absolute fairness to Italy and the two Marines – or to exercise any other form of jurisdiction";

102. *Considering* that India contends that:

> The proceedings before the Special Court are in abeyance. There is no prospect that the stay in those proceedings will be lifted, or that the prosecution will present the results of the NIA [National Investigation Agency] investigation, which has been blocked by the application of Italy and the marines, that it will present that report to the Special Court, or that the defendants will have their opportunity to answer that case. There is no chance that that is going to happen in the near future, and certainly not before the Annex VII arbitral tribunal is set up and running;

103. *Considering* that, with reference to the second Italian submission, India states that "the situation of either of the accused persons cannot justify any pre-judgement by this Tribunal concerning their conditions of living";

104. *Considering* that India points out in this regard that in the case of Sergeant Latorre new extensions for his stay in Italy are not to be excluded if necessary on humanitarian grounds and that "given the renewable six months leave granted by the Supreme Court on 13 July 2015, Italy is ill-advised to invoke any urgency in this matter";

105. *Considering* that India further points out that in the case of Sergeant Girone "the urgency of authorizing him to go back to and stay in Italy is belied by his own behaviour ...", namely by the fact that in the proceedings before the Supreme Court of 16 December 2014 "he formally withdrew his interim application seeking to relax bail conditions so that he may be allowed to travel to Italy";

106. *Considering* that, in the circumstances of the present case, continuation of court proceedings or initiation of new ones by either Party will prejudice rights of the other Party;

107. *Considering* that the above consideration requires action on the part of the Tribunal to ensure that the respective rights of the Parties are duly preserved;

108. *Considering* Italy's request that the Tribunal shall prescribe the following provisional measures:

> (a) India shall refrain from taking or enforcing any judicial or administrative measures against Sergeant Massimiliano Latorre and Sergeant Salvatore Girone in connection with the Enrica Lexie Incident, and from exercising any other form of jurisdiction over the Enrica Lexie Incident; and
>
> (b) India shall take all measures necessary to ensure that restrictions on the liberty, security and movement of the Marines be immediately lifted to enable Sergeant Girone to travel to and remain in Italy and Sergeant Latorre to remain in Italy throughout the duration of the proceedings before the Annex VII Tribunal;

109. *Considering* that the Tribunal is called upon to decide whether these requests are appropriate taking into account the facts of the case and the arguments advanced by the Parties;

110. *Considering* that, in the course of the proceedings, the Parties advanced conflicting arguments on the status of the two Marines;

111. *Considering* that Italy argues that the two Marines are part of its armed forces and therefore "[a]s State officials exercising official functions on board the *Enrica Lexie* pursuant to lawful authority, … immune from proceedings in India";

112. *Considering* that India states (see also paragraphs 50 and 80) that:

> Under articles 95 and 96 of the Convention, immunity from the jurisdiction of any State other than the flag State is available only to warships and Government ships operated for non-commercial purposes. Admittedly, the Italian marines were on board a merchant vessel, therefore, the Government of India was not obliged to recognize their claim of immunity under the Convention or any other principle of international law ;

113. *Considering* that the question of the status of the two Marines relates to the issue of jurisdiction and cannot be decided by the Tribunal at the stage of provisional measures;

114. *Considering* that Italy argues that any risk to India's rights could be addressed by an order that is directed to both Parties "not to take any step of criminal investigation or trial during the pendency of the Annex VII proceedings that could prejudice the rights of the other Party";

115. *Considering* that Italy maintains that its second submission is justified on at least three grounds: as a consequence of the first measure requested; by virtue of the applicable international standards of due process; and in light of the circumstances assessed during the hearing held in camera;

116. *Considering* that Italy argues, relying on the Order of the Tribunal in the *"Arctic Sunrise" Case*, that international standards of due process would be violated "if the measures restricting the marines' liberty are not lifted promptly";

117. *Considering* that, according to Italy,

> a freezing order in respect of the criminal proceedings is not enough. Italy's rights engaged by the prejudice that is posed to its State officials cannot be adequately addressed, or even addressed at all, by an order that simply maintains the status quo;

118. *Considering* that, during the hearing, Italy undertook to abide by any decision the Annex VII arbitral tribunal will render and "to return Sergeant Latorre and Sergeant Girone to India following the final determination of rights by the Annex VII tribunal, if this is required by the award of the tribunal";

119. *Considering* that in the view of India "the measures invocated by Italy would clearly jeopardize the effectiveness of India's rights at stake";

120. *Considering* that India strongly objects to the allegation of Italy that it has violated international standards of due process;

121. *Considering* that India further points out that the first submission by Italy does not indicate the period of time in which no judicial or administrative measures may be taken against the two Marines;

122. *Considering* that India emphasizes, in respect of the second submission by Italy, that it is its right to see that justice is done for the two dead fishermen;

123. *Considering* that India further points out that the second submission by Italy corresponds to the request on the merits Italy makes under letter (d) of the relief sought in its Statement of Claim and thus, if granted, would prejudge the merits contrary to the object and purpose of provisional measures;

124. *Considering* that, as far as the undertaking by Italy is concerned, India stated during the hearing that it "has legitimate apprehensions on Italy's ability to fulfil its promises";

125. *Considering* that the Order must protect the rights of both Parties and must not prejudice any decision of the arbitral tribunal to be constituted under Annex VII;

126. *Considering* that the first and the second submissions by Italy, if accepted, will not equally preserve the respective rights of both Parties until the constitution of the Annex VII arbitral tribunal as required by article 290, paragraphs 1 and 5, of the Convention;

127. *Considering* that due to the above the Tribunal does not consider the two submissions by Italy to be appropriate and that, in accordance with article 89, paragraph 5, of the Rules, the Tribunal may prescribe measures different in whole or in part from those requested;

128. *Considering* that the Parties disagree on which State has jurisdiction to decide on the *Enrica Lexie* incident and that such decision is to be taken by the Annex VII arbitral tribunal to be constituted;

129. *Considering* that, as was stated by the Additional Solicitor General of India during the hearing, the Supreme Court has actually stayed its proceedings and "[i]t would not be going too far to say that until the tribunal is constituted and hears the matter, there is no compelling assumption that the matter will be taken up and that there will be an adverse decision against them [Sergeant Latorre and Sergeant Girone]";

130. *Considering* that the Tribunal places on record assurances and undertakings given by both Parties during the hearing;

131. *Considering* that it is appropriate for the Tribunal to prescribe that both Italy and India suspend all court proceedings and refrain from initiating new ones which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal or might jeopardize or prejudice the carrying out of any decision which the arbitral tribunal may render;

132. *Considering* that, since it will be for the Annex VII arbitral tribunal to adjudicate the merits of the case, the Tribunal does not consider it appropriate to prescribe provisional measures in respect of the situation of the two Marines because that touches upon issues related to the merits of the case;

133. *Considering* that the Tribunal reaffirms its view that considerations of humanity must apply in the law of the sea as they do in other areas of international law (see *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999*, p. 10, at p. 62, para. 155);

134. *Considering* that the Tribunal is aware of the grief and suffering of the families of the two Indian fishermen who were killed;

135. *Considering* that the Tribunal is also aware of the consequences that the lengthy restrictions on liberty entail for the two Marines and their families;

136. *Considering* that any action or abstention by either Party in consequence of this Order should not in any way be construed as a waiver of any of its claims or an

admission of claims of the other Party to the dispute (see *Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015,* para. 103);

137. *Considering* that the present Order in no way prejudges the question of the jurisdiction of the Annex VII arbitral tribunal to deal with the merits of the case or relating to the merits themselves, and leaves unaffected the rights of Italy and India, respectively, to submit arguments in respect of those questions (see *Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015,* para. 104);

138. *Considering* that pursuant to article 95, paragraph 1, of the Rules each party is required to submit to the Tribunal a report on compliance with the measure prescribed;

139. *Considering* that it may be necessary for the Tribunal to request further information from the Parties on the implementation of the provisional measure and that it is appropriate that the President be authorized to request such information in accordance with article 95, paragraph 2, of the Rules;

140. *Considering* that, in the present case, the Tribunal sees no reason to depart from the general rule, as set out in article 34 of its Statute, that each Party bears its own costs;

141. *For these reasons,*

THE TRIBUNAL,

(1) By 15 votes to 6,

Prescribes, pending a decision by the Annex VII arbitral tribunal, the following provisional measure under article 290, paragraph 5, of the Convention:

Italy and India shall both suspend all court proceedings and shall refrain from initiating new ones which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal or might jeopardize or prejudice the carrying out of any decision which the arbitral tribunal may render;

FOR: *President* GOLITSYN; *Judges* AKL, WOLFRUM, JESUS, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, PAIK, KELLY, ATTARD, KULYK, GÓMEZ-ROBLEDO; *Judge* ad hoc FRANCIONI;

AGAINST: *Vice-President* BOUGUETAIA; *Judges* CHANDRASEKHARA RAO, NDIAYE, COT, LUCKY, HEIDAR.

(2) By 15 votes to 6,

Decides that Italy and India shall each submit to the Tribunal the initial report referred to in paragraph 138 not later than 24 September 2015, and *authorizes* the President, after that date, to request such information from the Parties as he may consider appropriate;

FOR: *President* GOLITSYN; *Judges* AKL, WOLFRUM, JESUS, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, PAIK, KELLY, ATTARD, KULYK, GÓMEZ-ROBLEDO; *Judge* ad hoc FRANCIONI;

AGAINST: *Vice-President* BOUGUETAIA; *Judges* CHANDRASEKHARA RAO, NDIAYE, COT, LUCKY, HEIDAR.

**

Done in English and French, both texts being equally authoritative, in the Free and Hanseatic City of Hamburg, this twenty-fourth day of August, two thousand and fifteen, in three copies, one of which will be placed in the archives of the Tribunal and the others transmitted to the Government of the Italian Republic and the Government of the Republic of India, respectively.

(signed)
Vladimir GOLITSYN
President

(signed)
Philippe GAUTIER
Registrar

Judge Kateka appends a declaration to the Order of the Tribunal.

Judge Paik appends a declaration to the Order of the Tribunal.

Judge Kelly appends a declaration to the Order of the Tribunal.

Judge *ad hoc* Francioni appends a declaration to the Order of the Tribunal.

Judge Jesus appends a separate opinion to the Order of the Tribunal.

Vice-President Bouguetaia appends a dissenting opinion to the Order of the Tribunal.

Judge Chandrasekhara Rao appends a dissenting opinion to the Order of the Tribunal.

Judge Ndiaye appends a dissenting opinion to the Order of the Tribunal.

Judge Lucky appends a dissenting opinion to the Order of the Tribunal.

Judge Heidar appends a dissenting opinion to the Order of the Tribunal.

DECLARATION OF JUDGE KATEKA

1. I have voted in favour of the operative paragraph of the Order. However, I have some reservations on some aspects of the Order. I have doubt as to the necessity of the measure prescribed by the Tribunal. After referring to the conditions for the prescription of provisional measures, I express my hesitation on whether there is urgency for the measure prescribed.

2. The conditions for the prescription of provisional measures include prima facie jurisdiction for the Annex VII arbitral tribunal, the risk of irreparable prejudice and the urgency of the situation. In the present case, the party seeking the prescription of provisional measures has established a prima facie basis on which the jurisdiction of the Annex VII arbitral tribunal might be founded. The Tribunal has correctly endorsed this view and further noted that the Applicant has presented sufficient facts and arguments to demonstrate that the rights it seeks to protect regarding the *Enrica Lexie* incident are plausible [paragraph 85 of the Order].

3. My main hesitation about the Order concerns the issue of urgency. The Tribunal can exercise its power to prescribe provisional measures only if there is a real and imminent risk that irreparable prejudice will be caused to the rights in dispute (*Questions Relating to the Seizure and Detention of Certain Documents and Data* (Timor-Leste), Request for the Indication of Provisional Measures, Order of 3 March 2014, paragraph 32, *I.C.J. Reports 2014*). No such real and immediate risk of irreparable damage has been established by the facts and arguments submitted by the Applicant

4. In the present case, the Tribunal has not only acted without giving full reasons for urgency but has also prescribed measures different from those requested by the Applicant. While the Tribunal has discretion under its Rules (article 89, paragraph 5) to prescribe measures different from those requested by the Applicant, this discretion should be exercised with great caution. It cannot be a matter of routine, especially when the prescription of provisional measures puts a restraint on the liberty of action of a State (Separate Opinion of Judge Higgins, *Legality of the Use of Force*, Request for the Indication of Provisional Measures, Order of 2 June 1999, paragraph 29, *I.C.J.*

Reports 1999). It is recalled that in its first provisional measure – in the *M/V "SAIGA" (No. 2)*, Order of 11 March 1998 – the Tribunal, even though the vessel and its crew had been released, went ahead and prescribed a measure out of concern that the rights of the Applicant would not be fully preserved, if pending the final decision, the vessel and its crew were to be subjected to any judicial or administrative measure (paragraphs 41 and 52). I fear that the Tribunal, out of good but mistaken intentions, has fallen into the same difficulty in the present case.

5. In the Order, the Tribunal has not advanced any satisfactory reason for its action on urgency. There is no imminent risk of irreparable damage to the Parties' rights. And yet the Parties are asked to suspend all court proceedings and to refrain from initiating new ones. In my view there is no justification for such a measure. Italy asserted its jurisdiction over the Enrica Lexie incident. The Office of the Prosecutor of the Military Tribunal in Rome opened an inquiry into the incident and a full investigation for the crime of murder. The criminal investigation is still open. No action is likely to be taken before the constitution of the Annex VII arbitral tribunal. India in both its written and oral pleadings has informed the Tribunal that all proceedings before the Indian Special Court – which has jurisdiction over the incident – have been stayed. The Additional Solicitor General of India stated before the Tribunal that the Indian Supreme Court has actually stayed its proceedings and "it would not be going too far to say that until the tribunal is constituted and hears the matter, there is no compelling assumption that the matter will be taken up and there will be an adverse decision against them (Italian marines)".

6. The Tribunal has noted these assurances and undertakings given by both Parties. Thus the Tribunal should have no reason to doubt that the Parties will not honour their word. As the ICJ has observed, "once a State has made … a commitment concerning its conduct, its good faith in complying with that commitment is to be presumed" (Timor-Leste v Australia) Request for the Indication of Provisional Measures, Order of 3 March 2014, paragraph 44). As the Tribunal has accepted the good faith of the Parties, it had no reason to prescribe the measure in question.

7. The question of urgency is also to be looked at from the procedural aspect in the context of the time left before the constitution of Annex VII arbitral tribunal.

According to Article 3 of Annex VII of UNCLOS, the arbitral tribunal will be constituted within the next three months. Bearing in mind that the dispute between the Parties has existed for over three years, nothing has been advanced to show that the situation has suddenly changed as to aggravate the rights of either party. The Applicant has availed itself of the judicial process of the Respondent during the past three years.

(signed) J. L. Kateka

DECLARATION OF JUDGE PAIK

1. Once the need for the prescription of provisional measures has been established, the next question is what the content of such measures should be. In this regard, the Tribunal finds in paragraph 126 of the present Order that "the first and the second submissions by Italy, if accepted, will not equally preserve the respective rights of both Parties until the constitution of the Annex VII arbitral tribunal as required by article 290, paragraphs 1 and 5, of the Convention". It then prescribes the measure set out in the operative part (1), which is similar in substance, though narrower in scope, to the first submission by Italy. On the other hand, the Tribunal rejects the second submission by Italy seeking the immediate lifting of restrictions on the liberty, security and movement of the two Marines. I concur with the above decision of the Tribunal to accept the first submission in part but to reject the second. However, given the extensive argument made by Italy, in particular, with respect to the second submission and also the fact that, in general, risks to human liberty or life are taken seriously in provisional measure proceedings, I find it necessary to explain a little further why I do so.

2. The present dispute between Italy and India comes down to the question which State has jurisdiction over the incident which occurred on 15 February 2012. (As the question of immunity is inextricably linked to that of jurisdiction, it can be considered to be part of the latter question.) Italy claims a right of "exclusive" jurisdiction over the incident. On the other hand, India also asserts a right to exercise jurisdiction and, having taken the two Marines into custody immediately after the incident, has exercised its criminal jurisdiction over them ever since then. In a dispute like the present one, in which the very existence of a right – India's right to exercise jurisdiction in this case – is contested between the parties, any provisional measures that preserve the rights of one party necessarily prejudice those asserted by the other party. The Tribunal must therefore weigh against each other the respective rights of the parties as affected by the relief sought. After all, in prescribing provisional measures, the Tribunal should preserve the rights of both parties to the dispute, rights which may subsequently be adjudged by the Annex VII arbitral tribunal to belong to "either" party.

3. The first submission of Italy aims to suspend the exercise of jurisdiction by India until the final decision of the Annex VII arbitral tribunal, thus to preserve the *status quo* that existed at the time the dispute was submitted to the arbitral procedure. The provisional measure to suspend the jurisdiction of India would certainly preserve the rights of Italy to which, according to Italy, irreparable prejudice has already been caused, and continues to be caused, by India's unlawful exercise of jurisdiction, which lies exclusively with Italy. What, then, would be the effect that compliance with such a measure might have on India's ability to exercise its right?

4. The provisional measure the Tribunal prescribes in the operative part (1) is similar, though narrower, to the above submission made by Italy. While this measure would prevent India from continuing to exercise its jurisdiction in relation to court proceedings, I do not consider that such suspension would unduly prejudice the rights of India under the circumstances. For one thing, India, in a sense, upholds the very principle or idea underlying the above measure, namely that a criminal trial should be suspended while preliminary jurisdictional issues are decided. In fact, this is why the Supreme Court of India made the order to the special trial court to keep the criminal proceedings over the two Marines in abeyance (Supreme Court of India, Order, 28 March 2014). As a result, the criminal trial before the special court has been stayed since March 2014, and it was submitted during the hearing that there is no prospect that the stay will be lifted in the near future. Now that arbitral proceedings have been instituted to decide the dispute between the Parties over the question of jurisdiction, the measure to suspend domestic criminal proceedings during its pendency would not, in principle or in reality, seriously affect the rights asserted by India. Thus I find the provisional measure requiring both Parties to suspend all court proceedings and to refrain from initiating new ones appropriate for preserving their respective rights under the circumstances of the present case.

5. On the other hand, the second submission seeks to remove all restrictions on the liberty of the two accused imposed by India and to secure their presence in Italy throughout the duration of the arbitral proceedings, thus to preserve, as far as the legal status of the accused is concerned, the *status quo ante* that existed before the allegedly unlawful exercise of jurisdiction by India took place. There is no inherent reason why such a request should not be made or granted so long as it is

appropriate under the circumstances. Without doubt, the provisional measure to the above effect would preserve the rights asserted by Italy with respect to the two Marines, to whom, Italy argues, irreparable prejudice has been caused and continues to be caused. The question is then: what would be the consequence of such a measure for India's ability to exercise the rights it asserts?

6. Exercise of criminal jurisdiction is a duty of the State. It is indispensable to the maintenance of law and order, a fundamental basis of any society, which no State can take lightly if it is not to neglect its duty as a State. In exercising criminal jurisdiction, obtaining the custody of the accused is crucial. Criminal proceedings without obtaining and maintaining the custody of the accused would be largely a fiction. Thus the question of the custody of the accused should be approached with utmost caution. The Tribunal was informed during the hearing that Indian law precludes a trial in absentia in a case like the present one (ITLOS/PV.15/C24/2, p. 41, lines 16-20). The second submission, if accepted, would then deprive India of any possibility, whether actual or legal, to exercise the rights it asserts over the *Enrica Lexie* incident during the pendency of the arbitral proceedings because the accused would no longer be subject to its jurisdiction. Furthermore, to me, requiring India virtually to "hand over" the accused to Italy goes beyond the function of provisional measures as interim relief and comes close to prejudging the merits of the dispute.

7. Due to the crucial role of the custody of the accused in the exercise of criminal jurisdiction, it is quite common in most legal systems for restrictions in one form or another to be imposed on their liberty and movement before the final determination of guilt. The level and extent of such restrictions may vary in accordance with the gravity of the alleged offence. In this case, the two Marines are accused of serious crime and the restrictions on their liberty need to be assessed in that context. During the hearing, Italy compared the present case with several other cases brought before the Tribunal, including the "*Arctic Sunrise" Case*, to make its case that the restrictions on the liberty of the Marines should be lifted immediately to enable them to return to and remain in Italy. However, there are differences between the present case and those other cases, the most critical one being the difference in terms of the gravity of the offence allegedly committed by the accused. In addition, I do not find

the present case comparable to prompt release cases in which the Tribunal decides the question of release upon application made under specific provisions of the Convention such as article 73, paragraph 2, and article 226, paragraph 1, of the Convention.

8. I acknowledge that overly lengthy restrictions on the liberty and movement of the accused should certainly be a concern for the Tribunal, which has underscored over and again that considerations of due process of law must be applied in all circumstances (see *"Juno Trader" (Saint Vincent and Grenadines* v. *Guinea-Bissau), Prompt Release, Judgment, ITLOS Reports 2004*, p. 17, at pp. 38-39, para. 77; *"Tomimaru" (Japan* v. *Russian Federation), Prompt Release, Judgment, ITLOS Reports 2005-2007*, p. 74, at p. 96, para. 76; *M/V "Louisa" (Saint Vincent and Grenadines* v. *Spain), Merits, Judgment, ITLOS Reports 2013*, p. 4, at p. 46, para. 155). During the hearing, the two Parties presented to the Tribunal different views on what has caused the current impasse. Whatever the cause may be, this lamentable state is an element that deserves scrutiny in assessing the provisional measure to be prescribed and has been scrutinized. However, it should also be recalled that those restrictions have been relaxed and the conditions of the accused made less onerous by the measures taken by the Supreme Court of India over the past few years.

9. Weighing and balancing the above considerations, I came to the conclusion that the provisional measure to lift immediately all restrictions imposed upon the liberty of the accused and to allow them to return to and remain in Italy during the pendency of the arbitral proceedings would not "equally" preserve the rights of the respective Parties to the present dispute. Moreover, given that at the heart of the present dispute is the custody of the two accused Marines, such a measure would amount to prejudging the merits of the case to be decided by the Annex VII arbitral tribunal.

10. Provisional measures are an exceptional form of relief. An applicant can obtain substantial relief without having to show conclusively the existence of jurisdiction or the validity of its claims. The provisional measures prescribed have binding force and the parties to a dispute are thus required to comply with them. It is

unclear whether a party can be compensated for any injury it has suffered in complying with provisional measures in the event that the rights in dispute are ultimately adjudged to belong to that party. Given this nature of provisional measures, the Tribunal should exercise caution in assessing not only whether to prescribe provisional measures but also what measures to prescribe. I believe that the decision of the Tribunal partly to accept the first submission but to reject the second has been made with such caution with a view to preserving the respective rights of Italy and India under the circumstances of the present case.

(signed) J.-H. Paik

DECLARATION OF JUDGE KELLY

1. I have voted in favour of the Order of the Tribunal in the case of the *"Enrica Lexie" Incident* in full agreement with the considerations and the provisional measures prescribed therein.

2. However, in prescribing that

> … pending a decision by the Annex VII arbitral tribunal … Italy and India shall both suspend all court proceedings and shall refrain from initiating new ones which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal or might jeopardize or prejudice the carrying out of any decision which the arbitral tribunal may render,

the Tribunal falls short of what I believe should have been its logical legal consequence, i.e., the prescription of an additional provisional measure to the effect of lifting all restrictions ordered by the Indian courts on the liberty and freedom of movement of the two Marines detained in India and the establishment by Italy of a similar form of control over them until a decision by the Annex VII arbitral tribunal is adopted, in accordance with assurances given by the Agent for Italy, Mr Azzarello during the oral hearing held on 11 August 2015.

3. The cases of these two members of the Italian armed forces, a status that I believe should not be overlooked, are similar inasmuch as they are restrained in their freedom and subject to the bail constraints decided by the Indians courts even if at present the situation of Chief Master Sergeant Massimiliano Latorre – who is in Italy due to medical reasons — is somewhat different from the one of Sergeant Salvatore Girone who remains in India.

4. The fact that the two Marines were never charged notwithstanding the murder allegations made by India is in my opinion a very important element that should have been taken into consideration. The provisional measure ordered by the Tribunal which I have quoted will have the effect of freezing the present situation of the two Marines inasmuch as the bail conditions determined by the Indian courts will not be changed. The present situation of Sergeant Girone, in detention since 19 February

2012, will likely be maintained until the Annex VII arbitral tribunal decides which of both States has jurisdiction over the incident.

5. I believe that the continuation of the bail restrictions imposed by India on the two Italian Marines is not acceptable bearing in mind that – for whatever reasons invoked by India – they have not been charged with murder and that the criminal law principle of presumption of innocence should apply in this case.

6. The assumption by India that the lifting of the bail restrictions on the two Marines granting them the freedom to return to Italy would imply that the killing of its two nationals will remain unpunished and that, therefore, this would impose an irreparable prejudice to the rights of India is, in my opinion, unfounded. As has been stated by Judge Jesus in his separate opinion on this case, an irreparable prejudice to the rights of India would have been made if, and only if, Sergeant Latorre and Sergeant Girone were not to return to India if the Annex VII arbitral tribunal decides that India has jurisdiction in this case.

7. I also believe that the assurances given by the Agent for Italy, Mr Azzarello, as registered by the Tribunal in paragraph 118 of the Order, should have been taken into account not only as a basis for the first provisional measure prescribed but also as a basis for the prescription of an additional provisional measure as I have previously stated.

(signed) E. Kelly

DECLARATION OF JUDGE *AD HOC* FRANCIONI

1. I have joined the decision of the majority on all the preliminary questions concerning prima facie jurisdiction under article 290, paragraph 5, and admissibility, as well as on the substantive question concerning the existence of the basic conditions justifying prescription of provisional measure in this case pending the constitution of the Annex VII tribunal.

