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INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

2015

Public sitting

held on Monday, 10 August 2015, at 9.30 a.m.,

at the International Tribunal for the Law of the Sea, Hamburg,

President Vladimir Golitsyn presiding

THE "ENRICA LEXIE" INCIDENT

(Italy v. *India)*

Verbatim Record

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Uncorrected

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

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Italy is represented by:

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

as Agent;

and

Mr Stefano Pontecorvo, Minister Plenipotentiary, Diplomatic Adviser, Ministry of Defence,
Ms Stefania Rosini, First Counsellor, Deputy Head, Service for Legal Affairs, Diplomatic Disputes and International Agreements, Ministry of Foreign Affairs and International Cooperation,
Mr Mario Antonio Scino, Adv., State Attorney, Office of the Attorney General,

as Senior Advisers;

Sir Daniel Bethlehem QC, Member of the Bar of England and Wales, 20 Essex Street, London, United Kingdom,
Mr Paolo Busco, Member of the Rome Bar,
Mr Sudhanshu Swaroop, Member of the Bar of England and Wales, 20 Essex Street, London, United Kingdom,
Mr Attila Tanzi, Professor of International Law, University of Bologna,
Mr Guglielmo Verdirame, Professor of International Law, King's College, London; Member of the Bar of England and Wales; 20 Essex Street, London, United Kingdom,
Sir Michael Wood, Member of the International Law Commission; Member of the Bar of England and Wales; 20 Essex Street, London, United Kingdom,

as Counsel and Advocates;

Dr Ida Caracciolo, Professor of International Law, University of Naples 2; Member of the Rome Bar,
Mr Suhail Dutt, Senior Advocate, Member of the Delhi Bar, India,
Ms Callista Harris, Solicitor admitted in New South Wales; Associate, Freshfields Bruckhaus Deringer, Paris, France,
Mr Ben Juratowitch, Solicitor Advocate, England and Wales; Solicitor of the Supreme Court of Queensland; Partner, Freshfields Bruckhaus Deringer,
Mr Kevin Lee, Advocate of the Supreme Court of Singapore, Singapore,
Dr Daniel Müller, Associate, Freshfields Bruckhaus Deringer,
Mr Diljeet Titus, Advocate, Titus & Co., Advocates; Member of the Delhi Bar, India,
Dr Philippa Webb, Lecturer in Public International Law, King's College London; Member of the New York Bar,

as Counsel;

Ms Francesca Lionetti, Freshfields Bruckhaus Deringer,

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as Legal Assistant.

India is represented by:

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

as Agent;

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

as Co-Agent;

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

as Deputy Agent;

and

Mr P.S. Narasimha, Additional Solicitor General,
Mr Alain Pellet, Emeritus Professor, University Paris Ouest Nanterre La Défense; former Chairperson, International Law Commission; Member, Institut de droit international,
Mr Rodman R. Bundy, Eversheds LLP Singapore; Member of the New York Bar; former Member of the Paris Bar,
Mr Narinder Singh, Chairman, International Law Commission,

as Counsel and Advocates;

Mr Benjamin Samson, Ph.D. Candidate, Centre de droit international de Nanterrre (CEDIN), University of Paris Ouest Nanterre la Défence, France,
Ms Laura Yvonne Zielinski, Eversheds Paris LLP; Member of the New York Bar,
Mr Ishaan George, Assistant Counsel to the Additional Solicitor General of India,

as Junior Counsel;

Mr M.A. Ganapathy, Joint Secretary (Internal Security-I), Ministry of Home Affairs,
Ms K. Nandini Singla, Joint Secretary (Europe West), Ministry of External Affairs,
Mr P.V. Rama Sastry, Inspector-General, National Investigation Agency,
Mr S. Senthil Kumar, Legal Officer, Ministry of External Affairs,

as Advisers.

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THE PRESIDENT: Pursuant to article 26 of its Statute, the Tribunal holds today a hearing in the Case concerning the "Enrica Lexie" incident between Italy and India.

At the outset I would like to note that Judge Vicente Marotta Rangel has tendered his resignation as a Member of the Tribunal on 18 May 2015. His place is therefore currently vacant.

On 21 July 2015, Italy submitted to the Tribunal a Request for the prescription of provisional measures pending the constitution of an arbitral tribunal in a dispute with India concerning the *Enrica Lexie* incident. The Request was made pursuant to article 290, paragraph 5, of the United Nations Convention on the Law of the Sea. The case was named *The "Enrica Lexie" Incident* and entered in the List of cases as case no. 24.

I now call on the Registrar to summarize the procedure and to read out the submissions of the Parties.

THE REGISTRAR: Thank you, Mr President.

(Interpretation from French) On 21 July 2015 a copy of the request for the prescription of provisional measures was sent to the Government of India. By order of 24 July 2015 the President fixed 10 August 2015 as the date for the opening of the hearing. On 6 August 2015 India filed its statement in response to Italy's request.

I will now read out the submissions of the Parties.

(Continued in English) The Applicant requests the Tribunal to 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 that 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.

The Respondent requests:

> [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 measures in the present case.

Mr President.

THE PRESIDENT: Thank you, Mr Registrar.

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At today's hearing, both Parties will present the first round of their respective oral arguments. Italy will make its arguments this morning until approximately 1 p.m. with a break of 30 minutes at around 11.15 a.m. India will speak this afternoon from 3 p.m. until approximately 6.30 p.m. with a break of 30 minutes at around 4.30 p.m.

Further to a request by Italy, and as agreed by the Parties, part of the hearing will not be open to the public. This will take place just after the morning break for a period of 30 minutes and I will provide more information when we reach 11.15.

Tomorrow will be the second round of oral arguments with Italy speaking from 10.00 to 11.30 a.m. and India speaking from 4.30 to 6 p.m.

I note the presence at the hearing of Agents, Co-Agents, Counsel and Advocates of the Parties.

I now call on the Agent of Italy, Mr Francesco Azzarello, to introduce the delegation of Italy.

MR AZZARELLO: Mr President, Members of the Tribunal, distinguished Agent and members of the delegation of the Republic of India, it is a particular honour to appear today before this Tribunal for the first time to represent the Italian Republic.

It is also a privilege to introduce the members of the Italian delegation. I do not propose to introduce everyone by name but wish to note the presence here of Minister Plenipotentiary Stefano Pontecorvo, the Diplomatic Adviser to the Minister of Defence, First Counsellor Stefania Rosini, the Deputy Head of the Legal Service at the Ministry of Foreign Affairs, and Avvocato Mario Antonio Scino, of the Attorney General's Office. In addition to other members of the Italian delegation, whose names and affiliations have been provided to the Tribunal, our submissions today will be made by the following counsel: Sir Daniel Bethlehem QC, Professor Attila Tanzi, Sir Michael Wood, Avvocato Paolo Busco, and Professor Guglielmo Verdirame.

Mr President, at your invitation, following the introductions of the Indian legal team, I will return to make some opening submissions on behalf of Italy. I thank you, Mr President.

THE PRESIDENT: Thank you, Mr Azzarello.

I now call on the Agent of India, Ms Neeru Chadha, to introduce the delegation of India.

MS CHADHA: Mr President, Mr Vice-President, and distinguished Members of the Tribunal, it is an honour and privilege for me to appear before this Tribunal as India's Agent.

I will introduce those representing India in these proceedings. The Co-Agent, Ambassador Vijay Gokhale, could not attend the hearing today due to some other exigencies. Dr Vishnu Dutt Sharma, Director in the Legal and Treaties Division is the Deputy Agent.

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India's Counsel and Advocates are Mr P. S. Narasimha, the learned Additional Solicitor General of India; Professor Alain Pellet, Emeritus Professor, University Paris Ouest Nanterre La Défense, former Chairperson of the International Law Commission and a member of the Institut de Droit International; Mr Rodman Bundy, Eversheds LLP Singapore, Member of the New York Bar and former Member of the Paris Bar; Mr Narinder Singh, Chairman, International Law Commission.

Mr Benjamin Samson; Ms Laura Zielinski; and Mr Ishaan George assist the Counsel. Mr Ganapathy, Ms Nandini Singla, Mr P. V. Rama Sastry and Mr Senthil Kumar are the Advisers.

I also wish to acknowledge our counterparts representing the Government of Italy and convey our greetings to them.

THE PRESIDENT: Thank you, Ms Chadha.

I now request the Agent of Italy, Mr Azzarello, to begin his statement.

MR AZZARELLO: Mr President, Members of the Tribunal, allow me, before introducing our case, to start by underlining that Italy and India have had historically good relations and shared values. It is not uncommon that friends resort to international arbitration – a peaceful mechanism provided for in the United Nations Charter – to resolve a dispute when they have not been able to solve their differences through negotiation.

Against this background, we were surprised at the tone of the Indian Written Observations. It is in many respects an intemperate document. I do not of course refer to the legal argument, which is fair game, and will be met by our response in due course. I do not even refer to factual overstatement, which was perhaps to be expected. I refer rather to wilful inaccuracies and a tone and an approach that perhaps best exemplifies why our two States are now at the impasse at which we find ourselves.

I limit myself to one example in illustration. It is only one example but it is egregious. The two Italian marines who are caught up in this dispute have not been charged with any crime. It is a matter of legal debate why that is the case, and I make no comment on this, but the fact remains that they have not been charged with, let alone convicted of, any crime, and indeed they have protested their innocence throughout.