2. In particular, I fully share the opinion of the majority that this is a legal dispute between Italy and India, that this dispute arises under the Law of the Sea Convention, that in view of the nature of the dispute the decision on the applicability of the rule of prior exhaustion of local remedies belongs to a later stage in accordance with this Tribunal's jurisprudence (see, in particular, *M/V "Louisa" (Saint Vincent and the Grenadines* v. *Spain, Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010,* p. 58), that the rights invoked by the applicant are "plausible" under international law, and that there has been no "abuse of legal process" by the applicant within the meaning of article 294, nor that any right of Italy to access this Tribunal may be deemed to have been forfeited because of Italy's participation in the Indian judicial process. Recognition by the Tribunal that the rights claimed by Italy in relation to the exclusive jurisdiction over the *Enrica Lexie* incident and over the two members of its armed forces arrested, detained and prosecuted after the incident, meet the plausibility threshold required for the prescription of provisional measures, has led to the further logical step of deciding that under the circumstances of the case the adoption of provisional measure is appropriate and that in view of preserving the respective rights of the parties to the dispute, an order for provisional measures has been issued to Italy and India to the effect that

> … shall both suspend all court proceedings and shall refrain from initiating new ones which might aggravate or extend the dispute submitted the Annex VII arbitral tribunal or might jeopardize or prejudice the carrying out of any decision which the arbitral tribunal may render.

3. I concur with this decision. However, the Tribunal has been much at pain in dealing with two fundamental issues that are at the heart of the granting of provisional measures: 1) the meaning and scope of the Tribunal's duty "to preserve

the respective rights of the parties to the dispute …" (article 290, paragraphs 1 and 2) and the requirement of "urgency of the situation" (article 290, paragraph 5). This has led to the adoption of provisional measures that, in my opinion, meet only in part the objective of preserving the respective rights of the parties and of taking into account the urgency of the situation in this specific case. This is why, pursuant to article 125, paragraph 2, of the Rules, I am filing this declaration, which does not concern the provisional measures that the Tribunal has prescribed, which are appropriate and legally necessary, but rather the measures that the Tribunal has failed to prescribe with regard to Italy's second request.

4. With this request, Italy had asked the Tribunal to prescribe that India shall take

> … all measures necessary to ensure that restrictions on the liberty, security and movement of the Marines be immediately lifted to enable Sergeant Girone to travel to and remain in Italy and Sergeant Latorre to remain in Italy throughout the duration of the proceedings before the Annex VII Tribunal.
> (Para. 31 of the Statement of Claim and para. 57 of the Request)

The Tribunal has declined to prescribe the measures indicated in the second request of Italy mainly on the basis of the explicit argument that granting such request would have amounted to an anticipation of a ruling on the merits, which belongs to the Annex VII arbitral tribunal. The reasoning of the Tribunal is also based on the assumption that the circumstances of the case did not meet the strict test of urgency under article 290, paragraph 5. While I fully understand the hesitation of the Tribunal in light of the imminent constitution of the arbitral tribunal, which will have competence to deal with the merits of the dispute and to decide on provisional measures, nevertheless I wish to state in this declaration why in my view, the provisional measures prescribed by the Tribunal should have included also the *pro tempore* lifting of the restrictions on liberty of the two marines. To explain this I will first focus on the need to preserve the respective rights of the parties and then on the requirement of urgency.

"… To preserve the respective rights of the Parties"

5. The standard for what is required to "preserve the respective rights of the Parties" has been effectively set by Judge Jiménez de Arechaga as President of the International Court of Justice in his individual opinion in *Aegean Sea Continental Shelf:*

> [T]he essential justification for the impatience of a tribunal in granting relief before it has reached a final decision on its competence and on the merits is that the action of one party *pendent lite* cause or threatens a damage to the rights of the other of such nature that it would not be possible fully to restore those rights, or remedy the infringements thereof, simply by a judgment in its favor.
> (Order on provisional measures 11 September 1976, *Aegean Sea Continental Shelf (Greece* v *Turkey) I.C.J. Reports 1976*, pp. 16-17)

6. The Tribunal has recognized that the nature of the rights involved in this dispute requires the prescription of provisional measure to the effect that India and Italy shall suspend the exercise of criminal proceedings and refrain from initiating new ones which may aggravate or extend the dispute. But how can such order be effective without a *pro tempore* lifting of the Indian measure of constraints over the personal liberty and movement of the two marines, one of whom, after three and a half years from the incident, is still confined in the premises of the Italian Embassy in Delhi and required to submit to Indian criminal jurisdiction by periodically reporting to Indian judicial police?

7. Much relevance in de-coupling the two provisional measures requested by Italy, and in finally denying the second request, has been given by the majority of the Tribunal to two considerations: first, that the rights of the two marines are not in imminent danger in light of the fairness and alleged benevolence shown by the Indian judicial system in dealing with two persons accused of a serious crime; second, because allowing the return to Italy of Sergeant Girone would prejudice India's right to exercise jurisdiction in the event of a decision of the arbitral tribunal finding that both Italy and India have "concurrent" jurisdiction over the incident.

8. The argument has also been advanced that allowing the temporary return of Sergeant Girone to Italy would amount to inappropriate anticipation of a decision on the merits which belongs exclusively to the Annex VII arbitral tribunal.

9. On the first point, I do not see how the granting of the second request of the applicant would have caused a prejudice to the rights of, or would put an undue burden on, India pending the adjudication of the merits of the case. On this question, the majority seems to have accepted the defendant's argument that it would be unrealistic to expect that Italy would return Sergeant Girone and Massimiliano Latorre to India in the event the arbitral tribunal were to decide that jurisdiction in this case is vested in Indian courts or that both Italy and India have concurrent jurisdiction over the case.

10. In support of this argument it has been repeatedly affirmed, first that because of the political sensitivity of the case in Italy, it would be unrealistic to expect that the Italian authorities would allow the return of the two marines if this was required by a future award of the arbitral tribunal. In this connection a misleading reference has been made also to a recent ruling of the Italian Constitutional Court which has declared unconstitutional for breach of fundamental rights of the individual a piece of legislation enacted by the Italian Parliament in order to comply with a decision of the International Court of Justice (*Corte Costituzionale,* judgment 238/2014, of 22 October 2014).

12. In my view, both these arguments are unfounded and should have been totally disregarded by the Tribunal.

13. First, because Italy has undertaken, and placed on the record of these proceedings, a commitment to unconditionally abide by any final decision of the Annex VII tribunal and to return the two marines to India, as it has done more than once, if required by the final award (Italy's Agent statement, PV.15/3, p. 19, l. 35-39). I cannot see how the Tribunal can proceed on the assumption of Italy's lack of trustworthiness on this important aspect of the dispute.

14. Second, pursuant to the bail order of the Indian Supreme Court, Italy has provided surety for each marine and has declared in the course of these proceedings its readiness to consider further arrangements for the provision of surety to India, as might have been required by an order of the Tribunal.

15. Third, any reference to the recent decision of the Italian Constitutional Court is misplaced and ill-conceived. This is so because that decision concerned a case of undisputed war crimes and crimes against humanity committed during World War 2, which could not be more far removed from the present case, which concerns a conflict of jurisdiction over a maritime incident. Further, the judgment of the Italian Constitutional Court shows exactly the opposite of what India has tried to infer from it. Contrary to India's regrettable and repeated assertion that Italy's promise is tainted by an alleged disposition to shun compliance with international judgments, the case shows that Italy not only promptly complied with a decision of the International Court of Justice (*Jurisdictional Immunities of the State (Italy* v. *Germany: Greece Intervening), Judgment, I.C.J. Reports 2012*, p. 99), but went as far as to adopt ad hoc legislative measure in order to ensure effective implementation of such decision in its internal legal order. Further, even after the Constitutional Court's decision affirming the inalienable right of access to justice for victims of international crimes, legislative measures have been adopted in order to ensure that no enforcement measures are taken with regard to foreign States assets in violation of the decision of the International Court of Justice in *Jurisdictional Immunities of the State* (see Law n. 162, 10 November 2014, Article 19-*bis*) not mentioned by counsel for India, either intentionally or for lack of adequate information. Italy's trust in international adjudication and its commitment to fully comply with international decisions is further confirmed by its filing on 25 November 2014 of a declaration of acceptance of the compulsory jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Court's Statute.

16. Having said this, it is hard to understand what prejudice the rights invoked by India would have suffered had the Tribunal extended provisional measure to the situation of the two marines. India has already allowed more than once the return of the two marines to Italy and Italy has ensured their return to India. India's right to exercise jurisdiction would not have been compromised in the least by the release of

Sergeant Girone pending the determination of the rights of the parties by the arbitral tribunal. By India's own admission, criminal proceedings are already at a stall pending the decision of the Supreme Court of India on jurisdiction.

17. The same cannot be said for the rights of Italy. Italy claims that the restraints on personal liberty and continuing exercise of criminal jurisdiction over the *Enrica Lexie* incident and the two marines constitute a continuous breach of India's obligations under the Convention. This is a matter for the arbitral tribunal to decide. However, in the event of an award favorable to Italy's claim of exclusive jurisdiction the prejudice to Italy's rights would be irreparable. The exercise of criminal jurisdiction on the face of Italy's opposition and complaint that this constitutes an injury to its sovereign right to its exercise of competence and punitive powers over members of its armed forces would not be reversible. The time spent in preventive detention by Sergeant Girone would not be reparable, considering also the exceptionally long period of time he has been subjected to measure limiting his personal freedom.

18. This leads me to conclude that the Tribunal had ample reasons for extending provisional measures to the temporary lifting of restrictions imposed by India on the personal liberty of the two marines "in order to preserve the respective rights of the parties to the dispute".

Urgency

19. There is no dispute that article 290, paragraph 5, makes the prescription of provisional measures contingent upon the existence of a situation of urgency in light of the circumstances of the case. The Tribunal has implicitly accepted that the circumstances of this dispute meet the test of urgency and has consequently decided to prescribe provisional measures to the effect "that both Italy and India suspend all court proceedings and refrain from initiating new ones which might aggravate or extend the dispute".

20. However, when the test of urgency has been applied to the situation of the two marines, the Tribunal has declined to prescribe provisional measures because,

in the opinion of the majority, that situation "touches upon issues related to the merits of the case" (para. 132 of the Order).

21. I agree that the issue of maintaining or lifting the measures restricting the personal liberty of the two marines touches upon the fundamental issue of who has the right to exercise criminal jurisdiction over the *Enrica Lexie* incident. But it would be misleading to assess the "urgency of the situation" only in the limited time frame of the weeks or months that will pass before the Annex VII tribunal is constituted and can rule on the question.

22. The assessment of urgency requires that we look at the situation in its whole context. The incident that ignited this dispute happened three and a half years ago. The exercise of enforcement jurisdiction by India over a ship flying the Italian flag and navigating in international waters remains contested by Italy. Equally contested is the exercise of criminal jurisdiction by India over the incident in which the regrettable death of two Indian fishermen has been attributed to members of Italy's armed forces deployed on the ship in counter-piracy mission in a high risk area. The jurisdictional dispute has not been resolved by diplomatic means. India remains adamant on its position that it had a right to intercept the *Enrica Lexie* in international waters and detain and prosecute the two marines. In my view, the urgency of the situation is manifest and the fact that final adjudication of the issue belongs to the merits, does not undermine the case for interim measures of protection of the two marines after such an exceptionally longue period of restriction of their personal liberty.

23. In point of law, my conclusion is supported by the very precedents of this Tribunal, such as the *M/V "SAIGA" (No. 2)*, the *M/V "Louisa",* and most recently the *"Arctic Sunrise",* which show that the Tribunal has always considered situations of deprivation of personal liberty as matters of urgency. All the more so in this case, which exhibits an exceptionally long period of time in which restriction on personal liberty have remained in force, which has entailed serious health and humanitarian concerns and which involves the status of the two marines as members of the armed forces in the exercise of their official functions. I hardy need to recall that the International Law Commission, in its report on "the immunity of foreign state officials

from criminal jurisdiction" defines in article 2(e) a State official as "any individual who represents the State or who exercises State functions". The report leaves no doubt that military personnel in the exercise of their functions are *par excellence* State officials (ILC, Report on the work of its sixty-sixth session, UN Doc, A/69/10 (2014) 231).

24. In a policy perspective it would have been appropriate for the Tribunal to have taken into account, even at the stage of provisional measures, the status that members of armed forces enjoy under international law. International cooperation in countering piracy, terrorism, human trafficking, supporting peace-keeping as well as humanitarian missions, requires the deployment of member of the armed forces oversea. It would be disastrous for international law if cooperation in these matters were to be stifled by the perceived risk members of the armed forces engaged in official duty could be systematically subjected to the criminal jurisdiction of the coastal state for incidents occurred in international waters and in the accomplishment of their official mission. It is regrettable that in written and oral proceedings of this case the two marines have been called "murderers". I have objected to this qualification that prejudges the culpability. But what I want to stress in these concluding remarks is that the two marines at the centre of this endless dispute belong to the same military corps that everyday risk their life in search and rescue operations that the Italian navy, and other navies, have conducted for months in order to mitigate the human tragedy of thousands of migrants drowning in their attempt to cross the Mediterranean. Giving them the benefit of the doubt at this stage of provisional measure would have sent a positive message to the outside world that this Tribunal is fully aware of the importance of keeping cooperation alive in these crucial matters in view of the general interest of the international community and beyond the respective rights of the parties to this dispute.

(signed) F. Francioni

SEPERATE OPINION OF JUDGE JESUS

1. I voted for the Order, and I concur with its reasoning. Nonetheless, as it does not address some issues raised in the context of this case on provisional measures, I felt that I should state in this brief separate opinion the details of my position on those issues. They concern the *prima facie* jurisdiction of the Annex VII arbitral tribunal, urgency for the prescription of provisional measures, the preservation of the respective rights of the Parties to the dispute and, finally, the provisional measures prescribed by the Tribunal.

I will address these issues in the order in which they are listed above.

(a) On the issue of *prima facie* jurisdiction

2. In order for the Tribunal to entertain a request for provisional measures pending the constitution of an Annex VII arbitral tribunal to which a dispute has been submitted, it has to satisfy itself that such an arbitral tribunal has *prima facie* jurisdiction to deal with the dispute concerning the interpretation or application of the Convention (see articles 288, paragraph 1, and 290, paragraph 5).

3. To assess whether the Annex VII arbitral tribunal has *prima facie* jurisdiction, the Tribunal has only to satisfy itself that the dispute arises out of conflicting interpretation or application by the Parties of, at least, one provision of the Convention and that, on this basis, it is possible or plausible that the arbitral tribunal will assert its jurisdiction to deal with the case in accordance with article 288, paragraph 1, of the Convention.

4. In the present case, in the course of the proceedings Italy invoked several articles of the Convention over which it believes there is a dispute of interpretation and application of the Convention between itself and India concerning the incident on 15 February 2012 involving the Italian flagged vessel *Enrica Lexie* and the Indian registered fishing vessel *St. Antony*, an incident that led to the unfortunate death of two Indian citizens.

5. The articles presented by Italy as a basis for the jurisdiction of the Annex VII arbitral tribunal include: article 87 of the Convention, on freedom of the high seas, which is applicable to the exclusive economic zone, the maritime area where the incident took place, by operation of article 58, paragraph 2, of the Convention; article 92 of the Convention, making ships sailing under the flag of one State only subject to its exclusive jurisdiction on the high seas; and article 97, on penal jurisdiction in matters of collision or any other incident of navigation.

6. While Italy maintains, on the basis of those articles, that India breached the Convention by its "exercise of jurisdiction over the *Enrica Lexie"* and its "interference with Italy's freedom of navigation" and that India also breached the Convention by its "exercise of jurisdiction over the *Enrica Lexie* incident and the Marines notwithstanding Italy's exclusive jurisdiction over the same by virtue of the undisputed fact that the incident took place beyond India's territorial sea", India argues that "the Annex VII tribunal that Italy requests be constituted does not have jurisdiction to rule on the case that it seeks to submit to it" and that "the subject-matter of the dispute does not fall within the ambit of the Convention", contending that "this case is not covered by Article 97" and that "there was no 'incident of navigation' nor any collision between the two ships", and arguing that, with reference to the two ships involved, "[t]hey had no physical contact and Article 97 of the UNCLOS […] is irrelevant by any means".

7. In my opinion, as is stated in the Order, some of the articles of the Convention presented by Italy seem to be relevant in establishing the *prima facie* jurisdiction of the arbitral tribunal. The opposing views of the two Parties as to whether or not these articles of the Convention apply to the present dispute confirm that there is, indeed, a dispute concerning the interpretation or application of the Convention, as referred to in article 288, paragraph 1, of the Convention. Such a dispute can only be resolved through the competent means of settlement, which in the present case is the Annex VII arbitral tribunal to be constituted. As a result, I am of the opinion that there is *prima facie* jurisdiction of the Annex VII arbitral tribunal and this Tribunal may therefore entertain the request for provisional measures made by Italy.

(b) On the issue of urgency

8. To prescribe provisional measures, once it has accepted the *prima facie* jurisdiction of the Annex VII arbitral tribunal to deal with the dispute, the Tribunal has to satisfy itself that the urgency of the situation requires the prescription of the requested provisional measures or other appropriate measures, as referred to article 290, paragraph 5.

9. Italy's main arguments in favour of urgency were premised on two factors:

(a) the long-term detention or restrictions on the movement of the two marines and the effect on their state of health and on the health of certain of their family members; and

(b) the irreparable prejudice to Italy that will occur if the Indian domestic court proceedings are to continue, in light of the fact that the Annex VII arbitral tribunal has been seised of the dispute to determine which of the Parties has jurisdiction to adjudicate the dispute concerning the incident.

10. With regard to the first factor, that is to say the issue of the long-term detention or restrictions on the movement of the two marines, which includes restrictions preventing them from leaving India's territory without the authorization of the Indian courts, I am of the view that the Tribunal should have concluded that the urgency requirement under article 290, paragraph 5, had been met, especially taking into account the effects on the health of the marines and their family as a result of a detention that has continued without charges for three and a half years.

11. I share the view that detention or restrictions on the movement of persons who wait excessively long to be charged with criminal offences is, per se, a punishment without trial. In such situations, every day that a person is under detention or subject to restrictions on movement is one day too many to be deprived of his or her liberty. Such situations, assessed in the context of a request for

provisional measures, carry with them a built-in need for urgency, as considerations of humanity are important in this regard.

12. I therefore believe that in the present case the urgency requirement was satisfied and this would have justified the imposition of provisional measures by the Tribunal, releasing the two marines from the detention or restrictions on movement that have been imposed on them by the Indian courts, especially having regard to the guarantees given by the Agent of Italy in his concluding remarks in the course of the hearings to the effect that Italy undertakes to hand over the marines to the Indian courts if the Annex VII arbitral tribunal were to decide that India has jurisdiction concerning the dispute over the incident.

13. With regard to the second factor, that is the irreparable prejudice to Italy that may occur if the Indian domestic court proceedings are to continue, in light of the fact that the Annex VII arbitral tribunal has been seised of the dispute to determine which of the Parties has jurisdiction to adjudicate the dispute concerning the incident, I am of the view that, here again, the urgency requirement under article 290, paragraph 5, had been met.

14. Indeed, if the Indian court system is to continue with the criminal trial of the two Italian marines, this might cause irreparable prejudice to Italy's rights, as the possible punishment of the imprisonment of the marines would render ineffective, or even moot, any decision of the Annex VII arbitral tribunal determining which of the Parties has jurisdiction to deal with the incident, in the event that the arbitral tribunal decided the issue of jurisdiction in favour of Italy. This alone justifies the urgency of the situation with respect to the prescription of provisional measures to suspend any exercise of criminal jurisdiction by either of the Parties pending a decision of the arbitral tribunal.

15. It may also be easier for India to halt the ongoing criminal prosecution of the two marines at this stage, allowing the proceedings of the arbitral tribunal to run their course, rather than doing it at a much later stage, by which time the possible transfer of the marines to Italy's jurisdiction, if that were the decision of the Annex VII arbitration, may prove far more difficult.

16. For these reasons I am therefore of the opinion that there is urgency in respect of the prescription of provisional measures on both counts.

(c) On the issue of preserving the respective rights of the Parties

17. India argues that its right "to continue the judicial process that has been set in motion" should be preserved and that if the first provisional measure requested by Italy were granted "the right of India to pursue its judicial review of the case would be severely prejudiced", adding that "if granted, Italy's second requested provisional measure [...] would prejudice the decision of the Annex VII Tribunal or preclude its implementation".

18. Regrettably, I do not share this view. As a matter of fact, as has been stated, an objective assessment of the rights of the Parties to be preserved would indicate that if India were to continue exercising its jurisdiction over the incident and a final decision were taken by the Indian court that led to the imprisonment of the two marines or any other form of punishment, such a decision would, by its very nature, render ineffective any decision that the Annex VII arbitral tribunal might take in the case submitted to it to determine which of the Parties should exercise jurisdiction over the incident, in the event that the arbitral tribunal decides that it is Italy that has jurisdiction over the case concerning the incident.

19. It might therefore prove to be difficult, if not impossible, for India to nullify any decision the Indian court might take in the criminal trial of the marines. It is evident that, if such situation were to occur, it would indeed cause irreparable damage to Italy. Therefore, the continued exercise of criminal jurisdiction by India in this case, pending a decision of the Annex VII arbitral tribunal, does not preserve the rights of Italy.

20. Conversely, and in order to establish a balanced approach to the rights of the two Parties that need to be equally preserved, one must raise the question as to what would be the irreparable prejudice to the rights of India if it were to suspend the exercise of its jurisdiction over the incident and if the marines were to stay in Italy

pending a decision of the Annex VII arbitral tribunal on which Party has jurisdiction over the case concerning the incident.

21. In my view, there would be no irreparable damage to India in either situation, for the following reasons:

(a) If the Indian court trial is suspended pending a decision of the Annex VII arbitral tribunal, India's right to resume and conclude the trial of the marines would be preserved if that arbitral tribunal were to decide the issue of jurisdiction in favour of India;

(b) On the other hand, if the two marines were allowed to stay in Italy pending a decision of the Annex VII arbitral tribunal, there would be irreparable prejudice to the rights of India only if the two marines did not return to India for trial in the event that the Annex VII arbitral tribunal decided that India has jurisdiction to deal with the incident. This scenario may not occur since, as has been mentioned, in his concluding statement, the Agent for Italy solemnly undertook to send the marines for trial in India if the Annex VII arbitration decided that India has jurisdiction in the case concerning the incident.

(d) On the measures prescribed

22. While I am in favour of the measure prescribed by the Tribunal in paragraph 141 of the Order, stating that "Italy and India shall both suspend all court proceedings and shall refrain from initiating new ones which may aggravate or extend the dispute submitted to the Annex VII arbitral tribunal or might jeopardize or prejudice the carrying out of any decision which the arbitral tribunal may render", I would also have favoured the prescription of a provisional measure that would have enabled the two marines to be in Italy pending the decision of the Annex VII arbitral tribunal, for the reasons explained above.

(signed) José Luís Jesus

OPINION DISSIDENTE DE M. BOUGUETAIA, VICE-PRÉSIDENT

1. Le Tribunal vient de rendre son ordonnance dans l'affaire *« Enrica Lexie »*, il accède ainsi à la demande de l'Italie et prescrit des mesures conservatoires. Cette affaire n'est pas aisée, au vu du vote elle a significativement divisé le Tribunal. Cette division s'est traduite par cinq opinions dissidentes et cinq opinions ou déclarations qui expriment toutes des points de vue différents notamment sur la compétence *prima facie* et sur l'urgence. Elle est aussi un *unicum* bien que des conseils et des juges ont essayé de la comparer à l'affaire *« Louisa »* ou à l'affaire « *Sunrise »*.

2. Je comprends que les parties aient tenté de puiser dans toutes les dispositions de la Convention pour y trouver des arguments et étayer leurs positions respectives. Cette démarche se serait certainement imposée s'il y avait le moindre rapport entre l'affaire et la Convention du droit de la mer. Il n'y en a malheureusement aucun, en tous cas, je n'en trouve pas et c'est pour cela que je regrette de ne pouvoir suivre le Tribunal dans sa décision.

3. Je n'évoquerai pas toutes les multiples questions que soulève l'affaire et qui auraient pu faire l'objet d'un long commentaire dans cette opinion (épuisement des recours internes, abus de droit, etc…).

Je me contenterai de concentrer ces quelques lignes sur ce qui me paraît fondamental et qui justifie ma position.

4. Le 15 février 2012, un incident est survenu au large des côtes de l'Inde à environ 20,50 miles de celles-ci au cours duquel deux fusiliers marins italiens embarqués à bord d'un tanker pétrolier battant pavillon italien ont ouvert le feu sur un bateau de pêche indien tuant deux pêcheurs et endommageant sérieusement le bateau de pêche.

5. Le 26 juin 2015, l'Italie a, en application de l'article 287 de la Convention sur le droit de la mer, engagé une procédure en vertu de l'annexe VII de la Convention à l'encontre de l'Inde.

6. Le 21 juillet, l'Italie a, dans le différend qui l'oppose à l'Inde, présenté au Tribunal une demande en prescription de mesures conservatoires au titre de l'article 290, paragraphe 5, de la Convention sur le droit de la mer. L'article 290, paragraphe 5, dispose clairement que le « Tribunal peut prescrire, modifier ou rapporter des mesures conservatoires conformément au présent article s'il considère, *prima facie*, que le Tribunal devant être constitué aurait compétence et s'il estime que *l'urgence de la situation l'exige* ». Le Tribunal devait alors s'assurer qu'un *différend* existe bien entre les parties, que le tribunal arbitral constitué au titre de l'annexe VII aurait une compétence *prima facie* et que *l'urgence* de la situation exige que des mesures conservatoires soient prescrites par le Tribunal.

7. L'existence d'un différend entre les parties au regard des faits et du droit a été aisément établie : il s'agit d'un incident entre un tanker Italien et un navire de pêche Indien pour le règlement duquel chaque partie revendique sa compétence. Il incombait donc au Tribunal avant de prescrire des mesures conservatoires au titre de l'article 290, paragraphe 5, et de s'assurer :

- que le tribunal arbitral aurait *prima facie* compétence (donc que le différend qui oppose les parties concerne l'interprétation ou l'application de la convention, article 287, paragraphe 1) ;
- que l'urgence de la situation exige que des mesures conservatoires soient prises.

8. C'est précisément sur ces deux points qui constituent les fondements des conditions requises pour les prescriptions de mesures conservatoires, que mon désaccord est total avec le Tribunal.

I) Sur la compétence *prima facie*

9. La compétence *prima facie* du tribunal arbitral de l'annexe VII constitue une condition à la compétence du Tribunal du droit de la mer (article 290, paragraphe 5). Pour que le tribunal arbitral annexe VII soit compétent il faut que le différend porte sur l'interprétation ou l'application de la Convention.

10. Le Tribunal devait donc s'assurer à ce stade de la procédure « que les dispositions invoquées par le demandeur semblent *prima facie* constituer une base sur laquelle la compétence du Tribunal arbitral prévu à l'annexe VII pourrait être fondée » (paragraphe 52 de l'Ordonnance).

11. En se contentant seulement de reproduire les vues des parties sans procéder à une analyse de leur valeur et de leur portée, le Tribunal a « décrété » cette compétence en « considérant que, par les motifs qui précèdent le Tribunal dit que le Tribunal arbitral prévu à l'annexe VII aurait *prima facie*, compétence pour connaître du différend » (paragraphe 54 de l'Ordonnance). Cela résonne comme un postulat qui n'a pour le moins aucun rapport avec une analyse juridique pertinente. En fait de tout le chapelet d'articles, de la Convention égrené par l'Italie pour établir une relation entre le différend et la Convention, aucune des dispositions ne pourrait prouver l'existence du *bonus fumi juris* pour reprendre la formule utilisée par le conseil de l'Inde.

12. L'Italie s'est même bien gardée de citer une seule de ces dispositions dans l'exposé de ses conclusions du 26 juin 2015, avisée qu'elle était que celles-ci ne présentaient aucune pertinence pour sa demande. Tous les articles de la Convention cités par l'Italie:

- Article 2, paragraphe 3, 27, 33, 56, 58, 87, 89, 92, 94, 97, 100 et 300, ne peuvent réellement et objectivement servir de base à la compétence *prima facie* du tribunal arbitral de l'annexe VII. Face à la vanité de tous ses arguments, l'Italie a insisté particulièrement sur l'article 97 de la Convention et soutenu qu'en « cas d'incident de navigation engageant la responsabilité pénale d'un membre du personnel du navire, il ne peut être intenté de poursuites pénales que devant les autorités judiciaires ou administratives soit de l'Etat du pavillon, soit de l'Etat dont l'intéressé a la nationalité ». L'Italie utilise là un argument « *ad hominem* » qui fragilise sa position. Elle a maintes fois déclaré que les fusiliers marins étaient des agents officiels pour lesquels elle a demandé un statut spécial, non prévu du reste par la Convention; ils ne peuvent donc être considérés comme membres du personnel du navire.

13. Par ailleurs, il n'y a eu en réalité aucun « incident de navigation » ni abordage puisque ces navires ne sont pas entrés en contact physique. Des coups de feu ont été tirés du navire Italien sur un bateau de pêche Indien immatriculé en Inde, pêchant dans la zone contigüe, et le *corpus deli* se trouve sur ce navire.

14. On pourrait ajouter que l'article 97 de la Convention se trouve dans la partie XII sur la haute mer et que l'incident s'est produit à 20,50 miles des côtes indiennes donc dans la zone contigüe. Le différend ne rentre pas du tout dans le champ d'application de l'article 97 de la Convention.

15. Il s'agit en fait dans cette affaire de savoir quel Etat a compétence pour juger une fusillade dans la zone économique exclusive de l'Inde qui a entraîné la mort de deux pêcheurs Indiens. L'objet du différend ne relève pas du champ d'application de la Convention et celle-ci est muette sur ces questions et celles liées à l'utilisation d'armes à feu dans la ZEE ayant entraîné mort d'hommes.

16. Je n'aborderai pas cet aspect de la question mais rappellerai seulement les déclarations interprétatives contradictoires qui ont été faites par les parties lors de leur ratification de la Convention. Pour l'Inde « la Convention n'autorise pas d'autres Etats à effectuer dans la Zone Economique Exclusive et sur le plateau continental, des exercices ou des manœuvres militaires, en particulier s'ils impliquent l'utilisation d'armes ou d'explosifs, sans le consentement de l'Etat côtier ». L'incident s'est produit à 20,50 miles des côtes indiennes, donc bien dans la Zone Economique Exclusive de l'Inde.

17. Le Tribunal a, cependant, dans une ingéniosité fertile dont il a le secret, décidé de retenir la compétence *prima facie* du tribunal arbitral que je qualifierai peu élégamment peut être de compétence « préfabriquée ».

18. Ce faisant il restait néanmoins au Tribunal à justifier *l'urgence* de la situation (condition de l'article 290, paragraphe 5) pour prescrire des mesures conservatoires.

II) Sur l'urgence

19. L'Italie a attendu trois ans et demi après l'incident pour saisir le tribunal pour des mesures conservatoires. Elle a participé durant cette période à toutes les procédures ouvertes devant les tribunaux Indiens. Où est l'urgence ? Y a-t-il eu des faits nouveaux qui justifieraient celle-ci ? La réponse est non.

20. L'argument selon lequel « l'urgence est prouvée par le fait que l'exercice de la juridiction de l'Inde est avérée et se poursuit » (paragraphe 98 de l'Ordonnance) est fallacieux, les procédures en Inde sont suspendues, l'Inde s'est engagée à sursoir à toute action en attendant la décision du tribunal arbitral qui interviendra au plus tard dans les quatre mois. Notons au passage que la Cour Spéciale de l'Inde aura à se prononcer d'abord sur l'immunité et sur sa propre compétence avant d'entamer la procédure criminelle et que l'Italie pourra faire valoir sa revendication de compétence exclusive devant elle.

21. L'Additional Solicitor General de l'Inde a lui-même confirmé devant le Tribunal que la Cour Suprême a en fait ajourné l'affaire et que « ce ne serait pas aller trop loin que de dire que tant que le tribunal arbitral n'aura pas été constitué et n'aura pas examiné l'affaire, il n'y a pas de raison impérative de présumer que l'affaire sera reprise et pourrait déboucher sur une décision défavorable à l'Italie » (PV.15/2, Narasimha, page 13, lignes 35 à 39).

22. Alors on soutient que l'urgence « peut être humanitaire » se fondant sur la situation des fusiliers marins et leur prétendue détention. Monsieur Latorre est actuellement en Italie où il se remet au sein de sa famille de sa maladie pour laquelle il a reçu tous les soins grâce aux nombreuses autorisations de se rendre en Italie que lui a généreusement accordées la Cour Suprême Indienne. Il jouit actuellement d'une autorisation qui expirera le 13 janvier 2016 et qui est susceptible de renouvellement.

23. Quant au second fusilier M. Girone, il coule des jours paisibles à l'Ambassade d'Italie à New Dehli où il revoit famille et amis et s'est déjà rendu deux fois en Italie grâce aux largesses de la Justice Indienne. Qui plus est

> l'urgence qu'il y aurait à l'autoriser à retourner en Italie y à demeurer est contredite par son propre comportement…. Il avait officiellement retiré sa demande en référé d'assouplissement du régime de contrôle judiciaire afin qu'il lui soit permis de se rendre en Italie.
> (paragraphe 105 de l'Ordonnance)

24. Le Tribunal reconnaît « mezza voce » dans une belle parabole linguistique qu'il y a urgence sans citer pour autant une seule fois le terme dans ses considérants. Il se contente simplement de considérer *« que le fait ci-dessus nécessite que le Tribunal prenne une mesure en vue de veiller à ce que les droits respectifs des parties soient dûment préservés »* (paragraphe 107 de l'Ordonnance).

25. Voilà une pudeur bien suspecte qui ne manquera pas de susciter bien des interrogations sur cette prétendue urgence.

26. L'Inde a bien tenté mais en vain de « mettre en balance les considérations humanitaires concernant les personnes accusées d'un crime grave et leur bien-être avec ceux des victimes de ce crime… et qu'il est bien admis qu'en cas de litige ce serait ces derniers qu'il faut privilégier » (paragraph 94 de l'Ordonnance). Peine perdue et c'est normal car il n'y a plus d'urgence pour des pêcheurs Indiens : Ils sont morts !!! C'est ce qui autorise peut-être cette référence sélective à l'humanitaire. Là aussi je suis désolé de ne pouvoir me résoudre à suivre la logique du Tribunal quand il trouve l' « urgence », là où il n'y en a point.

27. Je terminerai cette note en faisant quelques remarques sur la plausibilité des droits des parties et sur la portée de la mesure prescrite par le Tribunal.

28. Le Tribunal reconnaît qu'avant de prononcer des mesures conservatoires « il n'a pas à se préoccuper des prétentions concurrentes des deux parties et qu'il doit seulement s'assurer que les droits que l'Italie et l'Inde revendiquent et dont elles sollicitent la protection sont au moins plausibles » (paragraphe 84 de l'Ordonnance).

29. Ayant constaté la plausibilité de ces droits le Tribunal ne peut prescrire des mesures conservatoires que « dans l'éventualité où un *risque réel et imminent* existe

qu'un préjudice irréparable soit causé aux droits des parties au différents, en attendant que le tribunal arbitral constitue en application de l'annexe VII qui est saisi de l'affaire soit en mesure de modifier, rapporter ou confirmer lesdites mesures » (paragraphe 87 de l'Ordonnance).

30. Rien dans ce différend ne laisse supposer qu'il existe un risque réel et imminent qui causerait un préjudice irréparable aux droits des parties. Si tel était le cas, le Tribunal aurait dû mettre en balance les droits respectifs des deux parties pour déterminer laquelle subirait le plus grand préjudice et sur laquelle pèserait une charge excessive.

31. Comme l'a souligné récemment la Chambre spéciale du Tribunal, dans son ordonnance du 25 avril 2015, « la décision concernant l'existence d'un risque imminent de préjudice irréparable ne peut être prise qu'au cas par cas en prenant en considération tous les facteurs pertinents » (Ordonnance du 25 avril 2015, paragraphe 43).

32. D'un côté, nous avons deux victimes qu'aucune réparation ne pourra ramener aux veuves et aux orphelins qu'ils ont laissé en Inde et qui attendent que justice leur soit rendue; et de l'autre côté; deux fusiliers marins dont nous avons décrit la situation plus haut et qui jouissent des largesses de la Justice Indienne et de la bienveillante protection de leur pays.

33. La mesure conservatoire prescrite par le Tribunal rompt de façon regrettable l'équilibre entre ces droits. Bien qu'elle s'adresse aux deux parties elle ne contraint en fait que l'Inde à qui elle ôte implicitement toute compétence sur le différend. Seule l'Inde a engagé des enquêtes et des poursuites qu'elle devra abandonner au terme de la prescription du Tribunal.

34. La mesure conservatoire constitue en fait un pré-jugement en soustrayant implicitement les deux fusiliers Italiens à la juridiction Indienne.

35. Ainsi rédigée la mesure conservatoire prononcée peut avoir deux lectures embarrassantes dans les deux cas :

- Soit la suspension de toutes procédures judiciaires et la renonciation à de nouvelles sera interprétée par l'Italie, et il paraît évident qu'elle s'empressera de le faire, comme libérant le fusilier Gerone de toute autre contrainte; il pourra désormais regagner l'Italie en toute liberté et sans aucune garantie de retour au cas où le tribunal arbitral retiendrait la compétence des tribunaux indiens.
- Soit cette mesure sera perçue par l'Inde comme n'étant suspensive que des procédures judiciaires et ne concerne pas les mesures administratives dont est frappé Monsieur Gerone et qu'il devra donc demeurer en Inde en attendant la décision du tribunal arbitral.

36. Voici le genre de situation fâcheuse à laquelle on peut être confronté quand on fait autre chose que du droit ou quand celui-ci est appliqué de façon approximative, d'où la nécessité pour le juge de ne jamais se départir de l'impérative attitude d'impartialité et de la stricte application des normes juridiques existantes.

37. Dans ce différend le Tribunal aurait gagné à appliquer le droit et seulement le droit, il a préféré rechercher « un arrangement » qui ne satisfera en réalité personne. Même le juge *ad hoc* de l'Italie, Monsieur Francioni, a déclaré : « La mesure ne me satisfait pas pleinement » (voir la déclaration du juge *ad hoc*).

38. Bien que l'incident de l'*Enrica Lexie* se soit produit en mer, bien qu'il ait mis en rapport deux navires, bien que le Tribunal se soit ingénié à trouver des solutions juridiques dans le droit humanitaire, les droits de l'Homme ou dans le droit international général, il n'en demeure pas moins un incident qui met en opposition deux prétentions concurrentes de compétences au sujet d'un crime et qui n'aucun lien avec les dispositions de la Convention du droit de la mer qui ne couvre hélas pas ce genre de situation.

39. Face à l'approche du Tribunal il fallait que quelques voix discordantes s'expriment, celle de celui qui en assure la vice-présidence peut paraître curieuse vu l'inconfort dans lequel elle place son auteur, mais elle n'en atteste pas moins de la

bonne santé et de la crédibilité d'une institution qui œuvre continuellement au développement et au progrès du droit de la mer.

(signé) B. Bouguetaia

[UNOFFICIAL TRANSLATION]

DISSENTING OPINION OF VICE-PRESIDENT BOUGUETAIA

1. The Tribunal has just rendered its Order in the "*Enrica Lexie*" case, thereby accepting Italy's request for the prescription of provisional measures. This is not an easy case, and at the time of voting it significantly divided the Tribunal. This division is reflected in five dissenting opinions and five opinions or declarations which each express different points of view, particularly in regard to the Tribunal's *prima facie* jurisdiction and the question of urgency. It is also a unique case, notwithstanding that Counsel and the Judges have tried to compare it to the "*Louisa*" case and the "*Sunrise*" case.

2. I understand that the Parties have tried to draw from all the provisions of the Convention in finding arguments therein and in supporting their respective positions. Such an approach would be required if there were the slightest relationship between this case and the Convention on the Law of the Sea. Unfortunately, there is no such relationship or at least, I cannot discern any, and it is for this reason that I regret that I cannot follow the Tribunal's decision.

3. I shall not discuss all of the various questions that the case raises, which could be the subject of a long commentary in this opinion (exhaustion of local remedies, abuse of legal process, etc…).

   I shall content myself with focusing on certain threads that seem to me to be fundamental and which justify my position.

4. On 15 February 2012, an incident occurred off the coast of India, around 20.5 nautical miles therefrom, in which two Italian marines on board an oil tanker flying the Italian flag opened fire on an Indian fishing boat, killing two fishermen and seriously damaging the fishing boat.

5. On 26 June 2015, in accordance with article 287 of the Convention on the Law of the Sea, Italy initiated a procedure under Annex VII of the Convention against India.

6. On 21 July, in the course of its dispute with India, Italy submitted to the Tribunal a request for the prescription of provisional measures pursuant to article 290, paragraph 5 of the Convention on the Law of the Sea. Article 290, paragraph 5, provides clearly that the Tribunal: "may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the *urgency of the situation so requires.*" The Tribunal must therefore satisfy itself that there is indeed a dispute between the Parties, that the Tribunal which is to be constituted under Annex VII would *prima facie* have jurisdiction and that the urgency of the situation requires that the provisional measures be prescribed by the Tribunal.

7. The existence of a dispute between the Parties from a factual and legal perspective is easily established: it relates to an incident between an Italian oil

tanker and an India fishing boat, which each Party claims to have jurisdiction to resolve. It falls therefore to the Tribunal, before prescribing provisional measures pursuant to article 290, paragraph 5, to establish that:

- the arbitral tribunal would *prima facie* have jurisdiction (*i.e.* that the dispute between the parties concerns the interpretation or application of the Convention, article 287, paragraph 1);

- the urgency of the situation requires that the provisional measures be granted.

8. It is precisely on these two points, which constitute the fundamental conditions required for the prescription of provisional measures, that I am in total disagreement with the Tribunal.

I) On *prima facie* jurisdiction

9. The *prima facie* jurisdiction of the Annex VII Tribunal is a pre-requisite to the jurisdiction of the Tribunal on the Law of the Sea (article 290, paragraph 5). In order for the Annex VII Tribunal to have jurisdiction, the dispute must concern the interpretation or application of the Convention.

10. Accordingly, the Tribunal must satisfy itself at this stage in the proceedings "that any of the provisions invoked by the Applicant appears *prima facie* to afford a basis on which the jurisdiction of the Annex VII arbitral tribunal might be founded" (paragraph 52 of the Order).

11. In confining itself to only reproducing the views of the Parties without going on to analyse their value and their significance, the Tribunal has "decreed" this jurisdiction in "[c]onsidering that, for the above reasons, the Tribunal finds that the Annex VII arbitral tribunal would *prima facie* have jurisdiction over the dispute" (paragraph 54 of the Order). This sounds like an assertion which has not the slightest relationship with a pertinent legal analysis. Indeed, out of the rosary of Convention articles passed through the hands of Italy with a view to establishing a relationship between the dispute and the Convention, none of the provisions demonstrate the existence of *bonus fumi juris*, to borrow the phrase used by Counsel for India.

12. Italy only refrained from citing one of these articles in its closing submissions of 26 June 2015, having been informed that it was only this provision which bore no relevance to its request. All of the articles of the Convention cited by Italy are as follows:

- Article 2, paragraphs 3, 27, 33, 56, 58, 87, 89, 92, 94, 97, 100 and 300 cannot truly and objectively serve as grounds for the *prima facie* jurisdiction of the Annex VII Tribunal. Faced with the futility of all these arguments, Italy particularly insisted upon article 97 of the Convention and submitted that "in the event of an incident of navigation which gives rise to the penal responsibility of any person in the service of the ship, no penal proceedings may be instituted against such a person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national". Italy uses here an "*ad hominem*" argument which weakens

its position. At many points, it has declared that the Marines were official agents, for whom it seeks a special status which is not provided for under the Convention; accordingly, they cannot be considered as members of the vessel's crew.

13. Separately, in reality there is no "incident of navigation" or collision because there was no physical contact between the vessels.

14. It could be added that article 97 of the Convention is in Part XII concerning the High Seas and the incident occurred 20.5 nautical miles from the coast of India, so in the Contiguous Zone. The dispute does not in any way fall within the scope of article 97 of the Convention.

15. In fact, this case is about which State has jurisdiction to adjudicate a shooting in India's Exclusive Economic Zone which resulted in the deaths of two Indian fishermen. The subject matter of the dispute does not fall within the scope of the Convention and the Convention is silent on such questions and on questions relating to the fatal use of firearms in the Exclusive Economic Zone.

16. I will not deal with this latter aspect of the question but will just note the contradictory interpretative declarations made by the Parties at the time of ratifying the Convention. For India: "the provisions of the Convention do not authorize other States to carry out in the exclusive economic zone and on the continental shelf military exercises or manoeuvres, in particular those involving the use of weapons or explosives without the consent of the coastal State". The incident occurred 20.5 nautical miles off the Indian coast, so well within India's Exclusive Economic Zone.

17. Nevertheless, the Tribunal has, in a ready ingenuity known only to itself, decided to find that the Annex VII tribunal enjoys a *prima facie* jurisdiction, which I would not very elegantly describe as "pre-fabricated" jurisdiction.

18. With this done, it remained for the Tribunal to justify the *urgency* of the situation (a condition of article 290, paragraph 5) for prescribing provisional measures.

II) On urgency

19. Italy waited three and a half years after the incident before applying to the Tribunal for provisional measures. During this period, it participated in all of the ongoing proceedings before the Indian courts. Where is the urgency? Are there new facts to justify urgency? The answer is no.

20. The argument that the "urgency is demonstrated by the fact that the exercise of jurisdiction by India is certain and ongoing" (paragraph 98 of the Order) is fallacious, the proceedings in India are suspended, India has committed to stay all actions pending the decision of the arbitral tribunal which will issue a decision within four months at the latest. It is worth noting in passing that the Supreme Court of India would decide first on the questions of immunity and its own jurisdiction before opening criminal proceedings and that Italy could make its claim of exclusive jurisdiction before that Court.

21. The Additional Solicitor General of India himself confirmed before the Tribunal that the Supreme Court has in fact adjourned the case and that "it would not be going too far to say that until the tribunal is constituted and hears the matter, there is no compelling assumption that the matter will be taken up and that there will be an adverse decision against them" (PV.15/C24/2, Narasimha, page 13, lines 35 to 39).

22. We proceed then to the submission that the urgency "may be humanitarian", based on the situation of the Marines and their intended detention. Mr Latorre is currently in Italy, where he is with his family recovering from the illness that has been fully treated thanks to the numerous permissions to return to Italy which the Supreme Court of India has generously granted to him. He is currently availing of a permission which expires on 13 January 2016 and is renewable.

23. With respect to the second Marine, Mr Girone, he passes his days peacefully at the Italian Embassy in New Delhi where he sees his family and friends, and has already returned twice to Italy thanks to the generosity of the Indian justice system. In addition

> the urgency of authorizing him to go back to and stay in Italy is belied by his own behaviour.... he formally withdrew his interim application seeking to relax bail conditions so that he may be allowed to travel to Italy.
> (paragraph 105 of the Order)

24. The Tribunal recognises "mezza voce", in a nice linguistic turn, that there is urgency – yet without once using this term in its considerations. It contents itself with simply considering "*that the above consideration requires action on the part of the Tribunal to ensure that the respective rights of the Parties are duly preserved*" (paragraph 107 of the Order).

25. There is a suspect modesty in this phrasing which does not fail to raise questions as to this supposed urgency.

26. India certainly attempted, but in vain, to argue that "well-being and humanitarian considerations in favour of persons accused of a serious crime have to be balanced with that of the victims of the crime" and that "[i]t is a generally accepted principle that the latter should prevail in case of conflict" (paragraph 94 of the Order). This is a wasted effort, which makes sense given that there is no longer any urgency for the Italian fishermen: they are dead!!! It is this point which perhaps permits the selective referencing of the human angle. Here again I am sorry that I cannot resolve to follow the logic of the Tribunal when it finds that there is "urgency" where there is not.

27. I will conclude this Opinion by making several remarks as to the plausibility of the rights of the Parties and the effect of the measure prescribed by the Tribunal.

28. The Tribunal recognises that, before prescribing provisional measures it "does not need to concern itself with the competing claims of the Parties, and that it needs only to satisfy itself that the rights which Italy and India claim and seek to protect are at least plausible" (paragraph 84 of the Order).

29. Once it has acknowledged the plausibility of these rights, the Tribunal may only prescribe provisional measures where "there is a real and imminent risk that irreparable prejudice could be caused to the rights of the parties to the dispute pending such a time when the Annex VII arbitral tribunal to which the dispute has been submitted is in a position to modify, revoke or affirm the provisional measures" (paragraph 87 of the Order).

30. No aspect of this dispute allows one to suppose that there is a real and imminent risk of irreparable prejudice to the rights of the parties. If this were the case, the Tribunal ought to have weighed up the respective rights of the two Parties in order to determine which would suffer the greater prejudice and incur an excessive burden.

31. As highlighted recently by the Special Chamber of the Tribunal, in its Order of 25 April 2015, "the decision whether there exists imminent risk of irreparable prejudice can only be taken on a case by case basis in light of all relevant factors" (Order of 25 April 2015, paragraph 43).

32. On one hand, we have two victims who will never be returned by means of any form of compensation to their widows and orphans, who they have left behind in India and who await justice for them; on the other hand, we have two Marines whose situations are described above and who have benefited from the generosity of the Indian justice system and the benevolent protection of their home country.

33. The provisional measure prescribed by the Tribunal unsettles, in a regrettable manner, the balance between these rights. Although it is addressed to both parties, in fact it only constrains India, from whom it effectively takes away all jurisdiction in respect of the dispute. Only India has initiated the investigations and prosecutions that will have to be abandoned as a result for the duration of the Order.

34. The provisional measure effectively constitutes a pre-judgment, by shielding the Italian Marines from India's jurisdiction.

35. As drafted, the provisional measure granted can be read in two ways, both of which are unseemly:

- The suspension of all ongoing judicial proceedings and the preclusion of new proceedings will be interpreted by Italy (and it seems obvious that it will hasten to do so) as freeing Sergeant Girone from all restrictions, such that he can now return to Italy in complete freedom and without any guarantee of returning to India in circumstances where the arbitral tribunal re-instates India's jurisdiction.

- This measure is perceived by India as having a suspensory effect only in respect of the judicial proceedings and as not concerning the administrative measures to which Mr Girone is subject, such that he must remain in India in anticipation of the arbitral tribunal's decision.

36. This is the sort of disagreeable situation that can present itself when one applies something other than the law or when the law is applied in an imprecise way; this is why it is necessary for the judge never to depart from

the imperative position of impartiality and the strict implementation of applicable legal norms.

37. In this dispute the Tribunal would have benefited from applying the law and only the law, it preferred to find "an arrangement" which in reality will satisfy no-one. Even the *ad hoc* Italian judge, Mr Francioni has declared that the provisional measures adopted "meet only in part the objective" (see the declaration of the *ad hoc* judge).

38. Notwithstanding that the *Enrica Lexie* incident occurred at sea, notwithstanding that it involved two vessels, notwithstanding that the Tribunal has been ingenious in finding solutions in humanitarian law, human rights and general international law, it is still an incident which gives rise to two conflicting claims of jurisdiction in respect of a crime which has no link with the provisions of the Convention on the Law of the Sea, which unfortunately does not provide for this sort of situation.

39. In light of the Tribunal's approach, it was necessary for a number of dissenting voices to express themselves. Though it might be curious that one of those voices belongs to the Vice-President, given the discomfort in which it places him, this is a testament to the good health and credibility of an institution which strives continually for the development and progress of the law of the sea.

(*signed*) B. Bouguetaia

DISSENTING OPINION OF JUDGE P. CHANDRASEKHARA RAO

1. I disagree with the decision of the International Tribunal for the Law of the Sea (hereinafter "the Tribunal") mainly on the question of the need in this case for prescription of provisional measures in terms of article 290, paragraph 5, of the Convention.