India, in its Written Statement, skates lightly over this "technicality" with a disdain for due process in criminal proceedings. Its Statement opens with the observation that the subject matter of this dispute

> 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*.[1]

[1] Written Observations of India, at para. 1.6.

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It continues to say that:

> the two Marines used their automatic weapons against *St. Antony* without any warnings; to be noted: one fisherman was shot in the head and the other fatally shot in the stomach.[2]

Similar observations follow throughout the Written Statement.[3] As I say, Mr President, Members of the Tribunal, this cavalier attitude to due process is chilling.

With this said, I will now introduce very briefly our case.

The 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 – unlawful – exercise of jurisdiction over the incident, over the vessel, and over two marines of the Italian Navy, Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone. Sergeants Latorre and Girone were on official duty on board the *Enrica Lexie* at the time of the incident.

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.

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.

India, acting by ruse and by coercion, including with 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.

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, and Sergeants Latorre and Girone were arrested.

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.

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.

[2] Written Observations of India, at para. 1.7.
[3] See, for example, Written Observations of India, at paras. 1.14 and 3.77.

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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.

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.

Mr President, Members of the Tribunal, a correct and fair framework of legality needs to be restored, from its foundations.

Italy has tried in these three and a half years, in good faith, to promote, at different levels and directions, a friendly solution to the dispute. While engaging with Indian officials, Italy has acted constructively, listening to all proposals. Informal and formal contacts and concrete offers by Italy have been activated and made. Regrettably, all this has been to no avail.

Mr President, Members of the Tribunal, frustration, stress, deteriorated and deteriorating medical conditions affecting directly and indirectly the people involved threaten grave prejudice to Italy's rights and mean that there is a need to address urgently this situation. With humbleness, therefore, Italy was compelled to initiate proceedings before an Annex VII tribunal on 26 June this year and now seeks provisional measures from this Tribunal, the guardian of the principles, spirit and norms of the UN Convention on the Law of the Sea.

Mr President, Members of the Tribunal, Italy has been compelled to take this step because of the serious damage and irreparable harm to Italy's rights and interests if immediate steps are not taken by India to remedy the situation that it alone has caused.

In light of these developments, pursuant to article 290, paragraph 5, of the Convention, Italy respectfully requests the International Tribunal for the Law of the Sea to prescribe the following provisional measures: that India shall refrain from taking or enforcing any judicial or administrative measures against Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone in connection with the *Enrica Lexie* Incident, and from exercising any other form of jurisdiction over that incident; 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 Chief Master Sergeant Latorre to remain in Italy throughout the duration of the proceedings before the Annex VII tribunal.

Mr President, honourable Members of the Tribunal, this Request is made on the ground that Italy will suffer serious and irreversible prejudice to its rights if, notwithstanding the submission of the dispute to arbitration under Annex VII of UNCLOS, India is able to continue exercising its jurisdiction over the *Enrica Lexie* incident and the Italian marines, all the while subjecting the Italian marines to restrictions on their liberty and movement.

Mr President, Members of the Tribunal, the structure of Italy's oral submissions today

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will be as follows: I will shortly ask you to invite Sir Daniel Bethlehem to the podium. He will set out the facts of the *Enrica Lexie* incident in more detail and will address the subsequent dispute and the necessity for provisional measures. He will be followed by Professor Attila Tanzi, who will address certain issues of jurisdiction relevant to this Request. Sir Michael Wood will speak next. He will address the requirements for provisional measures and the rights at issue in this case.

After the morning break, Avvocato Paolo Busco will address the Tribunal in closed session on certain sensitive and confidential issues that have been addressed to the Tribunal and to India in writing. He will be followed by Professor Guglielmo Verdirame. He will begin in closed session with some brief observations but thereafter continue in open session to address why the conditions required for the prescription of provisional measures are satisfied in this case.

Finally, Sir Daniel will return briefly to the podium with some concluding observations.

Thank you Mr President, honourable Members. May I now ask you, Mr President, to call Sir Daniel Bethlehem to the podium.

THE PRESIDENT: Thank you, Mr Azzarello. I now give the floor to Sir Daniel Bethlehem.

MR BETHLEHEM: Mr President, Members of the Tribunal, it is an honour for me to appear before you representing the Italian Republic in these proceedings.

These proceedings concern Italy's Request for provisional measures. They do not address the merits of Italy's claim nor any issue of jurisdiction that India may raise in due course. You will need to satisfy yourselves that *prima facie* the Annex VII tribunal to be constituted would have jurisdiction. We consider this issue to be straightforward. Professor Tanzi, who will follow me, will address this aspect.

Although these proceedings are not concerned with the merits of the claim in issue between the Parties, it is important that you have a sense of what this case is about and why it is that Italy comes to you now to request the Tribunal to prescribe provisional measures. This is the subject of my submissions. I will address, in summary form, the facts of the dispute, India's coercion and Italy's assertion and exercise of jurisdiction. I will then set out some salient developments following the judgment of the Indian Supreme Court in this case in January 2013 and also deal with more recent developments and issues of urgency that have brought us before you today.

As a preliminary matter, though, before I turn to the facts of the dispute, I am compelled to say something more about India's treatment of these issues in its Written Statement.

You have already heard from Italy's Agent about the cavalier attitude that India has taken to due process in criminal proceedings by its characterization of the Italian marines as murderers. It is not simply that the marines have not yet been charged with any crime and have not been judged; it is that they contest every key aspect of

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the conduct that India alleges against them and maintain their innocence. The incident did indeed appear to be a pirate attack. It is not established that they caused the deaths of the two Indian fishermen. There is considerable evidential dispute. The correct procedures on the *Enrica Lexie* were followed in response to the suspected attack.

But the matter goes beyond the way in which India described the marines. India objects to the description of the facts of the incident given by Italy in its Notification instituting proceedings. Regrettably, in a number of important respects, the Indian statement has a barely recognizable relationship with reality. It is not just oversight or omission. It is wilful inaccuracy, and I will come to one or two examples of this during the course of my presentation. This of course goes to the merits of the underlying dispute, which is not before you. India addresses these matters simply for reasons of prejudice.

With that said, Mr President, Members of the Tribunal, let me outline the basic facts of the dispute to provide some context to what will follow.

The incident that sparked this dispute took place on 15 February 2012 about 20.5 nautical miles off the Indian coast of Kerala in an Indian Government-designated high-risk area for piracy. It involved the Italian-flagged oil tanker, the *MV Enrica Lexie*, and a suspected pirate attack. In the incident, it is alleged that two Indian fishermen on board the fishing boat *St. Antony* were killed by gunfire from the *Enrica Lexie*, the shots having been fired, it is alleged, by Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone. Sergeants Latorre and Girone were two of a detachment of six Italian marines who were assigned to the *Enrica Lexie* on official duties to protect the vessel from the threat of piracy in high-risk waters.

The map now on the screen, which is at tab 3 of your Judges' Folder, shows the position of the *Enrica Lexie* at the time of the incident and the 12-nautical-mile limit of India's territorial sea. The ship's position depicted on the map is taken from the automatically generated Ship Security Alarm System of the *Enrica Lexie*, which was activated when the apparent pirate attack was perceived, and is reflected on the Message that was automatically generated at that point. This Alarm System Message is at tab 4 of your Judges' Folder.[4] The coordinates indicated on the Message were automatically generated when the alarm button was pressed. There is no dispute that, as a matter of fact, the incident took place well beyond India's territorial sea.

Mr President, Members of the Tribunal, two parallel developments that followed the incident are material to this dispute. The first is that when they became aware of the incident, the Indian authorities in Kerala employed coercion to cause the *Enrica Lexie* to alter course from its journey between Sri Lanka and Djibouti, compelling her to enter Indian territorial waters and put into the port of Kochi on the Kerala coast. The Indian authorities also undertook coerced investigations on the vessel and

[4] Ship Security Alarm System Message sent out by the *Enrica Lexie* on 15 February 2012, Annex 3 to Annex A.

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interrogations of its crew, and arrested and detained Sergeants Latorre and Girone on 19 February 2012. All of this is incontrovertibly established by Indian documents.

The second development is that, immediately Italy was informed of the deaths of the two fishermen on board the *St. Antony*, it asserted its jurisdiction over the *Enrica Lexie*, over the incident, and over the *Enrica Lexie* crew, including the Italian marines, and the Office of the Prosecutor at the Military Tribunal in Rome initiated an investigation into the incident. I will return to this aspect shortly.

I turn, first, to the issue of the coercion of the Indian authorities to cause the *Enrica Lexie* to alter its course, to put into port at Kochi, to interrogate the crew, and ultimately to arrest and detain Sergeants Latorre and Girone on 19 February 2012. There are three Indian documents to which I would like to draw your attention to illustrate the point.

The first document is at tab 5 of your Judges' Folder.[5] It is a Report of India's National Maritime Search and Rescue Board dated 4 June 2012. If you turn to page 11, under the heading "Piracy", you will see a report of what is described as a

> [f]iring incident by the *MV Enrica Lexie*.