2. This case was brought to the Tribunal by Italy under article 290, paragraph 5, of the Convention. This paragraph lays down two conditions to be satisfied before the Tribunal may prescribe provisional measures: the Tribunal must consider first that *prima facie* the Annex VII arbitral tribunal would have jurisdiction and second, the "urgency" of the situation requires the prescription of provisional measures.

3. Explaining the essential elements of "urgency", the Special Chamber of the Tribunal (hereinafter "the Special Chamber") in *Ghana/Côte d'Ivoire* summarized the legal position as follows:

> Considering, in this regard, that urgency is required in order to exercise the power to prescribe provisional measures, that is to say the need to avert a real and imminent risk that irreparable prejudice may be caused to rights at issue before the final decision is delivered *(see Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica); Certain Activities Carried Out by Nicaragua in the Border Area (Nicaragua* v. *Costa Rica), Provisional Measures, Order of 13 December 2013, I.C.J. Reports 2013, p. 398, at p. 405, para. 25).*[1]

4. Accordingly, the Tribunal is required to examine whether there is a risk of "irreparable prejudice" to rights at issue in this case, whether such a risk is "real and imminent", and whether the "urgency" is such that the provisional measures are required "pending the constitution" of the Annex VII arbitral tribunal.

5. The Special Chamber referred to above also held that the requirements of article 290, paragraph 5, must be evaluated "on a case by case basis in light of all relevant factors".

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[1] See *Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015,* to be published, para. 42.

6. In this connection, two essential factors need to be underlined. Provisional measures cannot be prescribed merely on a finding that there is a *possibility* of prejudice to the rights in issue. In order for such measures to be prescribed, it is necessary to find that there is "a real and imminent risk" of irreparable prejudice being caused to rights at issue and that, more importantly, such prejudice could occur before the Annex VII arbitral tribunal would be able to deal with rights at issue. Though it is difficult to indicate precisely when the Annex VII arbitral tribunal could be constituted, it is reasonable to presume that it would be constituted in the next couple of months. The urgency of the situation has to be assessed not on a long-term basis but with reference to the short period involved before the Annex VII arbitral tribunal is constituted.

7. The question here is: has Italy established that the "urgency" of the situation in this case warrants the prescription of provisional measures?

8. Italy submitted its Request for the prescription of provisional measures under article 290, paragraph 5, on 21 July 2015. It needs to prove that the "urgency" of the situation called for provisional measures as on that date.

9. This case has been pending in Indian courts for nearly three-and-a-half years. Both Italy and the two marines have filed a number of petitions in these courts to slow down the legal process and thereby delay the criminal trial. More recently, the accused marines filed Writ Petition 236 of 2014 in the Supreme Court of India on the issues of jurisdiction and immunities. This led the Supreme Court to stay the trial proceedings before the Special Court which was constituted to try the case expeditiously.

10. On 26 June 2015, Italy notified a Statement of Claim instituting proceedings against India before an arbitral tribunal to be constituted under Annex VII to the Convention. On 8 July 2015, Italy filed an application in the Supreme Court of India for deferment of the writ petition mentioned above pending the award of the Annex VII arbitral tribunal in the present case and for an extension of the stay of the accused Mr Latorre in Italy until the final settlement of claims in the arbitration

proceedings. The Supreme Court has scheduled the next hearing for 26 August 2015.

11. Even before the Supreme Court of India could consider the deferment application, Italy approached the Tribunal with a Request for provisional measures.

12. On the date the Request for provisional measures was filed with the Tribunal, was there a "real and imminent risk" that India or its courts would cause irreparable prejudice to rights claimed by Italy before the Annex VII arbitral tribunal could deal with this case? In short, was the Italian Request justified by the "urgency of the situation" on the date it was filed? What was the "real and imminent risk" that Italy was seeking to avert on that date?

13. If the case was being litigated in the Indian courts for nearly three-and-a-half years and Italy had not deemed there to be any "urgency" in terms of article 290, paragraph 5, of the Convention, what happened suddenly to justify its Request on grounds of "urgency"?

14. Italy gave two reasons for finding "urgency". First, it drew attention to a statement made on 31 May 2015 by India's Minister of External Affairs, which reads as follows:

> So far as the marines is concerned, we have repeatedly conveyed to Italy, you please join us in judicial process. The matter is *sub judice*. So far, they have not even joined the judicial process. If they join our judicial process, things can move forward.[2]

15. Italy argues that this statement made them realize that:

> there was no scope for the Indian Government to engage in further discussions about a political settlement. *This is the reason* why Italy instituted Annex VII proceedings on 26 June.[3]
> (emphasis added)

[2] ITLOS/PV.15/C24/3, p. 7.
[3] ITLOS/PV.15/C24/3, p. 8.

16. It is surprising that Italy took more than three-and-a-half years to realize that in this case there was no prospect of "political settlement". It is highly improper to assume that Italy was not aware that the offence complained of is murder, that murder is not a compensable offence, and that the matter is also *sub judice*. As India's Minister of External Affairs stated, this position was "repeatedly conveyed to Italy". Accordingly, the Italian claim that it was only when India's Minister of External Affairs made the statement on 31 May 2015 that it became clear to them that there was no longer any prospect of a negotiated situation is totally untenable.

17. Let us turn to the second reason given by Italy. Explaining why it took more than three years to institute the arbitration proceedings, Italy stated: "[t]he well-foundedness of the application must be assessed without reference to the issue of delay in filing it"[4]. This is a strange argument. If the Request for provisional measures is not filed when the urgency of the situation so requires, and delay is allowed to occur, such delay would undermine the "urgency" requirement in article 290, paragraph 5, of the Convention. In any view of the matter, the "urgency" requirement has never been satisfied in the facts and circumstances of this case.

18. It must also be ascertained whether there is a real and imminent risk that irreparable prejudice may be caused to the rights of Italy if no provisional measures are prescribed in the next few months before the Annex VII arbitral tribunal is constituted. It will be relevant to examine the factual position on the eve of Italy's Notification instituting proceedings before the Annex VII arbitral tribunal.

19. The Special Court established by the Supreme Court on 18 January 2013 had been in abeyance since 28 March 2014. There was thus no prospect of imminent criminal proceedings against the two marines. The Supreme Court has yet to dispose of the deferment application filed by Italy on 8 July 2015. Even if the proceedings in the Supreme Court are permitted to continue, either the Supreme Court or the Special Court will first have to determine the questions of jurisdiction and immunity of the two marines before criminal proceedings could commence. Even if it were concluded for the sake of argument that the competent court decides

[4] ITLOS/PV.15/C24/3, p. 18.

that there is jurisdiction, it would be fanciful to imagine that the criminal proceedings would be completed before the Annex VII arbitral tribunal could deal with the case. As noted earlier, it is not enough that there is a possibility of prejudice; it is essential to establish that there is a "real and imminent risk" that irreparable prejudice may be caused to rights at issue before the Annex VII arbitral tribunal could deal with this case. The Tribunal has failed to establish that there is such real and imminent risk justifying the prescription of provisional measures.

20. Referring to the fact that the Supreme Court has actually stayed the Special Court proceedings, the Additional Solicitor General of India stated that "[i]t would not be going too far to say that until the [Annex VII] tribunal is constituted and hears the matter, there is no compelling assumption that the matter will be taken up and that there will be an adverse decision against them" i.e., the two marines.[5]

21. In any view of the matter, of the two accused marines, Sergeant Latorre is already in Italy on health grounds and he is authorized to stay there until 15 January 2016. The Additional Solicitor General of India assured the Tribunal: "It is not our case that he should come back if his health does not permit him to do that at all".[6]

22. The case of the other marine, Sergeant Girone, stands upon a different footing. There are no allegations of ill-treatment in respect of him. He lives in the comfort of the residence of the Italian Ambassador in New Delhi. He withdrew his application in the Supreme Court seeking to relax bail conditions thereby enabling him to travel to Italy. The Supreme Court disposed of his application as withdrawn. How can Italy argue that there is a situation of urgency regarding Sergeant Girone as of 21 July 2015 when he had unilaterally withdrawn a petition in the Supreme Court for the relaxation of his bail in December 2014?

23. What is more, even if Sergeant Girone is allowed to travel to Italy, it is highly improbable that Italy will oblige him to return to India to stand trial, if required, since on two occasions, as India has pointed out, Italy has betrayed solemn promises made to the Supreme Court of India. Further, the Indian courts have to bear in mind

[5] ITLOS/PV.15/C24/2, pp.12-13.
[6] Ibid.

the public interest in ensuring that justice is done for the two dead fishermen and that nothing is done which would make impossible the implementation of the final decision of the Annex VII arbitral tribunal.

24. The record in this case shows that there is absolutely no "real and imminent risk" that irreparable prejudice will be caused to Italy's rights before the Annex VII arbitral tribunal would be able to deal with the case.

25. In view of the above, there is no "urgency" such as that required to justify the exercise of the power to prescribe provisional measures. Though it appears that the measure prescribed by the Tribunal is addressed to both parties, it is actually addressed only to India. The measure prescribed by the Tribunal in this case is entirely one-sided and is not well-founded in law.

(signed) P. Chandrasekhara Rao

OPINION DISSIDENTE DE M. LE JUGE NDIAYE

(Soumise conformément à l'article 30, paragraphe 3, du Statut et à l'article 8, paragraphe 4, de la Résolution sur la pratique interne du Tribunal en une matière judiciaire).

N'ayant pu, à mon grand regret, me rallier à l'ordonnance du Tribunal, j'estime devoir exposer mon opinion dissidente. Celle-ci traite des conditions procédurales en la présente affaire 24 portant *L'incident de l'« Enrica Lexie » (Italie c. Inde),* demande en prescription de mesures conservatoires conformément à l'article 290, paragraphe 5 de la Convention des Nations Unies sur le droit de la mer.

1. En cette affaire 24, le Tribunal international du droit de la mer (le Tribunal) est saisi, par l'Italie d'une demande en prescription de mesures conservatoires présentée conformément à l'article 290, paragraphe 5 de la Convention.

2. Le Tribunal doit donc établir l'existence ou non du différend et déterminer si les conditions procédurales prévues par l'article 290, paragraphe 5 de la Convention sont réunies avant de décider si le Tribunal arbitral Annexe VII aurait compétence *prima facie* pour connaitre de l'affaire et, partant si le Tribunal a aussi le pouvoir de prescrire des mesures conservatoires au cas où les circonstances l'exigeraient.

Le différend : Régime juridique

3. En l'absence de définition du différend dans les statuts des juridictions internationales, il faut recourir à leur jurisprudence pour en établir le régime juridique, parce que la fonction juridictionnelle contentieuse, des tribunaux les conduit à connaitre de différends, lesquels doivent être réglés sur la base du droit. C'est dire que le différend doit exister et être justiciable.

4. Selon la CIJ,

> un différend est un désaccord sur un point de droit ou de fait, une contradiction, une opposition de thèses juridiques ou d'intérêts entre deux personnes

(Mavrommatis, Arrêt n°2, 1924, CPJI, série A, n°2 p.11).

5. La question de savoir s'il existe un différend dans une affaire donnée demande à être « établie objectivement » par la Cour.
(Aff. Interprétation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, 1er phase, avis consultatif, Rec. 1950, p. 74)

6. Il convient de « démontrer que la réclamation de l'une des parties se heurte à l'opposition manifeste de l'autre »
(Aff. Sud-ouest africain, Exceptions préliminaires Rec. 1962, p. 328)
[Aff. Activités armées sur le territoire du Congo, CIJ, Rec.2006, par. 90, p. 40].

7. La Cour, « pour se prononcer, doit s'attacher aux faits. Il s'agit d'une question de fond et non de forme » dit-elle.
[Géorgie/ Fédération de Russie, Exceptions préliminaires arrêt du 1er avril 2011, par. 30].

8. En principe, le différend doit exister au moment où la requête est soumise à la Cour.
(Aff. Incident aérien de Lockerbie, Rec. 1998, par. 42-44)

9. En ce qui concerne son objet, le différend doit « toucher l'interprétation ou l'application de la Convention » et être soumis conformément à la Partie XV de la CNUDM.

10. Comme l'indique la CIJ:

> Lorsqu'elle est saisie d'une demande en indication de mesures conservatoires, la Cour n'a pas besoin, avant de décider si elle indiquera ou non de telles mesures, de parvenir à une conclusion définitive sur sa compétence au fond mais qu'elle ne doit cependant indiquer de telles mesures que si les dispositions invoquées par le Requérant paraissent constituer prima facie une base sur laquelle sa compétence pourrait être fondée.
>
> La Cour doit
>
> examiner la question aussi complètement que le permet l'urgence d'une demande en indication de mesures conservatoires.

(Aff. Activités militaires et paramilitaires, Nicaragua / Etats-Unis, Mesures Conservatoires, Ordonnance du 10 mai 1984, par. 24 et 25).

11. Selon le Requérant,

> le différend soumis à la procédure arbitrale prévue à l'Annexe VII concerne un incident survenu à environ 20,5 milles marins au large des cotes de l'Inde, impliquant le navire *Enrica Lexie* un tanker battant pavillon italien, et l'exercice subséquent de la juridiction de l'Inde au titre de l'incident, et à l'égard des deux fusiliers marins italiens de la Marine italienne, le maître principal Massimiliano Latorre et el maitre Salvatore Girone, qui étaient en service officiel à bord de l'*Enrica Lexie* au moment de l'incident.
> (Requête, par. 3).

12. L'Inde reconnait que l'événement à l'origine du différend a eu lieu dans sa ZEE et que l'*Enrica Lexie*, un pétrolier battant pavillon italien, était impliqué. Elle a également admis que l'Inde envisage d'exercer sa juridiction à l'encontre des fusiliers marins.
(Réponse, par. 1.5)

Selon le Défendeur

> Il suffit de dire…que le silence de l'Italie déforme sérieusement la réalité des faits et ne permet pas au Tribunal de comprendre correctement quel est l'objet de ce différend, lequel est en fait centre sur le meurtre, perpétré par deux fusiliers marins italiens embarqués à bord de l'Enrica Lexie, de deux pêcheurs indiens sans armes qui se trouvaient à bord du St. Antony, un navire de pêche dument immatriculé en Inde et pleinement autorisé à pêcher dans le ZEE indienne. Ce Navire a par ailleurs été endommagé du fait de l'utilisation d'armes automatiques par les deux fusiliers marins.
> (Réponse, par. 1.6)

13. Le requérant fait valoir en réponse :

> We agree that the most regrettable deaths of the two Indian fishermen require investigation and, as appropriate, prosecution, and the Prosecutor of the Military Tribunal in Rome has an open investigation for the crime of murder that must be pursued to its conclusion. But there is an antecedent issue that requires prior determination, which is the subject-matter of the dispute between Italy and India, namely, who has jurisdiction to pursue the investigation and, as appropriate, prosecution, and what account must be taken of the immunity of State officials.
> The Marine contest the allegation that they fired the shots that killed the two unfortunate Indian fishermen. It is not accepted that the fatal shooting took place from the Enrica Lexie. […] And, I must emphasize, that the Marines have not been charged with murder under Indian law. […] A person is not guilty of an offense unless and until convicted by a properly constituted court on the basis of charges of which they are informed in a timely manner and to which they have had an opportunity to respond.
> (Second Round, Tuesday, 11 August 2015, Speech 1, Reply submissions, Sir Daniel Bethlehem, p.1-2)

Ce principe énoncé est un principe fondamental du droit pénal : le principe de la présomption d'innocence !

14. Pour déterminer les éléments de preuve relatifs à l'existence d'un différend entre les Parties, le Tribunal doit rechercher si :

(a) le dossier de l'affaire révèle l'existence d'un désaccord sur un point de droit ou de fait entre les deux Etats ;
(b) si ce désaccord touche « l'interprétation ou l'application » de la Convention ;
(c) si ledit désaccord existait à la date du dépôt de la requête.
(Géorgie/ Russie, par. 32)

15. On peut relever le désaccord sur les points suivants :

- l'exercice de la juridiction entre l'Etat côtier et l'Etat du pavillon ;
- l'exercice des pouvoirs de police entre les deux Etats et en particulier la question des poursuites judiciaires ;
- la matérialité des normes ;
- le contentieux de la qualification des faits ;
- les attributs de la souveraineté avec la question de l'immunité absolue pour une partie et fonctionnelle pour l'autre ; et enfin
- le contentieux du choix du forum.

16. A la date critique, le faits à l'origine de l'affaire 24, relèvent-ils ou non du droit interne du défendeur dans le cadre de la procédure pénale ?
Dans l'affirmative, si le Tribunal venait à accueillir les demandes du Requérant, y'aurait-il ingérence de sa part dans la substance même d'affaires pénales pendantes devant les juridictions indiennes ?
Comment interpréter, en droit international, les actions du Requérant et celles de ses nationaux dans l'ordre juridique du défendeur ?
Toutes ces questions rejaillissent sur l'existence ou non du différend en droit international.

17. Saisi dans le cadre de l'article 290 paragraphe 5 de la Convention, le Tribunal peut prescrire, modifier ou rapporter des mesures conservatoires … s'il considère, prima facie, que le tribunal arbitral devant être constitué aurait compétence et s'il estime que l'urgence de la situation l'exige, dit en substance cet article.

18. Pour s'acquitter des ces deux conditions procédurales, le Tribunal doit d'une part, établir un lien intime entre la base alléguée de compétence devant permettre au tribunal arbitral Annexe VII d'examiner l'affaire au fond et les demandes formulées par le requérant et vérifier la corrélation devant exister entre la demande au fond et la demande en prescription de mesures conservatoires. D'autre part, il doit établir avec soin les faits de la cause et leur pertinence pour pouvoir estimer ou non que l'urgence de la situation exige la prescription de mesures conservatoires.

19. Le Problème juridique fondamental de ce différend reconnu par les deux parties, c'est l'exercice de la juridiction, de la compétence en la matière.

- Pour l'Italie : "the subject-matter of the dispute Italy and India is who has jurisdiction to pursue the investigation and, as appropriate, prosecution, and what account must be taken of the immunity of State Officials".
- Pour l'Inde : « Le seul problème juridique est de savoir quel Etat (voire quels Etats, car il pourrait y avoir les juridictions concurrentes) a compétence pour juger les auteurs de celle-ci-qui a provoqué la mort de deux pêcheurs indiens ».

Quel sont les arguments des parties ?

Italie

> L'Italie soutient, en se fondant sur la CNUDM, en particulier les Parties II, V et VII, et plus précisément les articles 2, paragraphe 3, 27, 33, 56, 58, 87, 89, 92, 94, 97, 100 et 300 de la Convention, ainsi que sur le droit international coutumier, que l'Inde a violé ses obligations internationales.
> (Demande, par. 29 ; voir aussi PV.15/A24/1).
>
> Dans son Exposé des conclusions du 26 juin 2015 (annexe A de la Demande), l'Italie demande *:*

Conformément aux dispositions de la CNUDM, l'Italie prie respectueusement le tribunal constitué en vertu de l'annexe VII de dire et juger que :

a) L'Inde a agi et agit en violation du droit international en revendiquant et exerçant sa compétence au titre de l'*Enrica Lexie* et à l'égard des Fusiliers marins italiens en relation avec l'incident de l'*Enrica Lexie*.

b) La revendication et l'exercice par l'Inde de sa compétence pénale violent l'obligation de l'Inde de respecter l'immunité des Fusiliers marins italiens, en leur qualité de fonctionnaires de l'Etat exerçant des fonctions officielles.

c) L'Italie a compétence exclusive à l'égard de l'*Enrica Lexie* et des Fusiliers marins italiens en relation avec l'incident de l'*Enrica Lexie*.

d) L'Inde doit cesser d'exercer toute forme de compétence au titre de l'incident de l'*Enrica Lexie* et des Fusiliers marins italiens, y compris toute mesure de privation de liberté frappant les maîtres Lattore et Girone.

e) L'Inde a violé l'obligation qui lui est faite par la Convention de coopérer à la répression de la piraterie.

(Voir Exposé des conclusions, par. 33, annexe A de la Demande)

L'association de ces conduites et ces attitudes montre, sans conteste, un désaccord entre l'Italie et l'Inde qui, finalement, revient à un différend sur l'interprétation et l'application des règles internationales invoquées par l'Italie dans la procédure actuelle (PV.15/A24/1,voir également PV.15/A24/1, p. 21, ll. 1 – 11).

On [L'Inde] invoque même la déclaration au titre de l'Article 310. Il s'agit là de questions qui portent sur le fond clairement. (PV.15/A24/1,

L'Italie considère que le droit et les faits de l'affaire actuelle qui ont été fort bien présentés jusqu'à présent montrent, de manière évidente, que le tribunal en cours de constitution au titre de l'annexe VII aura beaucoup plus qu'une juridiction prima facie sur les fonds de l'affaire (PV.15/.A24/1, PV.15/C24/1, p. 20, ll. 18 – 21)

L'argument de l'Inde semble confondre la juridiction *prima facie*, cette exigence, avec une autre exigence séparée selon laquelle les droits demandés doivent être au moins plausibles. Lorsque l'on considère la juridiction *prima facie*, l'Inde affirme que « la question du différend n'entre pas dans le champ de compétence de la Convention ». L'Inde semble arguer qu'il n'y a pas de différend entre les Parties « relative à l'interprétation ou à l'application de la Convention». Dans ce contexte, elle se concentre sur les allégations de l'Italie au titre de l'Article 97 et sur l'immunité des représentants *de l'Etat (PV.15/A24/1, p. 20, l. 36 à 44, PV.15/A24/1, p. 18, ll. 50 et 51 et p. 19, ll. 1 et 2).*

Vérification de la compétence *prima facie*, voir PV.15/C24/1, p. 28 à 36.

Inde

[Le] tribunal de l'annexe VII dont l'Italie demande la constitution n'a pas compétence pour se prononcer sur l'affaire qu'elle veut lui soumettre (PV.15/A24/2, p. 14 et 15).

L'Inde convient que l'événement à l'origine du différend a eu lieu dans sa ZEE et que *l'Enrica Lexie*, un pétrolier battant pavillon italien, était impliqué. Elle convient également qu'elle envisage d'exercer sa compétence à l'encontre des fusiliers marins. (Observations écrites, par. 1.5).

[L]'objet du différend ne relève pas du champ d'application de la Convention… l'Italie donne une qualification erronée à l'objet du différend, qui n'est pas un incident de navigation, et encore moins une collision, mais un meurtre commis par deux ressortissants italiens sur la personne de deux ressortissants indiens, dans une zone maritime relevant de la compétence de l'Inde. (Réponse, paragraphe 3.5 ; sur l'objet du différend, voir aussi Réponse, paragraphe 1.6 et PV.15/C24/2. p. 15, ll. 3 à 7).

Le professeur Tanzi, s'est donné hier beaucoup de mal pour montrer qu'il existait un différend entre l'Inde et l'Italie. Ceci, je le lui concède bien volontiers – mais un différend sur quoi ? (PV.15/C24/4, p. 9, l. 26 à 28).

lLe] seul problème juridique est de savoir quel Etat (voire quels Etats, car il pourrait y avoir des juridictions concurrentes) a ou ont compétence pour juger cette fusillade qui a provoqué la mort de deux pêcheurs indiens. Et sur cela, la Convention de Montego Bay est muette) (PV.15/C24/4, p. 10, ll. 28 à 32).

[I]'Inde rejette l'idée que l'Italie puisse invoquer le bénéfice des immunités reconnues par la CNUDM en faveur des deux fusiliers marins concernés. (Réponse, paragraphe 3.5)

Personne ne conteste que les fusiliers marins italiens étaient à bord d'un navire marchand. Par conséquent, le Gouvernement de l'Inde n'était pas obligé de reconnaître leur demande d'immunité en 1 vertu de la Convention ou de tout autre principe de droit international (PV.15/C24/2, p. 2 ll. 48 et 49 et p. 3 ll. 1 et 2 ; voir également, PV.15/C.24/2).

3.1.1 Manquements allégués aux dispositions de la Convention

Italie

Les violations des dispositions de la CNUDM commises par l'Inde sont constituées, entre autres, par les actes ci-après : a) la saisie et l'immobilisation illégale par l'Inde du navire *Enrica Lexie* ; b) l'entrave de l'Inde à la liberté de navigation de l'Italie ; c) l'exercice par l'Inde de la compétence au titre de l'Incident de *l'Enrica Lexie* et à l'égard des Fusiliers marins, nonobstant la compétence exclusive de l'Italie à ce titre et à cet égard, en vertu du fait incontesté que l'Incident a eu lieu hors des eaux territoriales de l'Inde, à environ 20,5 milles marins au large des côtes indiennes ; d) l'exercice par l'Inde de la

juridiction pénale à l'égard des deux Fusiliers marins italiens, qui, en tant que fonctionnaires de l'Etat exerçant des fonctions officielles en vertu d'une délégation de pouvoir légale, bénéficient d'une immunité de juridiction pénale en Inde ; et (e) le défaut de coopérer à la répression de la piraterie, en exerçant sa juridiction pénale au titre de l'Incident de l'*Enrica Lexie* et à l'égard des Fusiliers marins italiens.(Demande, paragraphe 30, voir PV.15/C24/1, p. 4, l. 31 à 37)

Inde

L'Italie saisit le prétexte de sa Demande en prescription de mesures Conservatoires pour développer, dans son exposé des conclusions, des arguments sur le fond de l'affaire. L'Inde ne fera pas de même, puisque cela est contraire aux dispositions claires de l'article 290 de la CNUDM, qui limite l'objet des mesures conservatoires à la préservation "des droits respectifs des parties en litige (…) en attendant la décision définitive". Néanmoins, l'Inde souhaite qu'il soit bien clair qu'en s'abstenant de réfuter les arguments de l'Italie sur le fond, elle n'entend nullement accepter tacitement ces arguments. (Réponse, paragraphe 3.1)

[I]l ne suffit pas d'énumérer la longue litanie de dispositions de celle-ci qui pourraient avoir un vague rapport avec les faits de la cause, comme l'ont fait ce matin le professeur Tanzi et Sir Michael, pour que la compétence de la juridiction saisie soit établie. La véritable question est de savoir si le différend entre les Parties est couvert par une ou des dispositions de la Convention. Ce n'est prima facie pas le cas si l'on se focalise sur l'objet réel du différend (PV.15.C.24/2, p. 15, ll. 21 à 27).