Following the opening paragraph, which describes the alleged incident, the Report goes on in the following terms, and I read from the second paragraph:

> On receipt of information, ICGS *[Indian Coast Guard Ship]* Samar on patrol off Vizhinjam coast was diverted and ICGS Lakshmibai was sailed from Kochi at 1935 h on 15 Feb 12 (with 04 police personnel embarked) to the most probable area for search and interdiction of the suspected merchant vessel.
>
> Further, Coast Guard Dornier ex-747 Sqn (CG) was launched for sea-air coordinated search. MRCC (MB) *[The Maritime Rescue Coordination Centre Mumbai]* was concurrently directed to analyze the AIS *[Automatic Identification System]* and LRIT *[Long-Range Identification and Tracking]* plot and correlate with available inputs to identify and track the suspected merchant vessel.

After stating that suspicion attached to the *Enrica Lexie*, and that the *Enrica Lexie* was

> directed to alter course and proceed to Kochi anchorage,

the Report continues:

> UKMTO *[the UK Maritime Trade Operations centre in Dubai which operates an emergency incident response centre]* confirmed of having received a message from MT Enrica Lexie. At 1950 h on 15 Feb 12, CG Dornier located MT Enrica Lexie and vectored ICG ships for interception. CG Dornier also directed the vessel to proceed to Kochi anchorage for

[5] National Maritime Search and Rescue Board, Report, 4 June 2012, Annex 6 to Annex A, at pp. 11-13.

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> investigation. ICGS Lakshmibai intercepted MT Enrica Lexie at about 2045 h on 15 Feb 12 and escorted the vessel till Kochi anchorage.

Before we leave this document, I would like to ask you to turn to the last page, page 15. You will see there a Maritime Shipping Notice No. 7 of 2012, which is headed "Navigation off the Indian Coast – Transgressing of Fishing Nets Mistaking Fishing Boats with Pirate Skiffs". I do not propose to take you to this in any detail but would invite you in your own time to have a look at paragraphs 3 and 4 of this Maritime Shipping Notice.

I draw this to your attention to provide some balance to India's Written Statement, which attempts to cast doubt on any appreciation that the incident involved was apprehended to be a pirate attack.

Mr President, Members of the Tribunal, the second document that establishes India's coercion is at tab 6 of your Judges' Folder.[6] It is the statement given in the Kerala proceedings by the pilot of the Indian coast guard Dornier aircraft that intercepted the *Enrica Lexie* and required it to divert its course. The handwritten statement of the pilot is behind the typed version that Italy has produced. Mr President, Members of the Tribunal, in the interests of time, let me highlight just two portions of the statement for you. The first portion is towards the bottom of the typed part of the page which is numbered 77 at the bottom and you will see there, four lines up from the bottom, the statement:

> We located the vessel ENRICA LEXIE in the Position 09º51.6"N and 075º37.5"E. We encircled the vessel and contacted it over VHF in channel 16 and 10.

If you turn over the page, you will see about halfway down the paragraph there, at the point at which square brackets start, and I note that the square brackets are in the original handwritten manuscript, it says as follows:

> [We directed them – that is the Enrica Lexis – to amend the course and proceed to Kochi harbour and informed to be in channel 16 and 10. We contacted them continuously over VHF. The ship altered the course towards Kochi and we shadowed it to Kochi anchorage until 22.30 hrs].[7] At 21.25 hrs. we came into communication with ICGS Lakshmibai which was also engaged in the searching operation. Lakshmibai contacted the vessel over VHF at 21.30 hrs. Lakshmibai intercepted the vessel and escorted to Kochi anchorage at 22.35 hrs.]

Mr President, Members of the Tribunal, there is now on the screen – and at tab 7 of your Judges' Folder – a map showing the position of the *Enrica Lexie* at the point that it was intercepted and was diverted by the Indian coast guard Dornier aircraft, the coordinates being taken from the pilot's witness statement. This is some 36 nautical miles off the Indian coast.

[6] Statement by Commandant Alok Negi, Coast Guard Air Enclave Kochi, 19 February 2012, Annex 7 to Annex A.

[7] The [square brackets] are found in the original manuscript version of this statement.

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The last of the documents to which I would like to take you is the Boarding Officer's Report which describes the boarding of the *Enrica Lexie* by armed Indian police and coast guard personnel on 16–17 February 2015. This is at tab 8 of your Judges' Folder.[8] It is a detailed document, which I do not propose to take you through in full. I would, however, like you to look at parts of it.

I note in passing that paragraphs 4 and 5 of the Report echo the evidence of the Dornier pilot. May I ask you, please, to cast your eyes over paragraphs 6 to 12 of the Report, which contain the following details, which I summarize:

An armed contingent of at least 36 personnel boarded the *Enrica Lexie* in the early morning of 16 February 2012.

The Master and crew of the vessel were polite but initially refused to divulge any information claiming that the issue was *sub-judice* to Italian laws and no details could be shared with Indian agencies.

However, and this is the language of the Indian Report at paragraph 10,

> continued interrogation by the boarding team

resulted in the Master handing over information and documentation.

Again using the language of the Report, at paragraph 11,

> continuous pressure was maintained on the crew and Master.

The vessel was eventually ordered to put into port, at which point, in the early hours of 17 February 2012, the Master and crew, including the marines, were compelled to disembark.

As is clear from this Report, following its interception and compelled alteration of course to Kochi, there followed an unrelenting period of about 16 hours during which the *Enrica Lexie* and its crew of 30 were subject to coerced detention by 36 or more armed Indian personnel, and what the Boarding Officer's Report describes as "continued interrogation" and "continuous pressure".

Mr President, Members of the Tribunal, there is more to be said about these events but this will suffice for present purposes to illustrate that this was not a light-touch exercise of jurisdiction by India. The *Enrica Lexie* was intercepted in international waters by an Indian coast guard aircraft and armed Indian coast guard boats. It was ordered to put into port at Kochi. Armed Indian personnel interrogated the crew and the marines, applying continuous pressure to force them to hand over information and materials, which India has subsequently sought to introduce into its domestic court proceedings. This was an exercise of coercive power over an Italian-flagged vessel, and over Italian marines on official duties, in respect of an incident that took place beyond India's territorial jurisdiction.

[8] Boarding Officer's Report MV Enrica Lexie, 16-17 February 2012, Annex 9 to Annex A.

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Mr President, Members of the Tribunal, I turn now to the issue of Italy's prompt assertion of jurisdiction and the opening of a criminal investigation by the Office of the Prosecutor at the Military Tribunal in Rome.

Immediately Italy was informed of the deaths of the two fishermen on board the *St. Antony*, it asserted its jurisdiction over the *Enrica Lexie*, the incident and the crew of the *Enrica Lexie*, including the two marines, and the Office of the Prosecutor at the Military Tribunal in Rome initiated an investigation into the incident. I illustrate this point by reference to a number of documents.

The first document that illustrates this is the Boarding Officer's Report to which I took you a moment ago. You will recall that, in that Report, the Boarding Officer recorded that the crew had indicated that the issue was *sub-judice* to Italian laws (paragraph 9 of the Boarding Officer's Report). I do not propose to take you back to this document but only recall that already on 16 February 2012, less than 24 hours after the incident, the Master and crew of the *Enrica Lexie* had been in contact with the Italian authorities and had been informed that the incident was subject to Italian prosecutorial investigation.

The next document is Italy's Note Verbale to India of 16 February 2012, which you will find at tab 9 of your Judges' Folder, which was transmitted, again, within 24 hours of the incident.[9] In the interests of time, I need not take you to the document directly but draw your attention to its third paragraph, which states that

> … the Italian Navy detachment is exclusively answerable to the Italian judicial Authorities.

This Note Verbale of 16 February 2012 was followed up by a further Note Verbale the next day, 17 February 2012, in which Italy again asserted that

> the Italian judicial Authorities are the sole competent judicial Authorities for the case in question.[10]

The next document to which I would like to take you is a communication from the Military Prosecutor in Rome dated 17 February 2012. It is at tab 10 of your Judges' Folder.[11] It requires that certain specified information is provided to the Office of the Prosecutor "with the maximum urgency" by way of preliminary investigation.

The opening of a full criminal investigation into the incident by the Office of the Prosecutor of the Military Tribunal in Rome is addressed directly in a communication from the Office of the Prosecutor to the Head of the Cabinet at the Italian Ministry of Defence a few days later, on 24 February 2012. This document is at tab 11 of your Judges' Folder.[12] It is brief and reads as follows:

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[9] Note Verbale 67/438, 16 February 2012, Annex 10 to Annex A.
[10] Note Verbale 69/456, 17 February 2012, Annex 12 to Annex A.
[11] Communication from the Office of the Prosecutor at the Military Tribunal of Rome to the Commanding Officer of the Military Protection Detachment of the *Enrica Lexie*, 17 February 2012, Annex 11 to Annex A.
[12] Communication from Office of the Prosecutor of the Military Tribunal of Rome to the Head of Cabinet at the Ministry of Defence, 24 February 2012, Annex 13 to Annex A.

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> In reference to your request for information of today, I'm inform you that this office has opened a criminal proceeding under the number 9463/2012 (RGNR = General Registrar for the entry of Criminal notices) against LATORRE Massimiliano and GIRONE Salvatore – belonging to the Regiment San Marco and to the Military Protection Detachment embarked on board of the Italy Tanker "Enrica Lexie" – for the crime of murder, in reference to the events occurred in international waters in the Indian Ocean the 15th of February.

Mr President, Members of the Tribunal, Italy asserted jurisdiction over the *Enrica Lexie*, an Italian-flagged vessel, and over the Italian marines, within 24 hours of the incident of 15 February 2012. Italy drew this assertion and exercise of jurisdiction to the immediate attention of the Indian Government and to the Indian police and investigating authorities. The Office of the Prosecutor of the Military Tribunal in Rome opened an inquiry into the incident immediately and a full criminal investigation for the crime of murder within days.

Mr President, Members of the Tribunal, in its Written Statement, India says that the Italian authorities have not conducted any kind of serious investigation into the facts. The reality is very different, as we will set out in our Memorial. Following the opening of its investigation, the Italian Military Prosecutor sent numerous letters rogatory to India, seeking Indian cooperation and evidence to assist in the investigation. Those letters rogatory went unanswered. The criminal investigation in Italy is still open. An independent naval enquiry was undertaken. Italy has, from the very outset, taken the responsibility of its jurisdiction very seriously indeed.

Mr President, Members of the Tribunal, I return briefly to the chronology of the incident. Italy, together with Sergeants Latorre and Girone, challenged India's assertion of jurisdiction over the incident, over the *Enrica Lexie* and over the marines, in a petition before the Kerala High Court. The petition was addressed in a judgment of the Kerala High Court of 29 May 2012.[13] In this judgment, the Kerala High Court rejected the petition, finding that India had jurisdiction over the incident, the vessel and the marines, and that a criminal trial of Sergeants Latorre and Girone should proceed.

The Kerala High Court judgment was appealed to the Indian Supreme Court. The Supreme Court handed down its judgment on 18 January 2013.[14] In that judgment, while leaving open the relevance and application of article 100 of UNCLOS on the suppression of piracy, the Indian Supreme Court held that the State of Kerala had no jurisdiction to investigate the incident. The Indian Supreme Court also held, however, the Union of India did have jurisdiction to investigate and try the marines, concluding that the incident came within India's territorial jurisdiction.[15] The Supreme Court went on to direct the Indian Government to set up a Special Court – an exceptional court – to try the marines. The reason for this was that there is in India no federal criminal court empowered to address such issues. While the Supreme Court indicated that

[13] Judgment of the High Court of Kerala, 29 May 2012, annex 17 to annex A.
[14] Republic of Italy & Ors v. Union of India & Ors, Supreme Court of India Judgment of 18 January 2013, annex 19 to annex A.
[15] Republic of Italy & Ors v. Union of India & Ors, Supreme Court of India Judgment of 18 January 2013, annex 19 to annex A, at p.83, para. 101.

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issues of jurisdiction could, in its words, be "re-agitated" before the Special Court, it was not evident what this included, it being clear that the Supreme Court had spoken on questions of jurisdiction going to such matters as the exclusive jurisdiction of the flag State of a vessel exercising high seas freedom of navigation rights. The Indian Supreme Court also failed to address the status of the marines, as Italian State officials exercising official functions.

Mr President, Members of the Tribunal, there are two aspects of the developments since the judgment of the Indian Supreme Court that I would like to draw briefly to your attention as they go to the heart of why we are before you at this point. These are developments on the legal front, in the Indian court proceedings, and developments on the diplomatic front, concerning engagements between Italy and India in an attempt to resolve the dispute by way of a negotiated settlement. These issues are closely intertwined. Before I turn to these aspects, however, there is something that must be said about certain comments in India's Written Statement.

At various places in its Written Statement, India, in terms, calls into question Italy's good faith and says that Italy cannot be trusted to keep its word. We will come to *India's* word in this dispute in the merits proceedings. For the moment, I would like to address briefly the two matters that India cites to call into question Italy's good faith: first, Italy's alleged failure to make the remaining four marines available for interview and, second, the apparent decision not to return Sergeants Latorre and Girone to India after leave had been given to travel to Italy.

On the first of these issues, the availability of the other four marines for interview, with the greatest respect to our colleagues on the other side of the room, India ought to know its own law better than it states it to the Tribunal. As a matter of Indian law, the making available of witnesses for interview by video-conferencing satisfies the requirement to appear. This is what took place. There are those sitting not a million miles away from the Additional Solicitor General in Delhi who would well be able to speak to these issues. Italy fully satisfied the commitments that it had undertaken.

On the issue of the apparent Italian Government decision not to return Sergeants Latorre and Girone to India after a leave of absence in Italy, the reality is that the marines did in fact return to India by the deadline stipulated. This is recorded explicitly in the Indian Supreme Court Order of 2 April 2013 that India annexed to its Written Statement.[16] There was no breach of any undertaking. What there was in this episode were measures taken by the Indian Government to restrict the movement of the Italian Ambassador in Delhi in blatant violation of the Vienna Convention on Diplomatic Relations. This dispute was a hair's breadth away from becoming a dispute before the International Court of Justice addressing India's violation of the sacred canons of international law of diplomacy that rank alongside those concerning the law of the sea and freedom of navigation. Again, Italy fully satisfied the commitments that it had undertaken.

Mr President, Members of the Tribunal, with that aside, let me turn briefly to the litigation–diplomatic engagement narrative.

[16] Written Observations of India, annex 20, at para. 2.

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On the diplomatic front, throughout the period following the Indian Supreme Court judgment in January 2013, there was contact between the successive Italian and Indian Governments. Italy made strenuous diplomatic attempts to engage the Indian Government to resolve the dispute. Those attempts came to nothing, however, and the initiatives were heavily complicated by uncertainty in the Indian domestic proceedings. The Indian Supreme Court's judgment requiring, exceptionally, the establishment of a Special Court to try the marines was questionable as a matter of Indian constitutional law. The judgment had also left various matters unaddressed. Italy was therefore advised that the dispute could be resolved if the marines petitioned again to the Indian Supreme Court, as a revisiting of the issues would highlight India's lack of jurisdiction.

Given the lack of movement in India, and the proposal that the marines should petition again to the Indian Supreme Court, the marines did just that in March 2014 by a writ petition under article 32 of the Indian Constitution. By this petition, the marines challenged India's jurisdiction, and the jurisdiction of the Indian courts, and asserted their immunity. This article 32 writ petition is of considerable importance as the Indian Supreme Court is due to hear a deferment application in respect of this petition on 26 August, in just over two weeks' time. This deferment application was brought by the marines expressly with reference to the commencement of the Annex VII arbitration proceedings. I will say more about this in a moment.

Mr President, Members of the Tribunal, following the assumption to office in early 2014 of Prime Minister Renzi's Government in Rome and Prime Minister Modi's Government in Delhi, renewed efforts were made at the highest level to resolve the dispute in a negotiated manner that would be sensitive to the interests of all those engaged. In mid-2014, the Italian Government sought to engage the Indian Government about negotiations on a possible diplomatic solution, on the basis of detailed proposals that Italy had developed and that it stated expressly in correspondence to India would be sensitive to the Indian Supreme Court's engagement on the matter. Italy was carefully minded of the involvement of the Indian Supreme Court on the matter, even though it disputed India's jurisdiction, and Italy sought to formulate proposals for a settlement that would have been taken to the Indian Supreme Court by both Governments as a reflection of their agreement not just on issues of law but also with regard to the interests of all those engaged by the incident. Italy has throughout sought to assert and vindicate its rights under international law in a manner that was respectful of India.

This Italian initiative to engage the Indian Government on a possible settlement took place both on a visible track, in correspondence to the Indian Ministry of External Affairs, and, separately, behind the scenes, between the most senior representatives of Prime Minister Renzi and Prime Minister Modi.

It was only in late May of this year that it became clear beyond doubt that a negotiated settlement would not be possible. At this point, the Indian Government indicated to Italy that it had no latitude to pursue a negotiated settlement given the engagement of the Indian Supreme Court. This impasse is a matter of regret as Italy was and remains convinced that a negotiated settlement was possible.

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It is this political impasse, evident for the first time in late May of this year, that led Italy to commence Annex VII proceedings on 26 June. This political impasse also coincided with acute and increasingly urgent concerns, of both a humanitarian and a legal nature, that have brought us before you today.

Mr President, Members of the Tribunal, the humanitarian considerations will be addressed in the oral submissions of my colleagues Mr Busco and Professor Verdirame. I will say no more of these aspects other than to emphasize that they are not static considerations. Any delay in having regard to them risks potentially irreversible harm.

I turn then, almost finally, to the pressing legal considerations that have brought us here today.

While there was still a possibility of a political settlement, it was in the interests of both the Italian and the Indian Governments to afford space to their discussions. The delays in the Indian court proceedings provided some negotiating space.

There is no longer any prospect of a negotiated settlement. Quite apart from the critical humanitarian considerations that have compelled us here today, the failure of the political track has brought the dispute to a turning point. India's assertion of jurisdiction over the *Enrica Lexie* incident and over the Italian marines now threatens to crystallize into a more egregious and manifest violation of Italy's rights. There is now, but for the international proceedings that Italy has commenced, the prospect of imminent Indian criminal proceedings against Italian State officials in respect of a maritime incident over which Italy has exclusive jurisdiction. The threat of irreversible prejudice to Italy's rights has thus now crystallized sharply.