La demande de l'Italie, visant à empêcher l'Inde de prendre de nouvelles mesures judiciaires et administratives, aurait aussi pour effet de préjuger les assertions b), c) et d) avancées dans la Notification de l'Italie (l'assertion e) sera vue à propos de la deuxième demande de mesures conservatoires de l'Italie (Réponse, par. 3. 55).
Ces assertions sont en réalité centrées sur la question de savoir si les tribunaux indiens sont compétents pour ce qui est de l'incident en cause, et si les fusiliers marins italiens étaient couverts par l'immunité judiciaire, bien que les assertions soient présentées comme concernant des violations présumées de la CNUDM. (Réponse, par. 3. 55)

S'agissant des assertions spécifiques formulées dans l'Exposé des conclusions :

Sur l'article 2 de la Convention, voir PV.15/C24/4, p. 10. l. 13.

Sur l'allégation de violation de l'article 27, paragraphe 5 de la Convention :

> L'idée de départ, selon laquelle l'Inde aurait usé de ruse et de contrainte pour faire que le navire aille s'amarrer à Kochi, est entièrement contraire à la vérité … deux pêcheurs indiens non armés ayant été tués… il était approprié que l'Inde cherche à questionner les personnes à bord pour entendre leur version de ce grave événement. (Réponse, paragraphe 3.50)

> Il n'y avait là ni ruse ni contrainte, contrairement à ce qu'allègue l'Italie (PV.15/C.24/2, p. 2, ll. 8 et 9).
>
> Pour ce qui est des fusiliers marins, l'Italie n'a jamais affirmé que l'Inde n'avait pas le droit de les interroger (Réponse, paragraphe 3.51)
>
> L'Italie n'a en aucune façon montré avoir entamé quelques poursuites en Italie à l'encontre des deux fusiliers marins. (Réponse, paragraphe 3.53)

Sur l'article 33 de la Convention, voir PV. 15/C24/4, p. 9. l. 47

Sur les articles 56 et 58 de la Convention, voir PV. 15/4, p. 10, ll. 1 -4.

Sur les articles 87 et 89 de la Convention, voir PV. 15/4, p. 9, ll. 30 et 31.

Sur l'article 92 de la Convention, voir PV/15/4, p. 10, ll. 7 - 10.

Sur l'article 94 de la Convention, voir PV/15/4, p. 10, ll. 11 - 14.

Sur l'allégation de violation de l'article 97, paragraphe 3 de la Convention :

> Cette affaire n'entre pas dans le champ d'application de l'article 97 de la CNUDM, … il s'agit plutôt d'un double meurtre perpétré en mer (Réponse, paragraphe 1.11)
>
> Il ne s'est produit aucun 'incident de navigation' ni aucun abordage entre les deux navires. Ceux-ci n'ont eu aucun contact physique, et l'article 97 de la CNUDM… n'est applicable en aucune manière (Réponse, paragraphe 1.8 ; voir aussi PV15/C24/2, p. 3, ll. 10 - 16).

Sur l'article 100 de la Convention :

> Il n'y a pas eu non plus d'attaque de pirates ni de menace d'une telle attaque qui pourrait justifier le meurtre de deux pêcheurs indiens de telle manière que cela fonderait l'application de la Convention et, partant, la compétence prima facie d'un tribunal prévu à l'annexe VII. (PV.15/C24/2, p. 3, l. 13 à 17 ; voir aussi PV.15/2, p. 10, ll. 9 à 12 ; p. 15, ll. 18 et 19).

Sur l'article 300 de la Convention, voir PV.15/4, p. 10, ll. 21 - 25.

20. Sur la question de la compétence, le Tribunal doit examiner avec un soin tout particulier les dispositions de la Convention invoquées par le requérant et qui font l'objet d'un désaccord entre les Parties. En effet, pour déclarer compétent *prima facie* le tribunal arbitral Annexe VII, il ne suffit pas qu'un requérant invoque simplement des dispositions de la Convention qui, lues, de manière abstraite, pourraient fournir théoriquement une base de compétence.

Encore faut-il que l'organe juridictionnel tienne compte des faits dont il a connaissance au moment de statuer sur la prescription des mesures conservatoires.

Il doit en particulier s'assurer que la compétence *prima facie* au fond peut être établie sur cette base en rapport avec les dispositions de la Convention invoquées par le requérant.

21. Le Tribunal a jugé qu'

> avant de prescrire des mesures conservatoires, le Tribunal n'a pas besoin de s'assurer de manière définitive qu'il a compétence quant au fond de l'affaire, mais qu'il ne peut cependant prescrire ces mesures que si les dispositions invoquées par le demandeur semblent prima facie constituer une base sur laquelle la compétence du Tribunal pourrait être fondée.
> *(Navire « SAIGA » (No. 2)*, para. 69*)*

Il doit cependant le faire sur la base des principes que l'on vient de rappeler étant donné que la compétence doit être établie *proprio motu*. Il faut rappeler qu'aux termes de l'article 288 de la Convention, le Tribunal a compétence pour connaitre de tout différend relatif à l'interprétation ou à l'application de la Convention, si les parties au différend ont choisi le Tribunal comme moyen de règlement en application de l'article 287 de la Convention.

22. En ce qui concerne la compétence *prima facie* du tribunal arbitral de l'Annexe VII laquelle est une condition de la compétence du Tribunal international du droit de la mer, le requérant a avancé une brassée de dispositions de la Convention pour fonder sa requête : articles 2 al. 3, 27, 33, 56, 58, 87, 89, 92, 97, 100 et 300.

Le rôle du Tribunal, ici, est de s'assurer de la pertinence desdites dispositions au regard du différend qu'il s'agit de régler.

23. Au vu des dispositions invoquées par le requérant, l'on note que les Parties sont en désaccord sur le champ d'application des obligations leur incombant en vertu de la Convention et sur la pertinence de celle-ci. En effet, l'article 2, paragraphe 3, traite de la souveraineté sur la mer territoriale alors que l'incident a eu lieu dans la zone économique exclusive de l'Inde. Il en va de même de l'article 27 relatif à la juridiction pénale à bord d'un navire étranger dans la mer territoriale. L'article 33 traitant de la zone contiguë n'a pas été repris par les Parties dans la

suite de la procédure même si on le trouve dans la notification et la Requête du demandeur.

En ce qui concerne les articles 56 et 58 portant sur les droits des Etats côtiers et des autres Etats dans la ZEE. Leur non-pertinence en l'espèce réside dans le fait que la Convention est muette à la fois sur l'utilisation militaire de la ZEE et sur la question de la juridiction pénale en ce qui concerne les crimes et actes illicites dont la zone économique exclusive est le théâtre.

Pour ce qui est des articles 87 et 89 de la Convention, ils ont trait à la liberté de la haute mer et en particulier de la liberté de navigation. C'est pourquoi, le Requérant fait valoir des « violations des dispositions de la Convention :

(a) la saisie et l'immobilisation illégale par l'Inde du navire *Enrica Lexie ;*

(b) l'entrave de l'Inde à la liberté de navigation de l'Italie ».

Etant donné que, comme le requérant l'admet lui-même «we agree that the most regrettable deaths of the two Indian fishermen require investigation and, as appropriate, prosecution, and the Prosecutor of the Military Tribunal in Rome has an open investigation for the crime of murder that must be pursued to its conclusion»;

Etant donné que l'incident a eu lieu à un endroit où s'applique la législation pertinente indienne, à savoir le droit pénal, l'autorité judiciaire indienne peut exercer sa compétence pénale sans se trouver en violation du droit international.

Quant aux articles 92 et 94 qui traitent de la condition juridique des navires et des obligations de l'Etat du pavillon, l'objet du différend leur enlève toute pertinence en ce que le navire n'est guère incriminé mais plutôt des personnes accusées de meurtres lesquelles ne sont pas par ailleurs membres de l'équipage.

24. Dans ces conditions, il est difficile d'admettre que la saisie et l'immobilisation de l'*Enrica Lexie* dans le cadre d'une procédure pénale, soient interprétées comme une violation de la liberté de navigation en haute mer. Autrement, le principe de la liberté de navigation soustrairait les navires à toute poursuite judiciaire puisque leur

saisie serait regardée comme une atteinte au droit qu'a l'Etat du pavillon de jouir de la liberté de navigation. De la sorte, il n'y aurait plus jamais un ordre juridique sur les mers et les océans.

25. L'article 97 a trait à la juridiction pénale en matière d'abordage ou d'autres incidents de navigation. Il ressort du dossier qu'il n'y a eu abordage ni aucun incident de navigation et que l'*Enrica Lexie* et le bateau de pêche *St. Antony* n'ont eu aucun contact physique pour justifier l'applicabilité de l'article 97 paragraphe 3 de la Convention.

Qui plus est, la déclaration de l'Inde en vertu de l'article 287 de la Convention des Nations Unies sur le droit de la mer en date du 29 juin 1995 indique :

> Le Gouvernement de la République de l'Inde considère que les dispositions de la Convention n'autorisent pas d'autres Etats à effectuer, dans la zone économique exclusive et sur le plateau continental, des exercices ou des manœuvres militaires, en particulier s'ils impliquent l'utilisation d'armes ou d'explosifs, sans le consentement de l'Etat côtier.
> [Nations-Unies, 95/600, (XXI. 6) (XXI.6 (a) CN. 199. 1995. TREATIES-5 (Depositary Notification), RATIFICATION BY INDIA].

Il apparaît, au vu de ce qui précède, que l'article 97 paragraphe 3 n'est pas pertinent et est inopposable à l'Inde. L'article 100 a trait à l'« obligation de coopérer à la répression de la piraterie ». Cette obligation n'a pas de rapport direct avec l'objet du différend tel que le reconnaissent les deux Parties. Enfin les dernières dispositions invoquées par le requérant concernent l'article 300 de la Convention sur la bonne foi et la CIJ nous enseigne que ce principe « n'est pas en soi une source d'obligation quand il n'en existerait pas autrement ».
[CIJ, arrêt du 20 décembre 1998, Rec. 1998, paragraphe 94].

26. A dire vrai, la Convention n'est guère applicable pour cet incident dont le théâtre aurait pu être l'embouchure d'un fleuve quelconque dans le monde et avoir les mêmes termes que le différend de l'espèce.

C'est dire que le tribunal arbitral de l'Annexe VII n'aurait pas compétence parce que l'objet du différend n'a pas trait au droit de la mer *stricto sensu* mais plutôt à :

(a) l'exercice de la juridiction entre 1 Etat côtier et un Etat du pavillon ;

(b) l'exercice des pouvoirs de police et de justice pénale entre les deux Etats;

(c) le contentieux de la qualification des faits ;

(d) les attributs de la souveraineté avec la question de l'immunité ou encore;

(e) le contentieux du choix du forum.

Les dispositions de la Convention qui, de l'avis du requérant auraient été violées par le défendeur, ne peuvent servir de base sur laquelle établir la compétence du Tribunal arbitral de l'Annexe VII dans l'affaire au fond. Et le Tribunal international du droit de la mer n'a aucune compétence pour connaitre une affaire qui ne concerne en rien l'interprétation ou l'application de la Convention.

27. Il nous faut à présent examiner la seconde condition procédurale prévue au paragraphe 5 de l'article 290, l'urgence de la situation.
Rappelons d'abord les arguments des Parties.

Italie

> [L]'Italie réitère et s'appuie sur tous les faits et éléments ... qui démontrent que les droits en question subissent un préjudice ou un dommage irréversible ou, à tout le moins, sont exposés à un risque réel et imminent de subir un préjudice ou un dommage irréversible. La conduite de l'Inde perdure et il est probable que l'Inde prendra d'autres mesures avant que le tribunal arbitral prévu à l'annexe VII ne soit "à même de 'modifier, rapporter ou confirmer ces mesures conservatoires. (Demande, paragraphe 52, voir paragraphe 25, voir aussi, PV 15/1, p. 5, ll. 38-45).
>
> > Le risque de préjudice pour les droits de l'Italie a fortement augmenté au cours des derniers mois. (Demande, paragraphe 53) Le préjudice causé aux droits de l'Italie s'est aggravé chaque jour où les Fusiliers marins ont été soumis à la juridiction des tribunaux indiens. Le préjudice a été exacerbé par les problèmes médicaux évoqués dans l'addendum confidentiel. (Demande, paragraphe 54)
> >
> > Pendant toute cette période [trois ans et demi], l'Italie n'a pas pu exercer ses droits d'enquêter sur la conduite de ses Fusiliers marins ... afin d'engager une action à leur encontre ou, selon le cas, afin de les faire reprendre leur service en Italie, et, dans l'un et l'autre cas, l'Italie a été privée de ses droits de veiller à leur santé. L'Italie a une obligation légale de protection des Fusiliers. (Demande, paragraphe 54).

> L'urgence … est à la fois humanitaire et juridique. (PV 15/1, p. 49, l. 41 ; voir aussi PV 15/3, p. 7, ll. 9-21).

Sur la première mesure demandée:

> Lorsque des dommages irréparables sont subis par l'Italie à chaque fois que l'Inde exerce sa juridiction, l'urgence est prouvée par le fait que l'exercice de cette juridiction se poursuit. Nous sommes certains qu'en l'espèce c'est bien le cas. Comme Sir Daniel Bethlehem l'a signalé, la Cour suprême de l'Inde a prévu de tenir une audience le 26 août pour examiner la Requête (article 32) de sursis à statuer sur la Writ Petition, motivée par le recours à une procédure d'arbitrage en vertu de l'annexe VII. L'Additional Solicitor General de l'Inde est tenu de présenter aujourd'hui les vues du Gouvernement indien sur cette demande. Et, bien entendu, les deux fusiliers marins font toujours l'objet du contrôle judiciaire ordonné par la Cour suprême de l'Inde. Il y a donc bien exercice de juridiction en cours. (PV 15/1, p. 39, l. 45 – p. 40, l. 8).

> l'Inde a sans équivoque laissé entendre qu'elle souhaitait organiser ce procès …l'Inde rend l'Italie responsable des retards occasionnés, mais d'autre part, elle semble se fonder sur ces retards pour rassurer le Tribunal sur le fait qu'il n'y a pas d'urgence. (PV 15/1, p. 40, ll. 14-19)

Sur la seconde mesure demandée :

> le *statu quo*, pour les fusiliers marins, est un statu quo où leurs droits et ceux de l'Italie subissent quotidiennement un préjudice irréparable. Chaque jour où une personne est privée de ses droits doit être vu comme un jour de trop. » (PV 15/1, Verdirame, p. 47, ll. 39-42). [l'Inde] préjuge aussi la culpabilité des fusiliers marins avant même de leur avoir signifié un acte d'accusation, et que ce faisant elle a aggravé le préjudice qu'elle leur a fait subir et rendu encore plus visibles tous les risques qu'entraîne l'exercice poursuivi de sa juridiction pénale." (PV 15/1, p. 48, ll 7-11, voir aussi PV 15/3, p. 15, ll. 9-25).

Sur la détermination de l'urgence, voir PV 15/3, p. 15, l. 35 – p. 16, l. 40).

Sur la notion d'urgence (dimension temporelle) : « …la date-clé est celle à partir de laquelle le tribunal arbitral est lui-même opérationnel. » (PV 15/1, p. 25, ll. 35-36).

> les mesures [que le Tribunal] prescrit doivent en principe durer jusqu'à ce que le tribunal arbitral rende sa sentence finale au fond. (PV 15/1, p. 26, ll. 16-17).

> Il est donc tout à fait justifié que l'Italie demande des mesures conservatoires qui dureraient jusqu'à la décision finale du Tribunal arbitral. (PV 15/3, p. 10, ll. 27-28).

Sur la durée du différend :

> l'urgence n'est pas à évaluer en fonction du temps écoulé depuis l'apparition de ce différend mais [en tenant compte du fait] que chaque jour perdu de plus est un jour qui ne pourra jamais être récupéré. (PV 15/1, p. 50, ll. 14-16). [l'Inde] confond … deux aspects distincts aux fins de l'analyse, à savoir la durée du différend et l'évaluation de l'urgence. (PV 15/1,p. 48, ll. 17-18). Il n'est pas inhabituel que des différends portant sur l'exercice de la juridiction

ou l'immunité d'agents d'un Etat soient portés devant une instance internationale après une procédure nationale. (PV 15/1 p. 48, ll. 23-25). Le bien-fondé d'une demande doit être examiné quel que soit le retard éventuel dans la présentation de cette demande. La condition préalable pour demander une prompte mainlevée a pu être remplie. Mais même si ces pré conditions ne sont pas remplies… n'amène pas à… ne rend pas la demande irrecevable. (PV 15/3, p. 17, ll. 36-40).

Inde

Ni la première ni la seconde mesure conservatoire demandées par l'Italie ne remplissent le critère d' « urgence aggravée » résultant de l'article 290, paragraphe 5, de la CNUDM, ni même celui de l'« urgence de base » (Réponse, paragraphe 3.13)…

Sur la notion d'urgence, voir les Observations écrites, paragraphes 3.15 à 3.18.

Sur la notion d'urgence (dimension temporelle) :

> l'Italie ne limite aucunement sa première demande dans le temps. (PV 15/2, p. 23, ll. 27-28) Mais ce n'est pas ce qui est dit à l'article 290, paragraphe 5 (PV 15/2, p. 23, l. 44) il existe une limitation temporelle de la durée des mesures conservatoires qui pourraient être prescrites par le Tribunal de céans (PV 15/2, p. 24, ll. 5-6). il n'est pas demandé à ce Tribunal d'envisager de prescrire des mesures conservatoires qui resteraient en place tout au long de la durée de l'arbitrage prévu à l'annexe VII … La question est uniquement de savoir s'il y aura, au cours des prochains mois, une quelconque urgence une fois que le tribunal arbitral prévu à l'annexe VII aura été constitué et sera à même de statuer sur la question. (PV 15/2, p. 24, ll. 17-23, voir aussi PV 15/4, p. 5, ll. 8-11).
>
> Dans ces circonstances, il n'y a aucun risque que l'Italie subisse un préjudice quelconque au titre de cette procédure, aucune situation d'urgence qui justifie des mesures conservatoires, ni aucun motif de bloquer la procédure judiciaire et administrative indienne, qui s'est déroulée d'une manière exemplaire, nonobstant les différentes tactiques employées par l'Italie pour perturber la procédure. (Réponse, paragraphe 3.23).

Première mesure conservatoire demandée par l'Italie :

> Si l'on replace les faits dans leur contexte exact, il s'avère qu'il n'existe absolument aucune situation d'urgence justifiant que le Tribunal prononce une ordonnance interdisant à l'Inde de continuer à prendre des mesures judiciaires ou administratives — mesures qu'elle a toujours prises en toute légalité et loyauté à l'égard de l'Italie et des deux fusiliers marins — ou d'exercer toute autre forme de compétence. (Réponse, paragraphe 3.21 ; voir aussi PV 15/2, p. 31, ll.28-30 ; sur les « faits [qui] remettent en perspective la nature déplacée de la première mesure conservatoire demandée par l'Italie », voir Réponse, paragraphes 3.24 à 3.37.
>
> i) [L'Italie] est responsable à la fois des retards dans la conduite de l'enquête sur l'incident… et des retards de la procédure judiciaire

indienne. (voir aussi PV 15/2, p. 11, ll. 30-33 ; PV 15/2, p. 26, ll. 5-8, p. 29, ll. 20-26 ; et PV 15/4, p. 1, l. 38 p. 2, l. 47).

ii) [L]'Italie a été traitée de la manière la plus équitable par la Cour suprême. Un grand nombre de ses requêtes et de celles des deux fusiliers marins ont été favorablement accueillies… (voir aussi, PV 15/2, p. 26, ll. 10-13).

iii) L'Italie a, à plusieurs occasions, abusé des voies de droit… (voir aussi PV 15/2, p. 32, ll. 12-13 et p. 30, l.16 – p. 31, l. 7 ; PV 15/2, p. 40, ll. 7-8).

iv) [L']Italie a réussi à obtenir une suspension de la procédure devant le tribunal spécial, [ce qui]… signifie qu'il n'existe aucun risque réel et imminent de préjudice irréparable aux droits de l'Italie… la situation ne présente aucun caractère d'urgence… Quoi qu'il en soit, ce sont les droits de l'Inde qui ont été compromis par la conduite de l'Italie. (voir aussi PV 15/2, p. 11, ll. 21-25 et p. 13, ll. 35-39). La procédure devant la Cour spéciale chargée de juger les deux fusiliers marins est en suspens. Il n'y a aucune perspective que cette suspension puisse être levée ou que les résultats de l'enquête de la NIA puissent être présentés à la Cour spéciale ou que les défendeurs auront la possibilité de répondre dans un avenir proche, et certainement pas avant que le tribunal arbitral prévu à l'annexe VII soit constitué et opérationnel. (PV 15/2, p. 31, ll. 16-21 ; voir aussi PV 15/4, p. 5, ll. 15-21).

v) Sur la durée du différend : [L]e fait que l'Italie ait attendu plus de trois ans pour engager la procédure d'arbitrage prévue à l'annexe VII et pour introduire une demande en prescription de mesures conservatoires établit à lui seul l'absence d'urgence. Aucun événement récent n'est intervenu, au titre de la situation légale en Inde et de la procédure, qui ajouterait, si peu que ce soit, une urgence quelconque à cette affaire. (Réponse, paragraphe 3.38, voir aussi paragraphe 3.22 et PV 15/2, p. 32, ll. 17-24). Si un Etat reporte le dépôt d'une requête demandant des mesures conservatoires alors qu'il aurait pu le faire plus tôt, eh bien cela jette un doute sérieux sur cette requête car on peut penser qu'il n'existe pas véritablement de risques réels et imminents de préjudice irrémédiable. (PV 15/4, p. 7, ll. 37-41).

Deuxième mesure conservatoire demandée par l'Italie : aucune urgence ne justifie la seconde mesure conservatoire demandée par l'Italie – et, a fortiori, elle ne peut invoquer aucune urgence « aggravée » pouvant motiver la saisine du Tribunal de céans sans attendre la constitution du tribunal de l'annexe VII. (PV15/2, p. 37, ll. 32-35)

Cela supposerait que la situation effective des deux personnes accusées de meurtre est si dramatique que le Tribunal devrait prescrire liberté, sécurité et liberté de mouvement totales pour l'un et l'autre, y compris la faculté de rester ou de retourner en Italie. (Réponse, paragraphe 3.40). [N]ulle part… l'Italie n'ose prétendre que leur sécurité serait menacée. Et de fait, elle ne l'est pas, ni ne l'a jamais été. (Réponse, paragraphe 3.41)

S'agissant de la situation de M. Latorre : [D]e nouvelles prolongations ne sont pas à exclure si elles sont nécessaires pour motif humanitaire.

> (Réponse, paragraphe 3.42) [S]on état de santé est en évolution… (Réponse, paragraphe 3.43) [A]vec la prorogation renouvelable de six mois accordée par la Cour suprême le 13 juillet 2015, l'Italie est mal venue d'invoquer quelque urgence en l'espèce. (Réponse, paragraphe 3.43 ; voir aussi PV 15/2, p. 36, ll. 10-39).
>
> S'agissant de la situation de M. Girone : il est en liberté conditionnelle (Réponse, paragraphe 3.44) l'urgence qu'il y aurait à l'autoriser à retourner en Italie et à y demeurer est contredite par son propre comportement. (Réponse, paragraphe 3.45 ; see also PV 15/2, p.37, ll 2-17)
>
> Sur la privation de liberté : les marins ne sont pas détenus, incarcérés : ils sont en liberté je dirais très légèrement surveillée. (PV 15/4, p. 18, ll. 31-32)

28. Les mesures conservatoires se destinent à préserver les droits des Parties en litige et à prévenir un dommage irréparable. En effet pour faire face au caractère d'urgence d'une situation avant que le différend ne soit réglé en droit, au fond, le juge doit agir par la prescription de mesures conservatoires. Au regard de l'urgence, il doit s'assurer que le dommage est probable et imminent.

29. La préservation des droits des Parties en attendant la constitution du tribunal arbitral de l'Annexe VII est l'expression du principe d'égalité des Etats et celui de l'égalité effective des Parties devant le tribunal du point de vue procédural. Les droits à préserver sont ceux susceptibles d'adjudication au fond de l'affaire. Et les mesures conservatoires ne doivent être prescrites que lorsque le dommage irréparable est imminent. L'on a ainsi un lien intime entre le dommage et l'urgence : si le dommage irréparable n'est pas imminent, il n'y a guère urgence.

30. Les circonstances entourant l'affaire soumise au Tribunal doivent révéler ou non la nécessité d'agir pour préserver les droits des Parties et prévenir un préjudice irréversible ou un dommage irréparable. En ce sens, un risque réel et imminent doit être constaté ; d'où l'importance des données factuelles.

31. En effet, l'invocation des circonstances ne peut se faire sans considération des dispositions de la Convention dont la violation est invoquée à l'appui de la demande en prescription de mesures conservatoires. Et le juge doit jouer un rôle de premier plan dans l'évaluation de la corrélation des données factuelles avec la norme invoquée. Comme le remarque le juge Lauterpacht : « qualifier la présente affaire de grave et d'urgente ne signifie pas que la Cour doive, en l'abordant, se

départir de son impartialité traditionnelle et de son ferme attachement aux normes juridiques ». (So to describe the character of the present case is not to say that Court should approach it with anything other than its traditional impartiality and firm adherence to legal standards).
(Application de la Convention pour la prévention et la répression du crime de génocide, mesures conservatoires, Ordonnance de 13 septembre 1993, CIJ, Rec. 1993, p. 408).