In the notification commencing Annex VII proceedings, Italy requested provisional measures from India. Following the notification, the marines brought two applications before the Indian Supreme Court, on 4 July 2015, expressly rooted in the commencement of the Annex VII proceedings. The first application was by Sergeant Latorre for leave to extend his stay in Italy – which the Supreme Court had granted following Sergeant Latorre's stroke on 31 August 2014. In that application, Sergeant Latorre applied for leave to remain in Italy during the pendency of the Annex VII proceedings. The urgent reason dictating the application was that Sergeant Latorre's leave to remain in Italy was set to expire 11 days later, and Italy wanted to avoid unnecessary mental anguish to Sergeant Latorre, whose health remains a source of real concern, and an unnecessary escalation of the dispute with India over the issue of Sergeant Latorre's wellbeing.

In the second application, Sergeants Latorre and Girone applied for a deferment of the article 32 writ petition, on which I addressed you earlier, this being the petition that the marines brought in March 2014 to challenge India's jurisdiction. This deferment application was also put expressly in terms of the period of the pendency of the Annex VII proceedings.

Mr President, Members of the Tribunal, the purpose of these applications before the Indian Supreme Court was not simply to achieve the narrow ends requested in the applications; it was also to afford the Indian Government an opportunity to register its

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support for the request that the Indian domestic proceedings should be stayed pending the adjudication by the Annex VII tribunal of the rights in dispute between Italy and India. It was to afford India an opportunity to give effect to the provisional measures requested by Italy in its notification. It was also to afford an opportunity for India and the Indian Supreme Court to put in place appropriate arrangements that would adjourn further issues about the marines being continued to be subject to Indian jurisdiction until such time as the international law issues of jurisdiction and immunity had been authoritatively determined.

I should add that the article 32 writ petition deferment application was intended as a constructive device that would put on hold the Indian domestic proceedings to keep open the possibility of a judicial dialogue between the Annex VII tribunal and the Indian Supreme Court in due course.

Mr President, Members of the Tribunal, the Indian Government refused to support the application by Sergeant Latorre in the terms requested for leave to remain in Italy during the pendency of the Annex VII proceedings. It was prepared only to support a six-month extension of his leave to remain in Italy on humanitarian grounds, expressly rejecting any reference to the Annex VII proceedings. The consequence of the court's order is that Sergeant Latorre remains under the jurisdiction and control of the Indian Supreme Court. India makes much of the fact that he has been granted leave to remain in Italy until mid-January 2016. What it fails to acknowledge, however, is that, unless this Tribunal grants the provisional measures requested by Italy, Sergeant Latorre will have to re-apply to the Indian Supreme Court in a few months' time for leave to remain in Italy and to do so in circumstances in which the Indian Government has already made clear that it would not support any application for leave that was rooted in the pendency of the Annex VII arbitration proceedings. India therefore remains intent on exercising its jurisdiction over Sergeant Latorre even during the pendency of the international proceedings that will address India's entitlement to exercise jurisdiction.

As regards the article 32 writ petition deferment application, the Indian Supreme Court adjourned that hearing until 26 August to allow the Indian Government to submit an affidavit presenting India's views. That affidavit is due to be submitted today, by 1.00 p.m. Hamburg time. We look forward to seeing what the Indian Government has to say. Whatever it says, the issue will fall to be determined by the Indian Supreme Court on 26 August.

These provisional measures proceedings come on the cusp of potentially very severe complications in the dispute between Italy and India. These proceedings afford the Tribunal an opportunity to move this dispute onto a calmer and more stable trajectory that would allow for a determination of the rights of the Parties and would remove any risk of irreversible prejudice to either State's rights and interests.

Mr President, Members of the Court, there is one further issue that I must address. At the point at which Sergeant Latorre applied to extend his leave to remain in Italy and the marines applied for a deferment of the article 32 writ petition proceedings, careful consideration was given to whether an application by Sergeant Girone should also be made for leave to travel to Italy on the grounds of the commencement of the Annex VII proceedings and for humanitarian reasons. The decision was taken not to

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make such an application. The reason for this was that such an application had previously been made in December 2014. It was, however, at the time, forcefully opposed by the Government of India in the proceedings before the Supreme Court, and the Chief Justice of India expressed himself to be opposed to the application. Italy had every reason to believe that the position of the Indian Government and of the Indian Supreme Court had not changed.

This is another issue on which the Indian Written Statement is economical with the reality. The application by Sergeant Girone in December 2014 was withdrawn, before the judgment of the Court was issued, when it became clear in the hearing that the Indian Government, through its representatives in court, opposed it heavily and that, in the face of such opposition, the court would reject it. This episode set us on the path on which we now find ourselves; and, I add, in the face of the false umbrage that India expresses in its Written Statement about Italy's use of the word "hostage" to describe Sergeant Girone, this is the language that Indian officials have used to Italy. We have it on record and we would be content in due course to cross-examine Indian officials on the subject.

Mr President, Members of the Tribunal, Italy commenced Annex VII proceedings as soon as it became evident that there was no prospect of a political settlement. Italy left no stone unturned in its attempt to engage the Indian Government on a settlement proposal that would have been sensitive to the interests of all those engaged. These efforts were to no avail.

This impasse in the political dialogue has crystallized the dispute over India's exercise of jurisdiction in a manner that now threatens to aggravate the situation. It has also coincided with increasingly acute humanitarian considerations in respect of the two marines. These are the reasons why we are now before you requesting provisional measures.

Mr President, that concludes this first part of my submissions this morning. May I invite you to call upon Professor Tanzi.

THE PRESIDENT: Thank you, Sir Daniel. I now call upon Professor Tanzi.

MR TANZI: Mr President, Members of the Tribunal, it is a great privilege for me to be appearing for the first time before you and, especially, to do so on behalf of my country.

Mr President, in order for this Tribunal to entertain its jurisdiction over the present Request for provisional measures, firstly, there must be a title of jurisdiction permitting the Italian application; secondly, the Tribunal is to be satisfied *prima facie* that the Annex VII tribunal vested with the merits of the case has jurisdiction over the claims submitted to it. Contrary to the allegations advanced by the Indian Government in their Written Observations, Mr President, those requirements have been plainly satisfied by Italy.

As to the title for jurisdiction of the present proceedings, suffice to recall that both disputing Parties have consented to the Annex VII jurisdiction of the tribunal currently under constitution. Italy and India are both Parties to UNCLOS and mutually bound

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by it since 29 July 1995. However, India, differently from Italy, has made no declaration accepting any of the means of dispute settlement listed in article 287, paragraph 1. Consequently, lacking agreement between the Parties on such other means of dispute settlement, they have consented under article 287, paragraph 5, to submit to an Annex VII arbitration procedure any dispute concerning the interpretation or application of the Convention. Furthermore, in conformity with article 290, paragraphs 1 and 5, Italy duly submitted the present dispute to Annex VII arbitration on 26 June this year. The constitution of the Annex VII tribunal is currently pending.

Mr President, turning now to the second requirement, according to article 290, paragraphs 1 and 5, this Tribunal needs to consider – *prima facie* – whether the Annex VII tribunal under constitution has jurisdiction over the merits of the case.

As it has been authoritatively stressed, the assessment of *prima facie* jurisdiction is a question

> not whether there is conclusive proof of jurisdiction, but rather whether jurisdiction is not so "obviously excluded".[17]

Mr President, Members of the Tribunal, 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.

This Tribunal, in *Arctic Sunrise* – drawing on its six precedents most consistent on the point in issue[18] – concluded in the sense of the existence of *prima facie* jurisdiction (paragraph 71) after stressing that:

> the Tribunal is not called upon to establish *definitively* the existence of the rights claimed by the Netherlands (paragraph 69, emphasis added).

It also felt the need to determine that:

> the provisions of the Convention invoked by the Netherlands appear to afford a basis on which the jurisdiction of the arbitral tribunal might be founded (paragraph 70).

Such statements, Mr President, confirm the consistent case law of this Tribunal to the effect that it is to be content that the submissions on the merits of the case by the requesting party fall within the scope of the jurisdiction of the Tribunal which is to

[17] P. Tomka and G. Hernandez, "Provisional Measures in the International Tribunal for the Law of the sea", in E.P. Hestermeyer *et al*. (Eds.), *Coexistence, Cooperation and Solidarity. Liber Amicorum Rudiger Wolfrum*, Leiden-Boston, 2012, p. 1763 ff., at p. 1777.

[18] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea)*, *Provisional Measures*, *Order of 11 March 1998*, *ITLOS Reports 1998*, p. 24; *Southern Bluefin Tuna (New Zealand v. Japan; Australia* v. *Japan)*, *Provisional Measures*, *Order of 27 August 1999*, *ITLOS Reports 1999*, p. 280; *MOX Plant (Ireland* v. *United Kingdom)*, *Provisional Measures*, *Order of 3 December 2001*, *ITLOS Reports 2001*, p. 95; *Land Reclamation in and around the Straits of Johor (Malaysia* v. *Singapore), Provisional Measures*, *Order of 8 October 2003*, *ITLOS Reports 2003*, p. 10; *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; *"ARA Libertad" (Argentina* v. *Ghana)*, *Provisional Measures*, *Order of 15 December 2012*, *ITLOS Reports 2012*, p. 332.

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pass judgment on them. Sir Michael Wood will illustrate after me the rights invoked by Italy in its Notification and Request. However, permit me to anticipate that each and all of such rights fall squarely within the scope of the law applicable to the merits of the present case. Indeed, all the Italian submissions are deeply rooted in UNCLOS, namely in Parts II (Territorial Sea and Contiguous Zone), V (Exclusive Economic Zone) and VII (High Seas), notably with reference to articles 2(3), 27, 33, 56, 58, 87, 89, 92, 94, 97, 100 and 300 of the Convention.[19]

Mr President, the unilateral assertion of one's own claims would certainly not be sufficient, as such, to fulfil the basic jurisdictional requirement of the existence of a "dispute" between the Parties. In *Georgia v. Russian Federation,* building on established international case law, its own, amongst others, precedents, the International Court of Justice stressed that the existence of a dispute

> is a matter for "objective determination" by the Court,[20]

In doing so it recalled the famous *dictum* in *Mavrommatis* whereby

> [a] dispute is a disagreement on a point of law or fact.[21]

The general jurisdictional requirement of the existence of a dispute is enshrined in UNCLOS, in article 288 and it underpins the whole of Part XV of the Convention (Settlement of Disputes).

As to the means for assessing the existence of a dispute, it is noteworthy that the ICJ, in the same *Georgia* v. *Russian Federation* case, also felt the need to stress that

> the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for.[22]

The Court went on to state:

> [w]hile the existence of a dispute and the undertaking of negotiations are distinct as a matter of principle, the negotiations may help demonstrate the existence of the dispute and delineate its subject-matter.[23]

Indeed, Mr President, the Italian protests and claims and requests for consultations over the *Enrica Lexie* incident, repeatedly addressed to India ever since its occurrence, represent a reaction to India's persistent assertion of jurisdiction over

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[19] See Notification, para. 29.

[20] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)*, *Preliminary Objections*, *Judgment*, *ICJ Reports 2011*, p. 70, at p. 84, para. 30.

[21] *The Mavrommatis Palestine Concessions*, *Judgment*, *1924*, *PCIJ*, *Series A*, *No. 2*, p. 6, at p. 11.

[22] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination Georgia* v. *Russian Federation)*, *Preliminary Objections*, *Judgment*, *ICJ Reports 2011*, p. 70, at p. 84, para. 30.

[23] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)*, *Preliminary Objections*, *Judgment*, *ICJ Reports 2011*, p. 70, at p. 84, para. 30.

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the incident and over the two Italian marines which is clearly one of firm and repeated objection to its legality.

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. The assertion advanced by the Indian Government in their Written Observations that

> the subject-matter of the dispute does not fall within the ambit of the Convention[24]

only corroborates the evidence of the existence of such a dispute.

As evidenced in the Notes Verbales annexed to its Notification and Request,[25] and as has been further illustrated this morning by Sir Daniel, Italy has not limited itself to lodging complaints, but has conducted itself constructively with a view to reaching an amiable solution to the controversy. It is clear, Mr President, that through such conduct Italy has fulfilled the requirement whereby, before resorting to an international adjudicative body, the applicant is to prove that it has pursued in a meaningful manner a negotiated settlement of the dispute to no avail. Such a general rule is specified in article 283 UNCLOS on the Obligation to exchange views.

The assessment that good-faith attempts at amiable settlement are definitely to no avail requires caution on the part of the claimant. However, as stated by the International Court of Justice in the *North Sea Continental Shelf* case, building on established case law, the jurisdictional requirement in point is deemed to have been fulfilled

> when either of [the Parties] insists upon its own position without contemplating any modification of it.[26]

This, Mr President, is precisely the situation which has emerged from the facts eloquently described this morning by Sir Daniel. Those are the facts which, cumulatively taken, have made Italy draw, in May this year, the conclusion that a negotiated settlement could no longer be achieved. Such circumstances are precisely of the kind envisaged by this Tribunal when stating in *MOX Plant* that

> a State Party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted.[27]

[24] Written Observations of India, para. 3.5.
[25] NV 69/456 of 17 February 2012; NV 73/472 of 20 February 2012; NV 95/553 of 29 February 2012; NV 89/635 of 11 March 2013; NV 273/1570 of 9 July 2013; NV 447/2517 of 5 November 2013; NV 56/259 of 7 February 2014; NV 67/319 of 15 February 2014; NV 71/338 of 19 February 2014; NV 93/446 of 10 March 2014; and NV 123/714 of 18 April 2014, annex 20 to annex A.
[26] *North Sea Continental Shelf (Federal Republic of Germany* v. *Denmark; Federal Republic of Germany* v. *The Netherlands*), *Judgment*, *ICJ Reports 1969*, p. 3, at p. 47, para. 85.
[27] *MOX Plant (Ireland* v. *United Kingdom)*, *Provisional Measures*, *Order of 3 December 2001*, *ITLOS Reports 2001*, p. 95, at p. 107, para. 60.

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Mr President, that concludes my presentation on jurisdiction. Mr President, may I invite you to call Sir Michael Wood to the podium?

MR PRESIDENT: Thank you, Mr Tanzi. I now give the floor to Sir Michael Wood.

MR WOOD: Mr President, Members of the Tribunal, it is an honour to appear before you, and to do so on behalf of the Italian Republic.

I shall first recall, briefly, the requirements for provisional measures, as set out in UNCLOS and in your case law. Then I shall describe the rights claimed by Italy in this case and the link between those rights and the provisional measures sought.[28] Thereafter, Professor Verdirame will deal with the urgency requirement, after you have heard from Avvocato Busco.

The requirements for the prescription of provisional measures under article 290, paragraph 5, of UNCLOS are well-established. It can be seen from India's Written Observations that, despite the rhetoric, there is a fair measure of agreement between the Parties on what these requirements are. In particular, we agree that the purpose of provisional measures is

> to preserve the respective rights of the parties to the dispute …, pending the final decision.[29]

In this connection, a court or tribunal prescribing provisional measures will wish to be careful not to impose what the Special Chamber in the *Ghana/Côte d'Ivoire* case referred to as an "undue burden" – an "*undue*" burden, since in the nature of provisional measures there will inevitably be some burden – on the State against which they are prescribed. As Professor Verdirame will show later this morning, that would most certainly not be the case with the measures sought by Italy. What we propose would indeed preserve the respective rights of both Parties, pending the award of the arbitral tribunal, and that is notwithstanding India's wholly unconvincing attempt to suggest that they would prejudge the final award.

In reviewing the requirements for provisional measures, I shall focus on the differences between the Parties as they emerge from India's Written Observations.

The first requirement is straightforward. It is that two weeks must have elapsed between the date of the request for provisional measures and the reference to this Tribunal. That requirement has plainly been met. The request was made in Italy's Notification and Statement of Claim which was transmitted to India on 26 June.

The second requirement is that the Law of the Sea Tribunal may only prescribe provisional measures under article 290, paragraph 5, if it considers that *prima facie* the arbitral tribunal to be constituted would have jurisdiction. Professor Tanzi has shown that this is the case.

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[28] *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, *Provisional Measures*, *Order of 25 April 2015*, para. 63.
[29] UNCLOS, article 290(1).

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I would, however, like to make three points in light of India's Written Observations. First, the *prima facie* test embodies a "rather low" threshold, to borrow Judge Paik's expression in the *M/V "Louisa"* case.[30]

Second, what has to be determined is that there is *prima facie* jurisdiction over the case, that is over at least some of the matters raised in the Statement of Claim; it is not necessary for the Tribunal to reach this conclusion over each and every one of the claims made.[31] India focuses on one or two of Italy's arguments, and conveniently overlooks the wide range of matters covered by the Statement of Claim.

Third, 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.[32]

India seems to be arguing that there is no dispute between the Parties

> concerning the interpretation or application of [the] Convention.[33]

In this context, it focuses on Italy's claims under article 97 and in respect of the immunity of its State officials.[34] This argument, with respect, is misconceived. As Professor Tanzi has just pointed out, it is clear from India's Written Observations that there is a dispute concerning the interpretation and application of the provisions of the Convention; it sets out its position on the interpretation and application of article 97,[35] which is in opposition to that of Italy. It even invokes its declaration under article 310 of the Convention. These are clearly matters for the merits. The same is true in respect of all the other provisions of UNCLOS cited by Italy in its Statement of Claim.

Mr President, at its heart the dispute before the arbitral tribunal is about the jurisdictional provisions of UNCLOS, about whether – under the Convention – it is Italy or India that has the right to institute proceedings arising out of the incident of 15 February 2012; it is about freedom of navigation; and it is about whether, by asserting jurisdiction over the two Italian State officials, the marines, in respect of acts performed in an official capacity, India is violating the immunity from foreign criminal jurisdiction which they enjoy under international law. It is not appropriate at this provisional measures stage to enter into these questions of interpretation and application of UNCLOS, which clearly belong to the merits, tempting though it is to do so, in light of India's unfounded positions.

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[30] *M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain), Provisional Measures, Separate Opinion of Judge Paik, ITLOS Reports 2008-2010*, p. 72, at p. 73, para. 7.
[31] See *"ARA Libertad" (Argentina* v. *Ghana)*, *Provisional Measures*, *Order of 15 December 2012*, *ITLOS Reports 2012*, p. 332, at pp. 343-344, paras. 61-67.
[32] Written Observations of India, para. 3.5.
[33] UNCLOS, article 288(1).
[34] Written Observations of India, paras. 1.8. 1.11, 3.5.
[35] Written Observations of India, paras. 1.8, 3.5.