32. Ce, parce que l'urgence infère que dans les circonstances de l'espèce une action est nécessaire pour préserver les droits revendiqués par les Parties et qui ne peuvent attendre le rendu de la sentence du tribunal de l'Annexe VII. De ce fait l'état de la procédure lorsque la demande est faite de même que le temps devant s'écouler avant la constitution du tribunal arbitral apparaissent comme des éléments pertinents dans la détermination de l'urgence de la situation. En ce sens l'urgence se révèle liée à la gravité du dommage que l'on cherche à prévenir par la mesure conservatoire. Ainsi, si le Tribunal venait à constater que le dommage potentiel serait irréparable, alors l'urgence serait établie.

33. Et c'est là où réside toute la difficulté en ce qu'elle renvoie à la qualification des faits qui est un contentieux permanent dans toute affaire. Sir Hersh Lauterpacht a écrit que « A substantial part of the task of judicial tribunals consist in the examination and the weighing of the relevance of facts ». (H. Lauterpacht, the development of International Law by International Court, 1958, p. 48).

Dans une procédure qui se caractérise par l'urgence, l'évaluation par la juridiction saisie de manière impartiale et critique de la situation de fait est forcement limitée parce que ballottée entre la nécessité à l'urgence des mesures conservatoires et l'exigence impérieuse de ne pas déformer les faits.

34. Comme le remarque Kreca :

> La procédure en indication de mesures conservatoires repose en grande partie sur des présomptions refragables (*presumptio Juris tantum*), notamment la présomption simple de compétence de la Cour quant au fond de l'affaire dans laquelle des mesures conservatoires sont adoptées.[…] Toutefois, une appréciation incorrecte des faits conduit nécessairement à une application

> erronée du droit, ce qui, d'un point de vue ontologique, se trouve aux antipodes de l'idéal assigné aux procédures judiciaires. Et une appréciation *prima facie* des faits comporte inévitablement un très haut risque d'erreur.
> (Application de la Convention, op. cit. pp. 457-458).

35. En l'espèce, les faits avancés par le requérant à appui de sa demande indiquent-ils que l'urgence de la situation exige la prescription de mesures conservatoires ? Le Tribunal ne conclut pas vraiment sur l'urgence de la situation ou il le fait par prétérition. Il indique : « Considérant que le fait ci-dessus (la poursuite des procédures en cours) nécessite que le Tribunal prenne une mesure en vue de veiller à ce que les droits respectifs des parties soient dûment préservés ». (Paragraphe 107 de l'Ordonnance du 24 aout 2015).

Il ressort cependant du dossier que ces vues sont à nuancer dans la mesure où le premier fusilier marin se trouve en Italie depuis plus d'un an pour raison médicale tandis que le second a élu résidence chez l'Ambassadeur d'Italie en Inde où il a reçu à plusieurs reprises les membres de sa famille.

Qui plus est, l'Inde a donné des assurances au Tribunal et des engagements fermes à l'audience (Paragraphe 130 de l'Ordonnance).

Dans l'Affaire de *Timor-Leste*/Australie, la CIJ dit ceci :

> La Cour relève en outre que l'agent de l'Australie a indiqué que « l'Attorney-General du Commonwealth d'Australie a[vait] le pouvoir effectif et manifeste de prendre des engagements liant l'Australie, tant au regard du droit australien que du droit international ». La Cour n'a aucune raison de penser que l'engagement écrit en date du 21 janvier 2014 ne sera pas respecté par l'Australie. Dés lors qu'un Etat a pris un tel engagement quant à son comportement, il doit être présumé qu'il s'y conformera de bonne foi (Questions concernant la saisie et la détention de certains documents et données (TIMOR-LESTE c. AUSTRALIE). Demande en indication de mesures conservatoires, Ordonnance du 3 mars 2014, CIJ, Rec. 2014, paragraphe 44).

En effet, par leurs écrits et leur parole, les agents expriment le consentement des Etats qu'ils représentent à être liés.

C'est dire qu'il n'y a vraiment pas urgence dans les circonstances de l'espèce. Le Tribunal aurait du simplement énoncer de manière détaillée les faits qui l'ont conduit à prescrire la mesure s'il estime que l'urgence de la situation l'exigeait.

N'ayant observé l'existence de quelque risques probables et imminents pour les fusiliers marins, j'estime que les circonstances telles qu'elles se présentent actuellement au Tribunal n'exigent guère une prescription spécifique de mesure conservatoire.

36. A dire vrai, cette affaire n'aurait jamais du être apportée au Tribunal international du droit de la mer en raison de l'objet du différend. L'Inde n'étant pas un Etat européen, la Cour de la Haye ou un tribunal *ad hoc* aurait été plus indiqué.

Nous soumettons respectueusement cette opinion.

(signé) T. M. Ndiaye

[UNOFFICIAL TRANSLATION]

DISSENTING OPINION OF JUDGE NDIAYE

(Submitted in accordance with Article 30, paragraph 3, of the Statute and Article 8, paragraph 4, of the Resolution on the Internal Judicial Practice of the Tribunal).

Having been unable, to my great regret, to agree with the Tribunal's Order, I believe it is my duty to expose my dissenting opinion. This opinion deals with the procedural conditions in the present case No. 24 concerning the "*Enrica Lexie" Incident (Italy* v. *India)*, request for the prescription of provisional measures in accordance with Article 290, paragraph 5 of the United Nations Convention on the Law of the Sea.

1. In this case No. 24, the International Tribunal for the Law of the Sea (the Tribunal) was seised, by Italy, of a request for the prescription of provisional measures presented in accordance with Article 290, paragraph 5 of the Convention.

2. Therefore, the Tribunal has to establish the existence, or not, of the dispute and to determine whether the procedural pre-requisites provided under Article 290, paragraph 5 of the Convention are fulfilled before deciding whether the Annex VII Arbitral Tribunal would have *prima facie* jurisdiction in the case and thus whether the Tribunal has also the power to prescribe provisional measures if the circumstances so require.

The dispute: Legal regime

3. In the absence of a definition of the dispute in the statutes of international courts and tribunals, it is necessary to have recourse to their case-law in order to establish the legal regime, because the judicial contentious function of tribunals leads them to be seised of disputes, which must be resolved on the basis of law. This means that the dispute must exist and must be a legal dispute.

4. According to the ICJ,

> a dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons
> *(Mavrommatis, Judgment n°2, 1924, CPJI, Series A, n°2 p.11).*

5. The question whether there exists a dispute in a given case is a matter of "objective determination" by the Court.
(Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, 1st Phase, Advisory Opinion, ICJ Rep. 1950, p. 74)

6. "It must be shown that the claim of one party is positively opposed by the other".
(South-West Africa, Preliminary Objections, ICJ Rep. 1962, p. 328)
[Armed Activities on the Territory of the Congo, ICJ Rep. 2006, para. 90, p. 40].

7. The Court finds that its "determination must turn on an examination of the facts. The matter is one of substance, not of form."

[Georgia/ Russian Federation, Preliminary Objections, Judgment of 1 April 2011, para. 30].

8. In principle, the dispute must exist at the time the application is submitted to the Court.
(Aerial Incident at Lockerbie, ICJ Rep. 1998, paras. 42-44)

9. Concerning its object, the dispute must be "with respect to the interpretation or application of the Convention" and must be submitted in accordance with Part XV of UNCLOS.

10. As the ICJ has pointed out

> On a request for provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, or, as the case may be, that an objection taken to jurisdiction is well-founded, yet it ought not to indicate such measures unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded.

The Court has to give

> the matter the fullest consideration compatible with the requirements of urgency imposed by a request for the indication of provisional measures.
> *(Military and Paramilitary Activities, Nicaragua / United States, Provisional Measures, Order of 10 May 1984, paras. 24 and 25).*

11. According to the Applicant,

> [t]he dispute submitted to an Annex VII arbitral tribunal concerns an incident that occurred approximately 20.5 nautical miles off the coast of India involving the *MV Enrica Lexie*, an oil tanker flying the Italian flag, and India's subsequent exercise of jurisdiction over the incident, and over two Italian Marines from the Italian Navy, Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone, who were on official duty on board the *Enrica Lexie* at the time of the incident.
> (Request, para. 3).

12. India recognises that the facts having given rise to the dispute were commited in its EEZ and that the *Enrica Lexie*, an oil-tanker flying the Italian flag, was involved. It has also admitted that India envisages to exercise its jurisdiction over the two Marines. (Written Observations, para. 1.5)

According to the Respondent

> Suffice it to say … that Italy's silence seriously distorts reality and do not permit the Tribunal to correctly understand the subject-matter of the dispute, which actually centres upon the murder by two Italian Marines embarked on the *MV Enrica Lexie*, of two Indian unarmed fishermen embarked on the Indian fishing vessel *St. Antony*, a fishing vessel properly registered in India and fully permitted to be fishing in India's EEZ, which was also damaged by the use of automatic weapons by the two Marines.
> (Written Observations, para. 1.6)

13. The Applicant argues in response:

> We agree that the most regrettable deaths of the two Indian fishermen require investigation and, as appropriate, prosecution, and the Prosecutor of the Military Tribunal in Rome has an open investigation for the crime of murder that must be pursued to its conclusion. But there is an antecedent issue that requires prior determination, which is the subject-matter of the dispute between Italy and India, namely, who has jurisdiction to pursue the investigation and, as appropriate, prosecution, and what account must be taken of the immunity of State officials. The Marine contest the allegation that they fired the shots that killed the two unfortunate Indian fishermen. It is not accepted that the fatal shooting took place from the Enrica Lexie. [...] And, I must emphasize, that the Marines have not been charged with murder under Indian law. [...] A person is not guilty of an offense unless and until convicted by a properly constituted court on the basis of charges of which they are informed in a timely manner and to which they have had an opportunity to respond.
> (Second Round, Tuesday, 11 August 2015, Speech 1, Reply submissions, Sir Daniel Bethlehem, p.1-2)

The stated principle is a fundamental principal of criminal law: the principle of the presumption of innocence!

14. In order to determine the elements of proof concerning the existence of a dispute between the Parties, the Tribunal has to inquire whether:

(a) the case file reveals the existence of an disagreement on a point of law or fact between the two States;

(b) this disagreement is with respect to the “interpretation or application” of the Convention;

(c) this disagreement existed at the time the application was submitted. (Georgia/ Russia, para. 32)

15. There is disagreement on the following issues:

- the exercise of jurisdiction by the coastal State and the flag State;
- the exercise of police powers between the two States and in particular the question of criminal prosecution;
- the materiality of the rules;
- the dispute concerning the qualification of the facts;
- the attributes of sovereignty and the question of absolute immunity for one party and functional immunity for the other party; and finally
- the dispute on the choice of forum.

16. On the critical date, are the facts underlying case No. 24 submitted or not to the domestic law of the Respondent under the criminal procedure?

In the affirmative, in case the Tribunal upheld the Applicant's requests, would it interfere in the very substance of criminal matters pending before Indian tribunals?

How to interpret, in international law, the acts of the Applicants and of its nationals in the domestic legal order of the Respondent?

All these questions affect the issue of the existence of the dispute in international law.

17. Seized in accordance with Article 290, paragraph 5 of the Convention, the Tribunal may prescribe, modify or revoke provisional measures … if it considers that *prima facie* the arbitral tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires; this is the substance of that provision.

18. For these two procedural conditions to be fulfilled, the Tribunal has to, on the one hand, establish an intimate link between the jurisdictional basis for the Annex VII Arbitral Tribunal to examine the merits of the case and the submissions made by the Applicant, and to verify the relationship between the requests on the merits and the request for the prescription of provisional measures. On the other hand, it needs to establish with care the facts of the case and their relevance in order to evaluate whether the urgency of the situation requires the prescription of provisional measures or not.

19. The fundamental legal problem of this dispute recognised by both Parties is the exercise of jurisdiction in the present circumstances.

- For Italy: "the subject-matter of the dispute [between] Italy and India is who has jurisdiction to pursue the investigation and, as appropriate, prosecution, and what account must be taken of the immunity of State Officials".

- For India: "The only legal issue is to know what State or States – because there could be competing jurisdictions – has jurisdiction to try the perpetrators of this shooting, which led to the death of two Indian fishermen."

What are the Parties' arguments?

Italy

> Italy claims, pursuant to UNCLOS, in particular Parts II, V and VII, and notably Articles 2(3), 27, 33, 56, 58, 87, 89, 92, 94, 97, 100 and 300 of the Convention, and customary international law, that India has breached its international obligations. (Request, para. 29; see also PV.15/A24/1).
>
> In its Statement of Claim of 26 June 2015 (Annex A to the Request), Italy requests*:*
>
> In accordance with the provisions of UNCLOS, Italy respectfully requests the Annex VII Tribunal to adjudge and declare that:
> (a) India has acted and is acting in breach of international law by asserting and exercising jurisdiction over the *Enrica Lexie* and the Italian Marines in connection with the Enrica Lexie Incident.
> (b) The assertion and exercise of criminal jurisdiction by India is in violation of

India's obligation to respect the immunity of the Italian Marines as State officials exercising official functions.

(c) It is Italy that has exclusive jurisdiction over the *Enrica Lexie* and over the Italian Marines in connection with the Enrica Lexie Incident.

(d) India must cease to exercise any form of jurisdiction over the Enrica Lexie Incident and the Italian Marines, including any measure of restraint with respect to Sergeant Latorre and Sergeant Girone.

(e) India has violated its obligation under the Convention to cooperate in the repression of piracy.

(See Statement of Claims, para. 33, Annex A to the Request)

The combination of such juxtaposed conducts and attitudes unquestionably reveals a "disagreement" between Italy and India which amounts to a dispute over the interpretation and application of the Convention and the international rules invoked by Italy in the present proceedings. (PV.15/A24/1, see also PV.15/A24/1, p. 21, ll. 1–11).

It [India] even invokes its declaration under article 310 of the Convention. These are clearly matters for the merits. (PV.15/A24/1,

Italy considers that the law and the facts of the present case manifestly show that the Annex VII tribunal under constitution will have more than simply prima facie jurisdiction over the merits of this dispute (PV.15/.A24/1, PV.15/A24/1, p. 20, ll. 18-21)

India's argument seems to confuse the *prima facie* jurisdiction requirement with the separate requirement that the rights claimed be at least plausible. When considering *prima facie* jurisdiction, India asserts that "the subject-matter of the dispute does not fall within the ambit of the Convention." India seems to be arguing that there is no dispute between the Parties "concerning the interpretation or application of [the] Convention." In this context, it focuses on Italy's claims under article 97 and in respect of the immunity of its State officials (*PV.15/A24/1, p. 20, l. 36 to 44, PV.15/A24/1, p. 18, ll. 50 and 51 and p. 19, ll. 1 et 2)*.

Examination of *prima facie* jurisdiction, see PV.15/C24/1, p. 28 to 36.

India

[T]he Annex VII tribunal that Italy requests be constituted does not have jurisdiction to rule on the case that it seeks to submit to it (PV.15/A24/2, p. 14 and 15).

India agrees that the event which is at the origin of the dispute took place in the Indian EEZ and involved the *MV Enrica Lexie*, an oil tanker flying the Italian flag. It is also accepted that India envisages to exercise jurisdiction over the Marines. (Written Observations, para. 1.5).

[T]he subject-matter of the dispute does not fall within the ambit of the Convention… Italy mischaracterizes the subject-matter of the dispute, which is not

an incident of navigation, let alone a collision, in the high seas, but a murder committed by two Italian nationals of two Indian nationals in the maritime area under the jurisdiction of India. (Written Observations, para. 3.5; on the subject-matter of the dispute, see also Written Observations, para. 1.6 and PV.15/C24/2, p. 15, ll. 3 to 7).

Professor Tanzi went to a great deal of trouble yesterday to demonstrate that there was a dispute between India and Italy. Well, I am happy to grant him that – but a dispute about what? (PV.15/C24/4, p. 9, l. 26 to 28).

[T]he only legal issue is to know what State or States (because there could be competing jurisdictions) has jurisdiction to try the perpetrators of this shooting, which led to the death of two Indian fishermen. On this point the Montego Bay Convention is silent (PV.15/C24/4, p. 10, ll. 28 to 32).

[I]t is denied that Italy can invoke the benefit of any immunities recognized by the UNCLOS in favour of the two Marines concerned. (Written Observations, para. 3.5)

Admittedly, the Italian marines were on board a merchant vessel, therefore, the Government of India was not obliged to recognize their claim of immunity under the Convention or any other principle of international law (PV.15/C24/2, p. 2 ll. 48 and 49 and p. 3 ll. 1 and 2; see also, PV.15/C.24/2).

3.1.1 Alleged breaches of provisions of the Convention

Italy

India’s breaches of the provisions of UNCLOS follow, *inter alia*, from: (a) India's unlawful arrest and detention of the *Enrica Lexie*; (b) India's interference with Italy's freedom of navigation; (c) India's exercise of jurisdiction over the Enrica Lexie Incident and the Marines notwithstanding Italy’s exclusive jurisdiction over the same by virtue of the undisputed fact that the Incident took place beyond India’s territorial sea, some 20.5 nautical miles off the Indian coast; (d) India’s exercise of criminal jurisdiction over the Italian Marines who, as State officials exercising official functions pursuant to lawful authority, are immune from criminal proceedings in India; and (e) the failure to cooperate in the repression of piracy by exercising criminal jurisdiction over the Enrica Lexie Incident and the Italian Marines. (Request, para. 30, see PV.15/C24/1, p. 4, l. 31 to 37)

India

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

arguments. (Written Observations, para. 3.1)

It is not enough merely to recite a long litany of provisions of the Convention that might have some tenuous connection with the facts of the case, as Sir Michael and Professor Tanzi did this morning, to establish the jurisdiction of the tribunal. The real question is to know whether or not the dispute between the Parties is covered by one or more provisions of the Convention. *Prima facie* this is not the case if you focus on the real subject-matter of the dispute (PV.15.C.24/2, p. 15, ll. 21 to 27).

Italy's request to enjoin any further judicial and administrative actions would also effectively prejudge claims (b), (c) and (d) advanced in Italy's Notification (claim (e) will be addressed with respect to Italy's second provisional measures submission) (Written Observations, para. 3.55).
The essence of these claims centres on whether the Indian courts have jurisdiction over the incident and whether the Italian Marines enjoyed immunity from suit although the claims are cast in terms of alleged breaches of the UNCLOS. (Written Observations, para. 3.55)

Concerning the specific allegations made in the Statement of Claims:

On Article 2 of the Convention, see PV.15/C24/4, p. 10. l. 13.

Concerning the alleged violation of Article 27, paragraph 5 of the Convention:

> The premise that India used ruse and coercion to cause the vessel to berth at the Kochi anchorage is completely untrue … two unarmed Indian fishermen had been killed ….it was entirely appropriate for India to seek to question the individuals on board for their version of this serious event. (Written Observations, para. 3.50)
>
> There was no ruse, no coercion, as alleged by Italy (PV.15/C.24/2, p. 2, ll. 8 and 9).
>
> With respect to the marines, Italy never claimed that India did not have the right to interrogate them (Written Observations, para. 3.51)
>
> Italy has provided no evidence of the institution of proceedings against the two Marines in Italy. (Written Observations, para. 3.53)

On Article 33 of the Convention, see PV.15/C24/4, p. 9. l. 47

On Articles 56 and 58 of the Convention, see PV.15/4, p. 10, ll. 1-4.

On Articles 87 and 89 of the Convention, see PV.15/4, p. 9, ll. 30 and 31.

On Article 92 of the Convention, see PV/15/4, p. 10, ll. 7-10.

On Article 94 of the Convention, see PV/15/4, p. 10, ll. 11-14.

Concerning the alleged violation of Article 97, paragraph 3 of the Convention:

> This case is not covered by Article 97 of the UNCLOS, but rather is about a double murder at sea (Written Observations, para. 1.11)
>
> There was in reality no 'incident of navigation', nor any collision between the two ships. They had no physical contact and Article 97 of the UNCLOS … is irrelevant by any means. (Written Observations, para. 1.8; see also PV15/C24/2, p. 3, ll. 10-16).

On Article 100 of the Convention:

> there was no piracy attack or threat thereof that could justify the killing of two Indian fishermen so as to attract the application of the Convention and thus the prima facie jurisdiction of an Annex VII tribunal (PV.15/C24/2, p. 3, l. 13 to 17; see also PV.15/2, p. 10, ll. 9 to 12; p. 15, ll. 18 and 19).

On Article 300 of the Convention, see PV.15/4, p. 10, ll. 21 - 25.

20. Concerning the issue of jurisdiction, the Tribunal needs to pay particular attention to the provision of the Convention referred to by the Applicant and which are subject to disagreement between the Parties. Indeed, in order to establish the *prima facie* jurisdiction of the Annex VII Arbitral Tribunal, it is not sufficient for an applicant to simply invoke provisions of the Convention which in the abstract could constitute a theoretical basis for jurisdiction.

It is still necessary that the Tribunal takes into account the facts of which it has knowledge when deciding on the prescription of provisional measures.

In particular, it has to make sure that the *prima facie* jurisdiction on the merits can be established on this basis in relation with the provisions of the Convention relied upon by the applicant.

21. The Tribunal has decided that

> before prescribing provisional measures the Tribunal need not finally satisfy itself that it has jurisdiction on the merits of the case and yet it may not prescribe such measures unless the provisions invoked by the Applicant appear prima facie to afford a basis on which the jurisdiction of the Tribunal might be founded.
> (M/V "SAIGA" (No. 2), para. 69)

However, it must do so on the basis of the principles recalled above given the fact that the jurisdiction has to be established *proprio motu*. It needs to be recalled that, in accordance with Article 288 of the Convention, the Tribunal has jurisdiction over any dispute concerning the interpretation or application of this Convention, if the parties to the dispute have chosen the Tribunal as means for the settlement of disputes under Article 287 of the Convention.

22. In respect of the *prima facie* jurisdiction of the Annex VII Arbitral Tribunal, which is a condition for the jurisdiction of the International Tribunal for the Law of the Sea, the

Applicant has invoked a great number of provisions of the Convention in order to sustain its Request: Articles 2 (3), 27, 33, 56, 58, 87, 89, 92, 97, 100 and 300.

It is the Tribunal's task to control the relevance of these provisions with respect to the dispute it has to decide upon.

23. Concerning the provisions relied upon by the Applicant, the Parties are in disagreement on the scope of their respective obligations under the Convention and their relevance. Article 2, paragraph 3, deals with the sovereignty over the territorial sea whereas the incident took place in India's exclusive economic zone. Likewise, Article 27 concerns the criminal jurisdiction on a foreign vessel in the territorial sea. Article 33 dealing with the contiguous zone has not been referred to by the Parties during the proceedings even if it was listed in the Notification and the Request of the Applicant.

Articles 56 and 58 concern the rights of coastal States and those of other States in the EEZ. They are not relevant in the present case because the Convention remains silent on the military use of the EEZ and on the issue of criminal jurisdiction for crimes and illegal conduct within the EEZ.

Articles 87 and 89 of the Convention concern the freedom of the high seas and, in particular, the freedom of navigation. For this reason, the Applicant claims "breaches of provisions of the Convention :

(a) India's unlawful arrest and detention of the *Enrica Lexie*;

(b) India's interference with Italy's freedom of navigation."

Given the fact that, as admitted by the Applicant itself, "we agree that the most regrettable deaths of the two Indian fishermen require investigation and, as appropriate, prosecution, and the Prosecutor of the Military Tribunal in Rome has an open investigation for the crime of murder that must be pursued to its conclusion";

Given the fact that the incident took place in an area where the relevant Indian legislation is applicable, i.e., the criminal code, India's judicial authorities may exercise its criminal jurisdiction without being in breach of international law.

With respect to Articles 92 and 94 concerning the legal status of vessels and the obligations of the flag State, the subject-matter of the dispute deprives them of any relevance. It is not the vessel that is incriminated, but persons accused of murder which are not otherwise part of crew.

24. Under these circumstances, it is difficult to admit that the arrest and detention of the *Enrica Lexie* during the criminal procedure can be interpreted as violations of the freedom of navigation in the high seas. Otherwise, the principle of freedom of navigation would render vessels immune against all legal proceedings because their arrest would be considered an infringement of the flag State's right to free navigation. Thus, there would be never again a legal order governing the sea and the oceans.

25. Article 97 deals with criminal jurisdiction in matters of collision or other incidents of navigation. The record shows that there has been no collision or incident of navigation

and that the *Enrica Lexie* and the fishing boat *St. Antony* had no physical contact to justify the application of Article 97, paragraph 3 of the Convention.

Moreover, the statement of India pursuant to Article 287 of the United Nations Convention on the Law of the Sea dated 29 June 1995 states:

> The Government of the Republic of India understands that the provisions of the Convention do not authorise other States to carry out in the exclusive economic zone and on the continental shelf military exercises or manoeuvres, in particular those involving the use of weapons or explosives without the consent of the coastal State. [United Nations, 95/600, (XXI. 6) (XXI.6 (a) CN. 199. 1995. TREATIES-5 (Depositary Notification), RATIFICATION BY INDIA].

It appears, given the above, that Article 97, paragraph 3 is not relevant and is ineffective against India. Article 100 relates to the "duty to cooperate in the repression of piracy." This obligation is not directly related to the subject of the dispute, as both Parties have acknowledged. Finally, the last provisions relied on by the applicant relate to Article 300 of the Convention, on good faith, and the ICJ tells us that this principle "is not in itself a source of obligation where none would otherwise exist." [ICJ, judgment of 20 December 1998, *I.C.J. Rep. 1998*, para. 94].

25. In truth, the Convention is scarcely applicable to this incident, which could have taken place at the mouth of any river in the world and have the same terms as the current dispute.

This means that the Annex VII Arbitral Tribunal would not have jurisdiction because the subject-matter of the dispute is not related to the law of the sea *stricto sensu* but rather to:

(a) the exercise of jurisdiction between the coastal State and the flag State;

(b) the exercise of police and criminal justice powers between the two States;

(c) the dispute with regard to the characterisation of the facts;

(d) the attributes of sovereignty and the question of immunity; or

(e) the dispute with regard to the choice of forum.

The provisions of the Convention which, in the Applicant's opinion, would have been violated by the Respondent, may not serve as the basis for establishing the jurisdiction of the Annex VII Arbitral Tribunal in the case on the merits. And the International Tribunal for the Law of the Sea has no jurisdiction over a case which has nothing to do with the interpretation and application of the Convention.

27. We must now examine the second procedural condition contemplated by Article 290, paragraph 5: the urgency of the situation.

Let us first recall the Parties' arguments.

Italy

In relation to "urgency", Italy repeats and relies on all the facts and matters […] which show that the rights in question are suffering irreversible prejudice or damage or at the very least under a real and imminent risk of suffering irreversible prejudice or damage. India's conduct is ongoing and further action is likely to be taken before the Annex VII arbitral tribunal will be "in a position to 'modify, revoke or affirm those provisional measures'". (Request, para. 52, see para. 25, see also PV 15/1, p. 5, ll. 38-45).

> The risk of prejudice to Italy's rights has risen sharply over the last months. (Request, para. 53). The prejudice to Italy's rights has increased each day that the Marines have been subjected to the jurisdiction of the Indian courts. The prejudice has been exacerbated by the medical issues addressed in the Confidential Addendum. (Request, para. 54).
>
> For that entire period [three and a half years] Italy's rights to investigate the conduct of its Marines … to take action against them or to return them to the service of Italy, and in either case to ensure their health, have been prejudiced. Italy has a legal duty of care to the Marines. (Request, para. 54).
>
> Urgency … is both humanitarian and legal. (PV 15/1, p. 49, l. 41; see also PV 15/3, p. 7, ll. 9-21).

With respect to the first measure requested:

> In circumstances where irreparable harm is being suffered by Italy through each and every exercise of jurisdiction, urgency is demonstrated by the fact that the exercise of jurisdiction is ongoing. Here we know for a fact that that is so. As Sir Daniel Bethlehem has drawn to your attention, a hearing is scheduled to take place before the Indian Supreme Court on August 26 to address the article 32 Writ Petition deferment application that is rooted in the commencement of the Annex VII proceedings. The Additional Solicitor General for India is required to submit the Indian Government's views on that application today. And, of course, both marines are still under the bail conditions of the Indian Supreme Court. These exercises of jurisdiction are certain and ongoing. (PV 15/1, p. 39, l. 45 – p. 40, l. 8).
>
> India has left no doubt that it wants to proceed to trial … India blames Italy for the delay, on the one hand, but relies on delay on the other to reassure the Tribunal that there is no urgency. (PV 15/1, p. 40, ll. 14-19).

With respect to the second measure sought:

> the *status quo* in relation to the marines is one where their rights and Italy's rights are suffering irreparable damage on a daily basis. Every additional day in which a person is deprived of these rights must be regarded as one day too many. (PV 15/1, Verdirame, p. 47, ll. 39-42). India is also prejudging the marines' guilt before charging them, and by doing so, it has aggravated the prejudice, and brought all the risks connected to the ongoing

> exercise of criminal jurisdiction into even sharper relief." (PV 15/1, p. 48, ll 7-11, see also PV 15/3, p. 15, ll. 9-25).

On the determination of urgency, see PV 15/3, p. 15, l. 35 – p. 16, l. 40.

On the notion of urgency (temporal dimension): "[…] the key date is when the arbitral tribunal is itself in a position to act." (PV 15/1, p. 25, ll. 35- 36).

> the measures [that the Tribunal] prescribes may in principle last through to the arbitral tribunal's final award on the merits. (PV 15/1, p. 26, ll. 16-17).

> So it is entirely proper for Italy to request provisional measures extending to the final award of the arbitral tribunal. (PV 15/3, p. 10, ll. 27-28).

On the duration of the dispute:

> urgency is not be [*sic*] assessed by the length of time since the dispute has arisen but by an appreciation that every continuing day that is lost is a day that can never be recovered. (PV 15/1, p. 50, ll. 14-16). India is conflating two analytically distinct issues: the duration of the dispute and the assessment of urgency. (PV 15/1, p. 48, ll. 17-18). It is not uncommon for disputes over the exercise of jurisdiction and immunity of State officials to be brought to an international forum after some domestic proceedings. (PV 15/1, p. 48, ll. 23-25). The well-foundedness of the application must be assessed without reference to the issue of delay in filing it. The preconditions for seeking the prompt release may have been satisfied before, but failing to act as soon as those preconditions arise does not […] [render] the application inadmissible. (PV 15/3, p. 17, ll. 36-40).

India

Neither the first not the second Italian submission fulfils either the "aggravated urgency" standard resulting from Article 290(5) of the UNCLOS or even the "basic" standard of urgency. (Written Observations, para. 3.13)…

On the notion of urgency, see the Written Observations, paras. 3.15 to 3.18.

On the notion of urgency (temporal dimension):

> Italy places no time limit on its request. (PV 15/2, p. 23, ll. 27-28) But that is not what Article 290, paragraph 5, says (PV 15/2, p. 23, l. 44) there is a temporal limitation to the duration of any provisional measures that may be prescribed by this Tribunal (PV 15/2, p. 24, ll. 5-6). [the] tribunal is not called on to consider any provisional measures that will remain in force throughout the duration of the Annex VII tribunal. The question is only whether there is any urgency over the next few months, after which the Annex VII arbitral tribunal will have been constituted and will be in a position to deal with the matter. (PV 15/2, p. 24, ll. 17-23, see also PV 15/4, p. 5, ll. 8-11).

> In these circumstances, there is no risk that Italy will suffer any prejudice with respect to these proceedings, no urgency of the situation that would justify provisional measures and no grounds for restraining the Indian judicial and administrative process, which has operated in an exemplary fashion, notwithstanding the various tactics employed by Italy to disrupt the proceedings. (Written Observations, para. 3.23).

The first provisional measure requested by Italy:

> When the facts are placed in their proper context, they show that there is absolutely no situation of urgency that justifies the Tribunal issuing an order restraining India from continuing to take judicial or administrative measures – measures that it has always carried out lawfully and with absolute fairness to Italy and the two Marines – or to exercise any other form of jurisdiction. (Written Observations, para. 3.21; see also PV 15/2, p. 31, ll. 28-30; on the "facts [which] place the misplaced nature of Italy's first request in perspective", see Written Observations, paras. 3.24 to 3.37).
>
> (i) [Italy] has been responsible both for delays in allowing the investigation of the incident to be carried out […] and delays to the Indian court proceedings. (see also PV 15/2, p. 11, ll. 30-33; PV 15/2, p. 26, ll. 5-8, p. 29, ll. 20-26; and PV 15/4, p. 1, l. 38, p. 2, l. 47).
>
> (ii) Italy has been treated entirely fairly by the Supreme Court. Many of its, and the two Marines', applications have been favourably ruled on … (see also, PV 15/2, p. 26, ll. 10-13).
>
> (iii) Italy has, on several occasions, abused the judicial process (see also PV 15/2, p. 32, ll. 12-13 et p. 30, l. 16 – p. 31, l. 7; PV 15/2, p. 40, ll. 7-8).
>
> (iv) Italy succeeded in obtaining a stay of the Special Court proceedings [..] [which] means that there is no real and imminent risk of irreparable prejudice to Italy's rights […] there is no urgency to the situation […] If anything, it is India's rights that have been compromised by Italy's conduct. (see also PV 15/2, p. 11, ll. 21-25 et p. 13, ll. 35-39). The proceedings before the Special Court are in abeyance. There is no prospect that the stay of those proceedings will be lifted, or that the prosecution will present the results of the NIA investigation, that it will present that report to the Special Court, or that the defendants will have their opportunity to answer that case. There is no chance that that is going to happen in the near future, and certainly not before the Annex VII tribunal is set up and running. (PV 15/2, p. 31, ll. 16-21; see also PV 15/4, p. 5, ll. 15-21).
>
> (v) On the duration of the dispute: the fact that Italy waited over three years to bring the Annex VII Arbitration and to introduce a Request for Provisional Measures itself attests to the lack of urgency. Nothing that has recently taken place with respect to the legal situation in India and the proceedings there even remotely adds any urgency to the matter. (Written Observations, para. 3.38, see also para. 3.22 and PV 15/2, p. 32, ll. 17-24). If a State delays filing a request for Provisional

> Measures when it could have done so earlier, it causes serious doubts over its claim that there is a real and imminent risk of irreparable prejudice. (PV 15/4, p. 7, ll. 37-41).

> Second Provisional Measure requested by Italy: the second measure cannot be justified on the grounds of urgency as requested by Italy, far less can there be any form of aggravated urgency in bringing proceedings before this Tribunal before the Annex VII tribunal can be constituted. (PV 15/2, p. 37, ll. 32-35)

> This supposes that the actual situation of the two individuals accused of murder is so dramatic that the Tribunal should prescribe total liberty, security and movement for both of them including their stay in or return to Italy. (Written Observations, para. 3.40). [N]owhere else … does Italy dare allege that their security is threatened. And indeed it is not and never has been the case. (Written Observations, para. 3.41)

> Regarding the situation of Mr Latorre: new extensions are not to be excluded if necessary on humanitarian grounds. (Written Observations, para. 3.42). [H]is state of health is evolving […] (Written Observations, para. 3.43) [G]iven the renewable six months leave granted by the Supreme Court on 13 July 2015, Italy is ill-advised to invoke any urgency on this matter (Written Observations, para. 3.43; see also PV 15/2, p. 36, ll. 10-39).

> Regarding the situation of Mr Girone: he is under bail conditions (Response, paragraph 3.44) the urgency of authorizing him to go back to and stay in Italy is belied by his own behaviour. (Written Observations, para. 3.45; see also PV 15/2, p.37, ll. 2-17)

> On the deprivation of liberty: the marines are not detained, not imprisoned. They are at large under what I would call very light supervision. (PV 15/4, p. 18, ll. 31-32).

28. Provisional Measures aim to preserve the rights of the Parties in dispute and to prevent irreparable damage. Indeed to address the urgency of a situation before the dispute is settled on the merits and in law, the judge must act by prescribing provisional measures. In view of the urgency, he must be certain that the damage is likely and imminent.

29. The preservation of the rights of the Parties pending the constitution of the Annex VII Arbitral Tribunal is an expression of the principle of the equality of States and that of the effective equality, from a procedural perspective, of the Parties before the Tribunal. The rights to be preserved are those likely to be determined on the merits. And provisional measures should only be prescribed when the irreparable harm is imminent. There exists therefore a close link between the damage and the urgency: if irreparable harm is not imminent, there is little urgency.

30. The circumstances of the case before the Tribunal may or may not reveal the necessity of acting to preserve the rights of the Parties and to prevent irreversible prejudice or irreparable harm. In this sense, a real and imminent risk must be found: hence the importance of the factual evidence.

31. Indeed, the invocation of circumstances cannot be done without considering the provisions of the Convention whose violation is invoked in support of the request for prescription of provisional measures. And the judge should play a leading role in the evaluation of the correlation of the evidence supplied and the rule invoked. As noted by Judge Lauterpacht: "qualifier la présente affaire de grave et d'urgente ne signifie pas que la Cour doive, en l'abordant, se départir de son impartialité traditionnelle et de son ferme attachement aux norms juridiques." (So to describe the character of the present case is not to say that Court should approach it with anything other than its traditional impartiality and firm adherence to legal standards).
(Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, ICJ Rep. 1993, p 408).

32. This is so because urgency implies that in the circumstances of the case some action is needed to preserve the rights claimed by the Parties which cannot wait for the rendering of the award by the Annex VII Tribunal. Thus the state of the proceeding when the application is made, as well as the time remaining before the constitution of the Arbitral Tribunal are relevant factors for determining the urgency of the situation. In this sense, urgency is related to the severity of the damage which the provisional measure seeks to prevent. Thus, if the Court were to find the potential damage to be irreparable, urgency would be established.

33. And herein lies the difficulty, since this reference to the characterisation of the facts is in any case a matter which remains in dispute. Sir Hersch Lauterpacht wrote that "A substantial part of the task of judicial tribunals consists in the examination and the weighing of the relevance of facts." (H. Lauterpacht, The Development of International Law by the International Court, 1958, p. 48).

In a procedure characterised by urgency, the impartial and critical evaluation of the factual scenario by the tribunal seised is necessarily limited because the tribunal needs to balance the urgency of the provisional measures and the important requirement not to distort the facts.

34. As Kreca remarks:

> The procedure of indication of provisional measures relies heavily on refutable assumptions (*presumptio juris tantum*), e.g., the refutable assumption that the Court has jurisdiction in the merits of the case in which provisional measures are adopted … However, an incorrect assessment of facts necessarily leads to the erroneous application of law which is the ontological antipode of the ideal of judicial proceedings. And a *prima facie* assessment of facts necessarily entails a very high risk of mistake. (Application of the Convention, op. cit. pp. 457-458).

35. In this case, do the facts alleged by the Applicant in support of its request indicate that the urgency of the situation requires the prescription of provisional measures? The Tribunal does not really reach any conclusion as to the urgency of the situation or does so by preterition. It states: "Considering that the above consideration (i.e., continuation of court proceedings) requires action on the part of the Tribunal to ensure that the respective rights of the parties are duly preserved". (Paragraph 107 of the Order of 24 August 2015).

However, the record shows that these views are to be qualified insofar as the first Marine has been in Italy for more than a year for medical reasons, while the second Marine has taken up residence at the home of the Italian Ambassador to India, where on several occasions he has been visited by members of his family.

Moreover, India gave assurances to the Tribunal and firm commitments at the hearing (Paragraph 130 of the Order).

In the *Timor-Leste/Australia* case, the ICJ said this:

> The Court further notes that the Agent of Australia stated that "the Attorney-General of the Commonwealth of Australia [had] the actual and ostensible authority to bind Australia as a matter of both Australian law and international law". The Court has no reason to believe that the written undertaking dated 2 January 2014 will not be implemented by Australia. Once a State has made such a commitment concerning its conduct, its good faith in complying with that commitment is to be presumed. (Questions relating to the seizure and detention of certain documents and data (TIMOR-LESTE v. AUSTRALIA). Request for the Indication of Provisional Measures, Order of 3 March 2014, ICJ Rep. 2014, para. 44).

Indeed, through their writings and their words, agents express the consent to be bound of the States that they represent.

This means that there really is no urgency in the circumstances of the case. The Tribunal would simply have had to state in detail the events which led it to prescribe the measure, if it considered that the urgency of the situation demanded it.

Without having observed the existence of any probable and imminent risk to the Marines, I consider that the circumstances as they are presented to the Tribunal do not require the specific prescription of provisional measures.

36. In truth, this case ought never to have been brought before the International Tribunal for the Law of the Sea because of the subject-matter of the dispute. Since India is not a European State, the Court in The Hague or an *ad hoc* tribunal would have been more appropriate.

We respectfully submit this opinion.

(*signed*) T. M. Ndiaye

DISSENTING OPINION OF JUDGE LUCKY

1. I did not vote in favour of the operative paragraphs setting out the order of the Tribunal for reasons that may differ substantially from those in the Judgment/Order. However, I find it difficult to concur with some of the findings, specifically paragraphs 54, 67, 73, 106, 107, 129 131 and 141. Therefore, I feel obliged to cast a negative vote on the said paragraphs. This opinion sets out the reasons for my disagreement.

2. Although at this stage of the proceedings, where an application is made for provisional measures by Italy, the Tribunal does not deal with the merits of the case. That will necessitate assessment and findings on evidence. Nevertheless, a brief account of the incident presented by the States will be helpful.

Briefly the description presented by Italy, the Applicant, is set out in paragraphs 3-11 as follows:

3. On 15 February 2012, the *Enrica Lexie*, an oil tanker ("the tanker"), flying the Italian flag with 6 Italian marines on board was en route from Sri Lanka to Djibouti. The tanker was approximately 20.5 nautical miles off the coast of Kerala, India, when an unidentified craft was detected on the radar approximately 2.8 nautical miles from the tanker. The craft was heading towards the tanker. As the craft drew closer, two marines of the Italian Navy, Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone, who were on official duty on board the *Enrica Lexie*, concluded that the craft was on a collision course with the tanker and that its *modus operandi* was consistent with a pirate attack (there had been several pirate attacks in the area). Despite visual and auditory warnings from the tanker and firing warning shots into the water, the craft continued to head towards the tanker. Sergeant Girone, looking through binoculars saw what appeared to be persons carrying rifles as well as instruments for boarding ships. After apparent attempts to approach the tanker, the craft turned away and headed toward the open sea.

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

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

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

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

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

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

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

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

Briefly, the version of the incident by India is set out in paragraphs 12 and 13 as follows:

12. On 15 February 2012 the *St. Antony*, a fishing vessel, registered in India and permitted to fish in the EEZ of India was fishing in the EEZ of India, approximately 20.5 miles from the Indian sea coast off Kollam, Kerala. At about 4.30 p.m. (IST) two Italian marines on board the *Enrica Lexie*, namely Sergeant Latorre and Sergeant Latorre, fired 20 rounds through their automatic weapons at the fishing vessel, the *St. Antony* killing two fishermen, One was shot in the head and the other in the stomach. Mr Jelastine was at the helm of the boat and Mr Pink was at the bow. The act of firing endangered the safety of the other nine fishermen on board and caused damage to the gas cylinder and wheelhouse of the boat. The fishermen on board were unarmed. The investigations revealed that the firing was not supported by any reasonable belief of danger to life or property/or even that this firing was done in self-defence. In simple terms, two unarmed fishermen of India were killed through no fault of theirs. The two marines were arrested.

13. Since the arrest the marines have made applications for bail and challenged the jurisdiction of the Supreme Court of India. They claim that India does not have jurisdiction to conduct criminal investigations and to charge and try the marines for the capital offence of murder.

Difference in versions

14. In provisional measures proceedings, the Tribunal does not deal with the merits of the case. The Tribunal is dealing with the application for the measures set out hereunder. The main concern is whether there is a prima facie case, whether the matter is urgent and whether the current status quo should be maintained, and if so, will there be irreparable damage. Further, whether an arbitral tribunal, duly constituted, will have jurisdiction to hear and determine the matter.

15. The relevant article of the United Nations Convention on the Law of the Sea ("the Convention") *inter alia* is set out below:

> **Article 290, paragraph 5: provides**
> Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea or, with respect to activities in the Area, the Seabed Disputes Chamber, may prescribe, modify or revoke provisional measures in accordance with this article if it considers that prima facie the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4.

16. The above provision gives the Tribunal the jurisdiction to grant provisional measures [p]ending the constitution of an arbitral tribunal. This depends on whether that tribunal would have jurisdiction and that the urgency of the situation so requires.

17. The modification, revocation or affirmation of the order is the prerogative of the arbitral tribunal after it is constituted and is functional (see the *MOX Plant Case*). Therefore, it seems to me that the Tribunal has to determine whether the arbitral tribunal "would have jurisdiction" and whether or not the situation is "urgent" enough to necessitate granting the measures being sought.

18. Italy (the Applicant) seeks the following provisional measures in this case

> (a) India shall refrain from taking or enforcing any judicial or administrative measures against Sergeant Massimiliano Latorre and Sergeant Salvatore Girone in connection with the Enrica Lexie Incident, and from exercising any other form of jurisdiction over the Enrica Lexie Incident; and
> (b) India shall take all measures necessary to ensure that restrictions on the liberty, security and movement of the Marines be immediately lifted to enable Sergeant Girone to travel to and remain in Italy and Sergeant Latorre to remain in Italy throughout the duration of the proceedings before the Annex VII Tribunal.
>
> In summary, if the requested provisional measures are not granted forthwith then:
>
> "(a) there will be further and continuing breaches causing serious, irreversible and deepening prejudice to Italy's rights at issue;

> (b) action is likely to be taken by India that would prejudice the carrying out of any decision on the merits which the Annex VII arbitral tribunal may render; and
> (c) irreparable harm to health and well-being will or is very likely to follow, with the consequence of serious and irreversible prejudice to Italy's rights by virtue of the nexus between Italy and the Marines."

19. In effect this is an application to stay proceedings in the Indian Supreme Court, The said proceedings have been challenged in different Indian Courts *inter alia* on the question of jurisdiction.

20. The primary concern of a tribunal should be to determine whether the requirements for an order of provisional measures have been fulfilled.

Introduction

21. Both sides have not called any witnesses or provided any factual evidence about the incident. In their written submissions, each side has set out their account of the incident. It is clear that the account of each side differs from the other. Out of an abundance of caution, I have to make it abundantly clear that I am not making any findings of fact; such will be the function of the Court at the trial on the merits.

22. Another important question is whether the Annex VII arbitral tribunal, to be established, will have jurisdiction.

23. In order to grant provisional measures a court or tribunal has to consider the following:

Is there a dispute?

24. If there is a dispute, (I think there is a dispute) then;
Have the parties reached a settlement? The answer is negative;
Have the parties exchanged views? It is not disputed that the parties have done so.

25. Both States are Parties to the United Nations Convention on the Law of the Sea (the Convention). Arbitral proceedings under Annex VII of the Convention were initiated by Italy. An arbitral tribunal has not been constituted.

26. The chronology of events set out below provides useful information for consideration in determining the questions posed regarding jurisdiction, urgency, and delay in instituting the present proceedings, abuse of process and whether local remedies have been exhausted.

The following is a chronology of events

27. The list set out in annexes to the application is quite comprehensive. I have listed significant dates that will assist in arriving at a decision in this matter

(a) On 6 February 2012 six Italian marines were deployed **on board the** Italian ship the *M/V Enrica Lexie*, an oil tanker, as Vessel Protection Deployment officers.

(b) On 15 February 2012 the incident described in the versions of India and Italy, set out above, took place.

(c) On 15 February 2012 at 11.15pm on the basis of a complaint by the owner of the *St. Antony*, FIR No. 02/2012 was registered under Section 302 of the Indian Penal Code and the FIR was submitted to the Chief judicial Magistrate Court in Kollam. Kerala Police started an Investigation.

(d) On 19 the February 2012 during the investigation by the coast guard and police officers, Kerala police examined the crew members and identified and arrested Sergeants Latorre and Girone.

(e) On 21 February 2012 The Director General of the Kerala police issued order No. T3-16/673/12, thus constituting a special investigating team

(f) On 23 February 2012 Court Writ Petition No.4542 of 2012 was filed before the High Court of Kerala under Article 226 of the Constitution of India, challenging the jurisdiction of the State of Karalla to conduct a criminal investigation.

(g) On 24 February, the Deputy Attorney of the Prosecution, Office, Rome in a communication advised the Ministry of Defence, Head of Cabinet, that “this office has opened a criminal proceeding under number 9463/2012 (RGNR-

General Registrar for the entry of Criminal Notices) against Sergeants Latorre and Girone –for the crime of murder, in reference to the events occurred in international waters in the Indian ocean on the 15 February 2012."

In my opinion, the end result is that there are parallel criminal proceedings, in Italy and India. It may also be deemed competitive jurisdiction that has resulted in this application (Case 24).

(h) On 19 April 2012 Writ Petition was filed under Article 32 of the Constitution of India with the Supreme Court challenging the legality of the investigation and the alleged violations of Articles 14 and 21 of the Constitution of India.

(i) On 18 May 2012 Kerala police filed a charge sheet (police report) against the accused, the above mentioned marines (Sergeants Latorre and Girone) under sections 302,307 and 427, read with section 34 of the Indian penal Code and under section 3 of the SUA Act of 2001.

(j) On 22 May 2012 the accused filed an application for bail (No.351/7/12 before the High Court of Kerala. Bail was granted on 30 May.

(k) On 25 May 2012 Kerala police filed a charge sheet (police report) against the accused (Sgts.Latorre and Girone) under sections 302, 307 and 427, read with section 34 of the Indian Penal Code, and under section 3 of the SUA Act of 2002.

(l) On 22 May 2012 the accused, Sgts. Latorre and Girone, filed an application for bail before the High Court of Kerala (It is noted that bail was granted on 30 May 2012).

(m) On 25 May 2012, the case was committed to the Sessions Court for a criminal trial.

28. After several hearings in the High Court of Kerala for special leave to appeal the decision of the High Court of Kerala and a finding by the Supreme Court of India that the State of Kerala had no jurisdiction to investigate the case, the Union of India was directed to set up a Special Court to determine the question of jurisdiction. A series of diplomatic and ministerial negotiations, ensued, as well as applications to the Supreme Court and for a stay of proceedings. Nevertheless, Italy filed this application for provisional measures, pending the constitution of an Annex VII arbitral tribunal. A hearing before the Supreme Court is scheduled for 26 August 2015.

Abuse of Process

29. Articles 290, 294 and 295 of the Convention provide for the preservation of the rights of the parties to the dispute, whether the arbitral tribunal to be constituted would have *prima facie* jurisdiction and that the urgency of the situation requires an order for provisional measures The said articles must be construed as a whole and in the context of the chain of events set out in the chronology of events set out in paragraph 22 above. It seems apparent to me that Italy engaged the Judicial system of India with several applications, for bail, conditions of bail, jurisdiction and for a stay of investigation and a stay of judicial proceedings .All these applications were addressed by the Supreme Court during the past 3 ½ years. In July this year Italy filed this case for provisional measures notwithstanding that the Supreme Court of India is considering the matter and a Special Court has been established to hear and determine issues relating to jurisdiction and related matters. I find that an abuse of process is evident.

Jurisdiction

30. It is my view that the question in this case can be divided into the jurisdiction of the International Tribunal for the Law of the Sea (the Tribunal) to accept the application in this case and to determine whether the Annex VII tribunal, to be constituted, will have jurisdiction to determine the case on the merits.

31. Immediately after being informed of the incident, Italy promptly asserted that it has jurisdiction.

32. India has *de facto* exercised jurisdiction from the time the *Enrica* was ordered to proceed to the Port of Kochi where the investigation commenced. The vessel was boarded by armed Indian police and coast guard personnel, the ship and crew were detained. The crew was asked to hand over information and materials, which India subsequently sought to introduce into its domestic court proceedings. (ITLOS/PV15/c24/1 lines 1-5 and 38-46). The crew was interrogated. The two marines were subsequently arrested and informed of the charge.