The third requirement for provisional measures, which flows from the case-law, is that the rights claimed in the main proceedings must be at least plausible. Here too the threshold is a low one. I shall return to the plausibility of the rights claimed by Italy in a moment but, for the avoidance of doubt, let me say that, while for the purposes of provisional measures the threshold is low, Italy believes that the rights it asserts in these proceedings are far more than plausible; they are clear.

Fourth, there must be a link between the rights claimed and the provisional measures sought. Article 290, paragraph 5, has to be read together with article 290, paragraph 1,[36] and the measures must be considered

> appropriate under the circumstances to preserve the respective rights of the parties to the dispute.[37]

I shall return to this requirement.

And fifth, the urgency of the situation must be such that provisional measures ought to be prescribed by this Tribunal before the arbitral tribunal is constituted and is itself in a position to act on a provisional measures request.[38] As the Tribunal made clear in *Land Reclamation*, the key date is when the arbitral tribunal is itself in a position to act. As of today, we do not know when the Annex VII tribunal will be constituted, or when it will be in a position to act, but that will inevitably be some time after it is formed; it will have to convene, and put in place rules of procedure and other administrative arrangements, such as a registry; and of course it would need to conduct the necessary written and oral proceedings before it could make an order, so we are looking at months, not weeks. That is precisely why the framers of the Convention had the foresight to provide for the procedure before the Hamburg Tribunal. That is why your Tribunal has been ready to prescribe provisional measures even when the constitution of the Annex VII tribunal was expected to be much sooner than it is in the present case.

I turn now to another point about urgency. It is rather misleading to say, as India does in its Written Observations, that

> the [Law of the Sea] Tribunal is not called upon to prescribe provisional measures that will remain in place until the substance of the dispute is finally decided by the Annex VII arbitral tribunal; only until the Annex VII Tribunal is in a position to address the matter if requested to do so.[39]

Mr President, that is not what article 290 says, nor does India's assertion reflect the practice of this Tribunal. When the Law of the Sea Tribunal acts under paragraph 5 of article 290, the measures it prescribes may in principle last through to the arbitral tribunal's final award on the merits.

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[36] *"Arctic Sunrise" (Kingdom of the Netherlands* v. *Russian Federation)*, *Provisional Measures*, *Order of 22 November 2013*, *ITLOS Reports 2013*, p. 230, at pp. 247-248, paras. 80-82.
[37] UNCLOS, article 290(1).
[38] See *Land Reclamation in and around the Straits of Johor (Malaysia* v. *Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p.10, at p. 22, paras. 67-68.
[39] Written Observations of India, para. 3.17.

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Sir Daniel Bethlehem and Professor Tanzi have already covered the basic facts, as well as the first and second requirements that I have just described. I shall now deal with the third and fourth requirements. Professor Verdirame will later address you on the fifth one, urgency, and the prejudice that will be caused to Italy's rights if the measures are not prescribed.

I now turn to look in a little more detail at the issue of plausibility of the rights claimed, and the test adopted in your case-law, most recently in the Order of the Special Chamber in *Ghana/Côte d'Ivoire*:

> a court called upon to rule on a request for provisional measures does not need, at this stage of the proceedings, to settle the parties' claims in respect of the rights and obligations in dispute and is not called upon to determine definitively whether the rights which they each wish to see protected exist.[40]

The Chamber continued:

> the Special Chamber need not therefore concern itself with the competing claims of the Parties, and that it need only satisfy itself that the rights which Côte d'Ivoire claims on the merits and seeks to protect are at least plausible.[41]

The rights claimed by Italy are set out in our Notification and Statement of Claim at paragraph 29, which is also at tab 20 in the folders.

Before turning to paragraph 29, I first want to make the point that the rights claimed by Italy are rights of Italy, rights which have been directly infringed by India. At issue in this case are Italy's right to freedom of navigation, Italy's right to jurisdiction over the incident, Italy's right that its State officials, its military personnel, be treated in accordance with international law. This is not a case of diplomatic protection, as India would seemingly have you believe.

Paragraph 29 at tab 20 begins by indicating the provisions of UNCLOS that, in our submission, India has and is violating, and Professor Tanzi has already recalled these. It is Part II, Part V and Part VII (on the high seas). We have referred to a whole series of articles which Professor Tanzi read out.

Paragraph 29 sets out at subparagraphs (a) to (h), in a non-exhaustive fashion, the ways in which India has breached these provisions. This is reflected in the relief sought, which is set out at paragraphs 33 and 34 of the Notification. I note in passing that these violations of UNCLOS are not minor or technical. They go to the heart of the modern international law of the sea. They concern core principles such as freedom of navigation and the exclusive jurisdiction of the flag State.

[40] *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, *Provisional Measures*, *Order of 25 April 2015*, para. 57.
[41] *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, *Provisional Measures*, *Order of 25 April 2015*, para. 58.

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As you will see from paragraph 29, many of the breaches have a continuing character. As article 14 of the 2001 Articles on State Responsibility says:

> The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.[42]

It will be recalled that one of the examples of a continuing wrongful act, given by the International Law Commission in its commentary to this provision, is "unlawful detention of a foreign official".[43]

Some of the violations described in our Statement of Claim are indeed completed, even though their effects may continue.[44] These include interfering with freedom of navigation by forcing the *Enrica Lexie* to enter Indian territorial waters, ordering her to proceed to Kochi port, and arresting and detaining the vessel and crew.[45]

The continuing breaches include the ongoing measures taken against the two marines, in violation of various provisions of UNCLOS, including articles 27, 56(2), 92 and 97. You will find these at subparagraphs (a) and (e).[46] They also include the failure to cooperate in the repression of piracy, as required by article 100. That is at subparagraph (f).[47] In addition, by flagrantly ignoring the immunity to which Italy is entitled in respect of its State officials, its military personnel, India has violated and continues to violate articles 2(3), 56(2) and 58(2) of UNCLOS and customary international law. That you will find at subparagraph (g).[48]

It is, of course, particularly in relation to these continuing breaches that we seek provisional measures.

There is ample material in our Notification, which will of course be developed in the Memorial, to show that the rights claimed by Italy are plausible. Indeed, they are far more than plausible. We have summarized this material in paragraph 35 of the Request for provisional measures. At this stage, I need only recall some basic facts. The incident took place approximately 20.5 nautical miles from India's baselines, well beyond India's territorial sea. The two marines were on board an Italian-flagged vessel and were acting in exercise of their official duties as laid down by Italian law. Italy exercised its jurisdiction over the case without hesitation or delay, and so informed the Indian authorities before the marines were arrested by India. Notwithstanding this, India, after intercepting the *Enrica Lexie* in international waters and bringing her into India's waters and port, has exercised, and continues to exercise, jurisdiction over the incident and over the marines, in flagrant violation of numerous provisions of UNCLOS. Based on these facts, the rights asserted by Italy are not merely plausible; they are, in our submission, manifest.

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[42] *Yearbook of the International Law Commission,* 2001, Vol II(2), p. 59.
[43] Commentary (3) to article 14, *Yearbook of the International Law Commission,* 2001, Vol II(2), p. 60.
[44] Commentary (5) to article 14, *Yearbook of the International Law Commission,* 2001, Vol II(2), p. 60.
[45] Notification, para. 29(a), (b), (c) and (d).
[46] Notification, paras. 29(a) and (e); 33(a), (c) and (d); and 34.
[47] Notification, para. 29(f); 33(b); 34.
[48] Notification, para. 29(g); 33(d); 34.

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Mr President, Members of the Tribunal, I now turn to the link between the rights claimed by Italy and the provisional measures we seek. Here too the position is straightforward.

The measures sought in our Request are set out at paragraph 57. They were read out this morning by the Registrar and by the Agent of Italy and I do not need to repeat them now.

The link between the measures sought and the rights claimed by Italy is obvious from a comparison of what is in the Request and the relief sought in the Notification.

The request that India refrain from taking or enforcing measures against the marines is directly linked to the claims in the Notification that India must cease to exercise jurisdiction over the marines,[49] and that India's exercise of jurisdiction is in violation of their immunity.[50] I do not think I need repeat that the prejudice caused to the marines, officials of the Italian State, is a direct infringement of the rights of Italy. It is likewise directly linked to our claims that Italy has exclusive jurisdiction over the marines,[51] and that India must cease to exercise any measure of jurisdiction over the marines, including any measure of restraint.[52] It is likewise directly linked to our claim that India is violating its obligation to cooperate in the repression of piracy.[53]

Mr President, Members of the Tribunal, before concluding, I ought to address briefly India's reference in its Written Observations to article 295 of UNCLOS, on exhaustion of local remedies.[54] I make three quick points. First, the invocation of the exhaustion of local remedies rule is not a matter for a provisional measures hearing. It would require a detailed examination of the facts relating to the merits, and would be an issue for the merits, as is clear from your decision in *M/V Louisa*.[55] For example, if the rule were found to apply, which we would strongly dispute, we would say that local remedies have been exhausted. There is no requirement to exhaust remedies that have no prospect of success, remedies that would not be effective. But for you to reach that conclusion would require close examination of the legal proceedings that have taken place in India and of such avenues as might theoretically still be available. That is clearly not appropriate or possible at the provisional measures stage.

Second, and in any event, the local remedies rule does not apply here. Article 295 provides that local remedies are to be exhausted "where this is required by international law", that is, in the context of diplomatic protection. But, as I have already said, in the present case Italy is asserting direct injury to its own rights.