33. The questions are **whether** the arbitral tribunal will have jurisdiction and whether the matter is admissible and whether the Tribunal can grant/order the provisional or mandatory injunctive relief. The question of parallel jurisdiction will be considered later in this opinion in order to decide which of the two States has jurisdiction to hear and determine the matter.

34. In order to arrive at a decision, whether or not to grant the reliefs sought. It seems to me that the Tribunal is being asked to act as a Court of Judicial Review of the Indian Administrative and Judicial System and to decide whether there is an abuse of the due process of law. If the Tribunal finds that the matter is urgent and the marines are subject to an abuse of process then the reliefs sought should be granted. However, it seems to me that the application is not urgent and local remedies are still pending

35. A crucial question must be whether or not the dispute between the parties falls within the ambit of the Convention. Firstly let me say at the outset that the Convention does not contemplate or provide for situations in the instant case where the offence of murder is committed involving victims and accused from different ships in the EEZ of one of the States. Article 2, paragraph 3, deals with sovereignty over the territorial sea. The offence did not occur in the territorial sea. Article 27 provides fo*r Criminal jurisdiction on board a foreign ship* ***passing through the territorial sea*** *)to arrest any person or to conduct an investigation in connection with any crime* ***committed on board the ship during its passage (my emphasis).*** The alleged offence occurred in the EEZ during passage in the EEZ and on board two ships. Article 33 provides for infringement of the customs, fiscal, immigration or sanitary laws in the contiguous zone In these circumstances this article cannot be applicable. Article 56, paragraph 2, provides that:

> In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

36. This article must be construed as a whole with the other paragraphs for example article 58, paragraph 1(a), that provides for *sovereign rights for the purpose*

of exploring and exploiting, conserving and managing the natural resources … The circumstances in this application are not related to the foregoing. Article 58 provides for and specifies the *Rights and duties of other States in the exclusive economic zone.* Article 87 speaks of freedom on the high seas. Article 87, paragraph 1(a), speaks of freedom of navigation. The said article like the other articles is silent on the commission of criminal offences. Article 92 specifies the status of ships and article 94 the duties of a flag state, these are not applicable.

37. There is a view with which I do not agree that article 97 is applicable even given a wide and generous interpretation, article 97, paragraph 1, reads:

> In the event of a collision or other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the administrative authorities either of the flag State or the State of which the person is a national.

38. The governing words in this provision are "**collision** "and "any other **incident of navigation** concerning the ship on the high seas. The allegations in this application do not relate to "collision" or incident of "navigation". Consequently the contention that "incident" can also mean allegation of murder is incorrect. Article 100 in my view is also not applicable.

39. Before determining which State has jurisdiction, the forum for any trial of the marines is of paramount importance.

The Forum

40. It is not disputed that the incident occurred on 15 February 2012 at approximately 20.5 nm off the coast of India. It is not disputed that both States are claiming jurisdiction. It is not disputed that the *Enrica Lexie* is an oil tanker, registered in Italy and was flying the flag of Italy at the time of the incident. It is also not disputed that the *St. Antony* is a fishing vessel that was registered in India.

Where did the actual incident take place?

41. The incident occurred in the EEZ of India. However, this is a case of alleged murder or the unlawful killing of two fishermen on board a fishing vessel, the *St. Antony*, registered in India and permitted to fish in the said EEZ. The shots were allegedly fired from the *Enrica Lexie*, a tanker ship, flying the Italian flag and registered in Italy. The fishermen died on the *St. Antony*, death occurred on the boat .Therefore in my view the alleged murder took place on the *St. Antony*, not on the *Enrica Lexie*.

42. The factors that I have gleaned are from the Judgment of the United States Supreme Court in the **United States v Cotroni [1989] 1 SCR 1469**

- Where was the impact of the offence felt or likely to be felt?

The answer to this question seems to be in India.

- Which jurisdiction has the greater interest in prosecuting the offence?

The answer seems to be India.

- Which police force played a major role in the development of the case?

It is the Indian police force and investigating officers and the relevant Court.

- Which jurisdiction has laid the charges?

It appears to me that Italy has laid charges; However India has been prevented from doing so by the applications to the Indian Supreme and High Courts.

- Which jurisdiction is ready to proceed to trial?

It seems to me that India is prepared to proceed to trial. The case was sent to the Sessions.

- Where is the evidence located?

The evidence seems to be in India.

Arbitration

43. I do not think it is legally correct to find that India has consented to the jurisdiction of the Annex VII tribunal. Article 287 of the Convention in dealing with the choice of procedure paragraph 3 provides that;

> 3. A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII.

44. The article specifies the Party *is "deemed"* to have *"accepted arbitration."* This cannot mean the party has consented to arbitration. If the party has not exercised its right to make a declaration it must accept arbitration. There are several factors to be considered before the question of jurisdiction can be determined. Article 290, paragraph 1, of the Convention provides that:

> if a dispute has been duly submitted to a court or tribunal which considers that *prima facie* it has jurisdiction under this Part or Part XI, section 5,the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the rights of the parties to the dispute…pending the final decision.

45. It follows that there must be a dispute that has been submitted. The question is whether the court or tribunal has or in this case the Annex VII tribunal will have jurisdiction to hear and determine the matter. In my opinion, there are two salient questions to be examined. Firstly is there a sufficient reason or evidence to find that there is a *prima facie* case. Perhaps it will be convenient to define the meaning of *prima facie*. In law it means that there is sufficient evidence to prove a claim. The standard of proof in such an application is relatively low (See the *Louisa Case*). However, in my opinion the threshold should not be reduced to meet the case of an applicant.

46. Secondly, as I alluded to earlier, neither side has led any evidence. What is before the tribunal is some documentary evidence, i.e. the chronology of events, the medical and the fact that the matter is currently engaging the attention of the Supreme Court of India? The question relating to jurisdiction is extrinsically linked to admissibility and more importantly, urgency. Article 290, paragraph 5, sets out the relevant law it reads in part:

> Pending the constitution of an arbitral tribunal to which the dispute is being submitted under this section, any court or tribunal agreed upon by the parties or failing such agreement within two weeks from the date of the request for provisional measures the International Tribunal for the Law of the Sea…may prescribe, modify or revoke provisional measures in accordance with this Article if it considers that ***prima facie*** the tribunal

> which is to be constituted **would have jurisdiction** and the **urgency** of the situation so requires" (emphasis mine)

47. The words to be addressed are firstly "***prima facie***", secondly "***would have jurisdiction***" and "***urgency***". Jurisprudence of some national and international bodies provides that

> Provisional measures (which are similar to injunctive relief in most national Courts) are discretionary in nature and are only granted in exceptional and urgent circumstances specifically to guarantee, even temporarily, the rights of the applicant party (see the Separate Opinion of Judge Mensah in the *MOX Plant Case*). When there is a request for provisional measures the Tribunal will not and should not deal with the merits of the case; to do so would be to usurp the function of the arbitral tribunal. Further, in an application for provisional measures which is heard *inter partes*, the parties would not have had the time nor would they, as in this case, have been able to provide *all* the evidence to prove or to refute the allegations.
> (See *Land Reclamation by Singapore in and around the Straits of Johor (Malaysia* v. *Singapore), Provisional Measures (Separate Opinion of Judge Lucky)*)

The degree of proof

48. The burden of proof required in a case for provisional measures is relatively low. The Tribunal is being asked to make mandatory orders, *inter alia*, to grant the measures set out above. Therefore, several factors have to be considered: the balance of convenience or inconvenience to each side; the status quo as to whether the decision would cause prejudice; and, whether there will be serious, irreversible harm to the marines and by extension Italy. Because of the foregoing factors, could and should the matter be deemed urgent? Nevertheless, the question to be posed and answered when considering each factor, and/or all of them jointly is whether the decision will be fair to both sides.

Urgency

49. Perhaps, at this juncture it will be convenient to deal with the question of "urgency", which is a requirement for prescribing provisional measures. This is of particular significance in the special circumstances of this case. The view expressed

here is supportive of my reason for not recommending the measure in the concluding paragraphs of the judgment.

Is there a *prima facie* case?

50. In my view the merits of the application have to be considered, but not determined or seemingly determined. The evidence must disclose that there would be serious harm to the Applicant and that the rights of the applicant party would be prejudiced. The possibility or probability of such harm cannot be based on speculation because this is insufficient. The Applicant must show a very strong probability upon the facts that serious harm will accrue to it in the future. The degree of probability of future harm is not an absolute standard; what is to be aimed at is justice between the parties having regard to the circumstances. I mean no disrespect to either party because in such applications time constraints are relevant: the full "pre-trial" processes have not occurred, the defence to the Statement of Claim has not been served and neither side's case has been "proved" as at a final hearing on the merits. As I suggested earlier, I do not find that the evidential requirements for provisional measures have been met.

51. For the avoidance of doubt, and to support my view that an Annex VII tribunal will not have jurisdiction to deal with this case, I have searched and can find no provision in the articles of the Convention to support the submission that a case of murder in the EEZ involving accused of one State and victims of another can be tried by an international tribunal. This is a matter for the domestic court of the relevant forum (see paragraph 45). Municipal or domestic courts have the experience to hear and determine criminal cases.

52. The procedure in the Indian judicial system is that when a report of a criminal offence is made an investigation begins. Charges are not preferred until the report of the investigating team is submitted to the relevant body.

53. The chronology of events pertaining to this incident, set out in paragraph 27 (above), fortifies my view that the due process commenced from the date of arrest and has continued until the said marines began to make a series of applications for

bail, to leave India for specific reasons and later to stay proceedings. In my view the Court was lenient and reasonable in these circumstances. An accused charged with murder is not entitled to bail.

54. At this stage, I have to mention that the crime of murder is not a bailable offence. I have not seen the reasons for granting bail. It seems as though the charges were not framed by the relevant court. Nevertheless, Italy made a successful application to have the process "stayed" at a hearing by the Supreme Court of India. It seems to me, having read the chronology of events in respect of the judicial proceedings before the Indian Courts that from the date of arrest of the Sergeants and Italy were availing itself of the due process in the Indian Judicial system, thereby delaying the preferment of criminal charges and preventing a trial before a special Court in India.

55. Before proceeding, I think reference to the factual background (the factual matrix) in this matter is important. The question of where the incident occurred is significant. Whether it occurred in the contiguous zone is not relevant. The fact is that the incident occurred in the EEZ of India. In addition, although it is said to be international waters, India was entitled to pursue the *Enrica Lexie* because bullets were allegedly fired by marines from the *Enrica Lexie* and had killed two fishermen on board the *St. Antony*. Secondly, it is my view that the actual killing occurred on board the *St. Antony*, a fishing vessel registered in India. It is not disputed that the said marines from the *Enrica Lexie* fired the shots. The question whether they thought it was a pirate attack or whether the shots were fired into the water and not at the *St. Antony* killing two fishermen and injuring others is a matter of fact to be determined when the case on the merits is heard

Is the matter in the circumstances urgent?

56. It is not disputed that three and a half years have passed since the marines were arrested. However, during this period an application for provisional measures was not filed and further there being parallel jurisdiction, because Italy insisted that the marines should be tried in Italy. An application was not made to India to extradite the marines to face trial in Italy. Instead, Italy made an application for bail and filed

an application to determine whether India has jurisdiction in the Indian Supreme Court.

57. In my opinion, Italy has itself to blame for the delay as it used, in my humble and respectful opinion, the due process of the law and the rather lenient and flexible approach in the Indian was beneficial to the Applicant judicial process. It is also not disputed that diplomatic and political negotiations were also taking place for the States to arrive at an amicable settlement. It is my view that there is a clear separation of powers between the independent judiciary of a country and the political directorate. It is accepted that that the legal system governed by international law is not superior to the legal system governed by municipal law because each system or order is superior in its own sphere (G. Fitzmaurice, *The General Principles of International Law 92 H R 1957 II*, pp5, 70-80. Borchand, *The Relations between International Law and Municipal Law, 27 Virginia Law Review 1940,* p.137; see also infra the reference to the *"Hoshinmaru"* and *"Tomimaru"* cases, the *"Louisa" Case* and the *"Virginia G" Case*).

58. For the reasons set out I am of the view than the matter is not urgent. In any event it will be beneficial to the marines if the case is heard and determined by the Supreme Court of India where a special court comprising sitting judges of the Supreme Court are ready to precede once the applications to stay proceedings and the question of jurisdiction is determined by the said Court.

59. It seems to me that in the light of the fact that the matter is currently before a special court of the Supreme Court of India, only the Supreme Court can order a "stay of judicial proceedings (see the Judgment of the Supreme Court of Ghana in the *ARA Libertad Case*, Civil Motion No.15/10/13 (20 June 2013). ITLOS had ordered the release of the *ARA Libertad*. However, it was by motion to abridge time that the motion was heard by the Supreme Court of Ghana and the order of Judge Frimpong was overturned consequently the Libertad was legally released). The separation of powers is important. A Ministry of government or an administrative body may not act contrary to the order of a court.

60. I do not think that the Convention envisaged and provided for a case where murder takes place in the EEZ or the high seas involving two or more States. The Convention is silent on this issue. Therefore, the domestic or municipal law will apply more so because the domestic courts are versed in the determination of such matters.

61. I have to be quite emphatic in the circumstances .The matter is by no means urgent. Italy should not have come to this Tribunal at this time, not after 3 ½ years. However, it chose to seek relief in the Indian judicial system with applications for bail, applications to limit bail restriction so that the marines could return to Italy to vote in the elections and for health reasons. All these applications were allowed by the Indian Supreme Court that set up a Special Court to hear and determine the matter inclusive of questions of jurisdiction. A hearing is fixed for 26 August 2015.

62. Respectfully, I must say that the Supreme Court is rather accommodating, lenient and benevolent in this matter. The marine currently in India is housed at the residence of the Italian Ambassador, he is on bail notwithstanding that in India persons on a charge of murder are not entitled to bail. In other words Murder is not a boilable offence. This fortifies my view that the matter cannot be deemed urgent. The integrity of the Indian criminal justice system and the Supreme Court must be respected.

63. If the requests of Italy are granted this would be an affront to the dignity and integrity of the Indian Supreme court and by extension to the Italian court system where the criminal proceeding are in progress. It is my view that questions of jurisdiction ought to be determined by the Indian Supreme Court that has conduct of the matter. In fact a hearing with respect to the application of the two marines will be heard on 26 August 2015.

64. For purposes of completion, I will consider whether the articles cited by counsel for Italy apply to this application; and whether the following statement of the Second Solicitor general at the end of his oral submission was a commitment that the matter will not be “taken up”. Counsel for Italy cited the following articles of the

Convention contending they were applicable and support the application. Counsel for India in his opening statement said

> The prayer for provisional measures is in two parts. The first part: India shall refrain from taking or enforcing any judicial or administrative measures against Sergeant Massimiliano Latorre and Sergeant Salvatore Girone in connection with the *Enrica Lexie* incident and from exercising any other form of jurisdiction over the *Enrica Lexie* incident.

65. This in my opinion is accomplished by the fact that the Supreme Court has stayed proceedings. **It would be going too far** to say that until the arbitral tribunal is constituted and hears the matter, there is no compelling assumption that the matter will be taken up and that there will be an adverse decision against them. The predominant words are highlighted. This is a comment and it would be mind-boggling and incredible to find that by these words the Second Solicitor is conceding or agreeing with the request. The meaning subscribed to the words is apparent and the meaning is obvious.

Exhaustion of local remedies

66. It seems to me that prior to the filing of this application for provisional measures Italy had resorted to the Indian Courts for relief. As I alluded to above there were several applications to the High Court in Kerala to the Supreme Court over the past three years. In fact, a matter is currently pending before the Supreme Court on the question of jurisdiction. The Supreme Court has ruled that the incident is to be dealt with by a Special Court, appointed under the Constitution of India. This court will most probably consider the question of jurisdiction and the matter as a whole. Therefore for the foregoing and other reasons that can be gleaned in this opinion I do not think there has been an exhaustion of local remedies.

67. Having read the written submissions, considered the documents submitted, and heard the oral submissions, I find that *prima facie* the Annex VII arbitral tribunal to be constituted would not have jurisdiction, the matter is not urgent, local remedies have not been exhausted and an abuse of process is evident.

68. For the above reasons I will dismiss the application and I will not grant the provisional measures requested.

69. I have to add that I have read in draft the dissenting opinion of Judge P. Chandrasekhara Rao. I agree with the views expressed therein.

(signed) A. A. Lucky

DISSENTING OPINION OF JUDGE HEIDAR

1. I am unable to vote in favour of the present Order because in my view the requirements for the prescription of provisional measures set out in article 290, paragraph 5, of the United Nations Convention on the Law of the Sea (hereinafter "the Convention") are not fulfilled in this case. I concur with the majority that the Annex VII arbitral tribunal would *prima facie* have jurisdiction over the dispute; that the requirements of article 283, paragraph 1, of the Convention regarding an exchange of views between the Parties are satisfied; that the issue of exhaustion of local remedies should not be addressed in the provisional measures phase; and that Italy has demonstrated that the rights it seeks to protect regarding the *Enrica Lexie* incident are plausible.

2. However, as I will explain below, in my view the requirement of urgency is not fulfilled. Additionally, I will attempt to clarify the application of the "plausibility test", as there is an apparent confusion in this regard in paragraphs 84 and 85 of the Order.

The requirement of urgency

3. In its provisional measures proceedings, the Tribunal has in its practice balanced a rather low threshold of *prima facie* jurisdiction with a more stringent application of the main requirement for the prescription of such measures, namely urgency. Provisional measures constitute an exceptional form of relief in the sense that they are not to be ordered as a matter of course but only in those cases where such special measures are considered necessary and appropriate. The prescription of provisional measures is appropriate only where the urgency in the situation so requires. In other words, a court or tribunal may order provisional measures only in cases where there is a risk that rights of one of the parties will suffer serious and irreparable prejudice, and the urgency of the situation is such that the risk cannot be averted otherwise than by ordering such measures.[1]

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[1] Thomas A. Mensah, "Provisional Measures in the International Tribunal for the Law of the Sea (ITLOS)", in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2002), p. 43-44.

4. Article 290, paragraph 1, of the Convention provides:

> If a dispute has been duly submitted to a court or tribunal which considers that *prima facie* it has jurisdiction under this Part or Part XI, section 5, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision.

5. By comparison, article 290, paragraph 5, of the Convention provides:

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

6. The functions of the Tribunal under paragraphs 1 and 5 of article 290 are quite different. When the Tribunal examines a request for provisional measures under paragraph 1, it has to consider whether or not to prescribe such measures pending its own final decision on a dispute that has been "duly submitted" to it. However, under paragraph 5, the Tribunal has to consider whether it is appropriate to prescribe such measures in a dispute the merits of which will be dealt with by another body, and the measures it prescribes will be addressed to parties which have not accepted its jurisdiction in respect of the dispute.[2]

7. Due to these clear differences, the urgency requirement for provisional measures under paragraph 5 of article 290 is stricter than the urgency requirement in paragraph 1 thereof. This applies both to the so-called qualitative dimension and temporal dimension of the requirement of urgency.[3]

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[2] Thomas A. Mensah, "Provisional Measures in the International Tribunal for the Law of the Sea (ITLOS)", in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2002), p. 46.
[3] *Southern Bluefin Tuna Cases, Provisional Measures, Separate Opinion of Judge Treves, ITLOS Reports 1999*, p. 316, paras. 4 and 5.

8. As far as the qualitative dimension is concerned, the Tribunal and the Special Chamber it constituted under article 15, paragraph 2, of its Statute, have interpreted the urgency requirement of paragraph 1 of article 290 to the effect that provisional measures may not be prescribed unless there is "a real and imminent risk that irreparable prejudice may be caused to the rights of the parties in dispute" (*M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain), Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010*, p. 58, at p. 69, para. 72, and *Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015*, para. 74).

9. Unlike paragraph 1 of article 290, paragraph 5 sets out the requirement of urgency explicitly. There would have been no necessity to do so had the intention of the drafters been that this "urgency" be the same as the one inherent in the concept of provisional measures and reflected in paragraph 1.[4] It follows that the qualitative dimension of the requirement of urgency is even more stringent under paragraph 5 of article 290 than under paragraph 1 thereof.

10. Turning to the temporal dimension of the requirement of urgency, paragraph 1 of article 290 provides that any provisional measures prescribed shall apply "pending the final decision", that is until the moment a judgment on the merits has been rendered. The relevant time period is therefore typically more than one year, even a few years, from the adoption of the order for provisional measures.

11. In contrast, paragraph 5 of article 290 provides that any provisional measures prescribed shall apply only "[p]ending the constitution of an arbitral tribunal to which a dispute is being submitted". This has been interpreted to the effect that the measures shall apply until the arbitral tribunal has been constituted and become functional. The relevant time period is a few months from the adoption of the order.

12. Consequently, when the Tribunal considers a request for provisional measures under paragraph 5 of article 290 of the Convention, its task is not to determine whether there is a real risk that irreparable prejudice to the rights of the

[4] *Southern Bluefin Tuna Cases, Provisional Measures, Separate Opinion of Judge Treves, ITLOS Reports 1999*, p. 316, para. 3.

parties might occur before a judgment is rendered on the merits, but rather whether such prejudice is likely to occur before the arbitral tribunal has been constituted and become functional. This has obviously a major bearing on the issue of urgency which is a precondition for the prescription of provisional measures.[5] The temporal dimension of the requirement of urgency is much more stringent under paragraph 5 of article 290 than under paragraph 1 thereof.[6]

13. It follows from the above that there is no urgency under paragraph 5 of article 290 if the provisional measures requested could, without prejudice to the rights to be protected, be granted by the arbitral tribunal once constituted.[7]

14. In the present case, there is in my view no real and imminent risk that irreparable prejudice to the rights of the Parties might occur before the Annex VII arbitral tribunal has been constituted and become functional. Such prejudice is not likely to occur within the next few months after the adoption of the Order. Taking into account the fact that court proceedings have been ongoing in India since the *Enrica Lexie* incident three and a half years ago, and the current status of the proceedings, it is very unlikely that a criminal trial over the Italian Marines, Sergeant Latorre and Sergeant Girone, will be commenced, let alone completed, within this time period.

15. As far as the second request by Italy is concerned, it must be taken into account that the restrictions on the liberty of the Italian Marines are as lenient as can be expected in the circumstances. Due to his health condition, Sergeant Latorre was granted a new six months leave to stay in Italy by the Supreme Court of India on 13 July 2015. Presumably, the Annex VII arbitral tribunal will have been constituted and become functional when this leave expires, but even if that should not be the case, there is no reason to believe that the leave would not be extended as on several previous occasions if required. The restrictions on the liberty of Sergeant

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[5] Thomas A. Mensah, "Provisional Measures in the International Tribunal for the Law of the Sea (ITLOS)", in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2002), p. 47.
[6] *ARA Libertad, (Argentina* v. *Ghana), Provisional Measures, Declaration of Judge Paik, ITLOS Reports 2012*, p. 352, para. 3.
[7] *Southern Bluefin Tuna Cases, Provisional Measures, Separate Opinion of Judge Treves, ITLOS Reports 1999*, p. 316, para. 4. See also Rüdiger Wolfrum, "Interim (Provisional) Measures of Protection", in *Max Planck Encyclopedia of Public International Law*, Oxford Public International Law (2006), para. 36.

Girone in India are quite lenient as he enjoys freedom of movement there and has received frequent family visits. I am therefore of the view that not granting the second request does not leave Italy in a situation where there would be a real and imminent risk that irreparable prejudice might occur to it before the Annex VII arbitral tribunal has been constituted and become functional. Taking into account the objective of provisional measures to preserve the rights of both parties, I am also of the view that granting the second request by Italy would not be appropriate as it would prejudice the asserted rights of India.

16. As this case is to be decided on the basis of the law and not *ex aequo et bono*, and the requirement of urgency set out in article 290, paragraph 5, of the Convention, is not fulfilled, the prescription of any provisional measures in this case is unwarranted.

The plausibility test

17. International courts and tribunals have only recently started to apply the so-called plausibility test explicitly in provisional measures proceedings. The International Court of Justice has applied this test since 2009 in six such proceedings.[8] The Tribunal has so far not applied the plausibility test explicitly but the Special Chamber of the Tribunal in *Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures,* did apply the test.[9]

18. The objective of the plausibility test is to establish whether the rights asserted by the party requesting provisional measures are plausible. This entails "that there is

[8] 1. *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 139; 2. *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011,* p. 6; 3. *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia* v. *Thailand) (Cambodia* v. *Thailand), Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011*, p. 537; 4. *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Provisional Measures, Order of 22 November 2013, I.C.J. Reports 2013,* p. 354; 5. *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica); Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 13 December 2013*, I.C.J. Reports 2013, p. 398; and 6. *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Request for the Indication of Provisional Measures, Order of 3 March 2014*.

[9] *Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015*, paras. 58-62).

a realistic prospect that when the Court rules upon the merits of the case they will be adjudged to exist and to be applicable".[10] The fulfillment of the test of plausibility of rights asserted by the applicant in provisional measures proceedings, which is closely linked to the analysis of *prima facie* jurisdiction, is one of the requirements for admissibility.

19. In paragraphs 84 and 85 of the present Order, the plausibility test appears to be applied not only to the applicant, Italy, as it should be, but also to the respondent, India. This may be due to a confusion of the plausibility test with an entirely different, and subsequent, step in the consideration of a request for the prescription of provisional measures, namely the assessment of the rights of both parties for the purpose of their preservation in accordance with article 290 of the Convention.

20. It must be emphasized that the plausibility test by its very nature only applies to the applicant, the party requesting provisional measures. This is confirmed in the jurisprudence referred to in paragraph 17 above and supported by the fact that in the present case only the Applicant, Italy, attempted to demonstrate that its asserted rights are plausible and not the Respondent, India.

(signed) T. Heidar

[10] *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Request for the Indication of Provisional Measures, Order of 3 March 2014*, Dissenting Opinion of Judge Greenwood, para. 4.