Third, and closely related, the local remedies rule would only be relevant where a State espouses the claim of a private citizen. It does not apply where the individual

[49] Notification, para. 33(a).
[50] Notification, para. 33(b).
[51] Notification, para. 33(c).
[52] Notification, para. 33(d).
[53] Notification, para. 33(e).
[54] Written Observations of India, para. 3.5.
[55] *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 pp. 68-69, paras 66-69.

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injured was a State official engaged in official business.

Mr President, that concludes what I have to say this morning. I would request that, after the break, you invite Mr Paolo Busco to the podium. As previously agreed, we hope that part of the hearing will be in camera.

I thank you, Mr President.

THE PRESIDENT: Thank you, Sir Michael.

We have now reached the time when the Tribunal will withdraw for a break of 30 minutes.

Before withdrawing, however, I wish to inform the public that, in accordance with article 26 of the Tribunal's Statute and article 74 of its Rules, Italy has requested that part of the hearing be held in camera in order to present arguments dealing with some confidential information.

Thus, further to the agreement reached between the Parties, an in camera sitting will be held. This will take place directly after the break. Only the Tribunal, the Parties' representatives and teams and the Registry staff will be able to attend this part of the sitting. The general public is requested to remain outside of the courtroom until the public sitting resumes. This part of the sitting will not be broadcast on the internet.

The estimated duration of the sitting in camera will be 30 minutes. After that the hearing will continue in public and the public will be invited to return to the courtroom.

It is now 11.05. The hearing will resume in camera at 11.35. The public will be admitted again to the hearing after 30 minutes of the hearing in camera.

(Short adjournment)

IN CAMERA PROCEEDINGS

[redacted]

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IT-34(a) (Redacted)

[redacted]

IT-34(a) (Redacted)

[redacted]

[redacted]

[redacted]

[redacted]

(Members of the public were re-admitted)

THE PRESIDENT: We now resume the public part of today's sitting. I give the floor to Mr Guglielmo Verdirame, to continue the oral arguments of Italy.

MR VERDIRAME: Mr President, Members of the Tribunal, Sir Michael Wood addressed you earlier on the plausibility of Italy's rights and on the appropriateness of Italy's requested measures in the light of those rights. I shall now elaborate on appropriateness by focusing on the consequences if the measures are not granted, in particular on the prejudice that Italy's rights would suffer, and on the question whether the requested measures would place an undue burden on India. I shall show throughout that the prescription of the measures requested by Italy is justified by reasons of urgency.[75]

In the Notification, Italy requested India to refrain from exercising any jurisdiction over the *Enrica Lexie* incident while the dispute under UNCLOS is pending. I shall refer to this request as Italy's First Request. In the Notification, Italy also requested India to take all measures necessary to ensure that restrictions on the liberty, security and movement of the marines are immediately lifted.[76] I shall refer to this request as Italy's Second Request. I shall examine each request by reference to both consequences and urgency.

As regards Italy's First Request, Mr President, it is important to keep the nature of the dispute at the front of our considerations. This is at heart a dispute between two States on the interpretation and application of rules governing the exercise of jurisdiction under the UN Convention on the Law of the Sea.

Whether India can exercise jurisdiction over the *Enrica Lexie* incident under UNCLOS is in dispute; whether India can detain the marines or subject them to bail conditions in connection to the Enrica Lexie incident is in dispute; whether India is within its rights in deciding if and when Sergeant Latorre should return to India and if and when Sergeant Girone should be released and returned to Italy is in dispute;

[75] Request, para. 37.
[76] Request, para. 5; Notification, paras. 31-32.

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and, of course, whether India can put the marines on trial is disputed between the Parties.

It is for the Annex VII tribunal to determine if India can lawfully exercise *any* of these rights. The rights of the Parties can only be established once the Tribunal delivers its award. Pending that determination, any exercise of jurisdiction by India will prejudice the very rights which Italy is seeking to vindicate through the Annex VII proceedings.

As the International Court of Justice observed, in the context of provisional measures the key concern is

> to preserve by such measures the rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent.[77]

Italy's key concern is precisely that: to preserve the rights which the Annex VII tribunal has not yet adjudged. Italy cannot preserve those rights if India continues to exercise jurisdiction.

It is also important to recall here that the rights of jurisdiction which Italy is seeking to preserve are not abstractions. As Sir Daniel has shown, and contrary to India's assertions in the Written Observations, Italy attempted to exercise jurisdiction promptly after the incident.

In its Written Observations, India has left no doubt as to its determination to put the marines on trial. As observed by Italy's Agent, India has seemed to have already decided the outcome of that trial.

If a trial does take place, the effective implementation of an award by the Annex VII tribunal in favour of Italy would suffer fatal prejudice. Italy's attempt to exercise its jurisdiction at that point – by resuming the investigation that it launched promptly after the incident or by prosecuting and trying the marines – would be met with formidable and almost certainly insurmountable difficulties.

For 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. The trial of the marines and any steps towards it thus clearly constitute actions which, in terms of *Arctic Sunrise*, are capable of prejudicing

> the carrying out of any decision on the merits which the arbitral tribunal may render.[78]

India seeks to argue that it would stand to suffer greater prejudice than Italy if the Request were granted, and describes Italy's request as a request for prejudgment.

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[77] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v *Nigeria)*, *Provisional Measures*, *Order of 15 March 1996*, *ICJ Reports 1996*, p. 13, at p. 22, para. 35.

[78] *"Arctic Sunrise" (Kingdom of the Netherlands* v. *Russian Federation)*, *Provisional Measures*, *Order of 22 November 2013*, *ITLOS Reports 2013*, p. 230, at p. 251, para. 98.

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On the question of the balancing of competing risks on each side, the Special Chamber in the recent Order on Provisional Measures in *Ghana/Côte d'Ivoire* proceeded on the basis that the provisional measures should not place an "undue burden" on the country against which they are ordered. In the present case, India cannot plausibly claim that it would be placed under any such "undue burden".

If India perseveres in the exercise of jurisdiction, even proceeding to a criminal trial while the dispute is still pending, all risk of irreparable prejudice would be on Italy's side. India contends that its rights will not be preserved unless it can continue to exercise jurisdiction.[79] However, preservation of rights cannot be interpreted to mean that one State will continue to exercise jurisdiction when the issue in dispute is precisely who has jurisdiction. In the particular facts of this case, India cannot claim that it will suffer prejudice or be placed under any undue burden if it is not allowed to proceed to a trial, the outcome of which India has made a point of announcing in its Written Observations. Mr President, Members of the Tribunal, the essence of this Request is to suspend any action in relation to the exercise of jurisdiction. We accordingly invite you to make an order in the terms we specified in the Request,[80] but, if you are so minded to do, in terms addressed to both sides.

Mr President, Members of the Tribunal, I would now like to turn to the reasons that make the First Request urgent.

Italy's case in respect of the First Measure meets the requirement of urgency, judged by reference to each of the critical time frames discussed earlier by Sir Michael: the time when the Annex VII tribunal is in a position to act and the pendency of the proceedings.

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.

We also know that, based on India's Written Observations, India is determined to pursue the exercise of jurisdiction throughout the next few weeks and months and throughout the pendency of the Annex VII proceedings. While no timetable has been set for the criminal trial, India has left no doubt that it wants to proceed to the trial and would have already done so were it not for what it calls the abuse of process by Italy and the marines in the Indian domestic proceedings. 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.

[79] Written Observations of India, paras. 3.54, 3.57, 3.82.
[80] Request, para. 5

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Mr President, Members of the Tribunal, the jurisdictional dispute between Italy and India is for the Annex VII tribunal to determine. In advance of that, India insists on carrying on with an exercise of jurisdiction that is tainted with violations of due process and with the prejudgment of the guilt of the marines running through India's Written Observations.[81] In these circumstances, the requirement of urgency is amply satisfied by reference both to the period before the Annex VII tribunal will be in a position to act and to the pendency of Annex VII proceedings.

Mr President, Members of the Tribunal, I will now come to Italy's Second Request, which is that India should lift all measures restricting the liberty, security and movement of the marines, and refrain from exercising any such jurisdiction, while the dispute is pending.

It cannot be in contention that India is limiting the rights of liberty and movement of both marines. The hearing before the Supreme Court of India on 13 July 2015 showed unequivocally that India regards the marines as on bail and subject to its jurisdiction. Sergeant Girone is not allowed to leave Delhi and is subjected to a form of detention that is more limiting in many ways than 'house arrest' for he is thousands of miles away from his home and family. Sergeant Latorre is in Italy at present but, unless provisional measures are ordered by the Tribunal, he will remain subject to Indian jurisdiction, to the requirement of having to constantly re-apply to the Indian Supreme Court for extensions of his leave to remain in Italy, and to the risk that the Indian Supreme Court, or indeed the Special Court that has been established to conduct the criminal trial of the marines, would revise the current bail conditions or revoke bail altogether.

The lifting of the bail measures is appropriate and necessary on three separate and discrete grounds. I have already covered one of these in camera and I shall now address the other two.

I can deal with the first one briefly. If the Tribunal agrees that India should not exercise the very rights that form the object of this dispute, all restrictions placed on the marines through the exercise of that jurisdiction should be set aside while proceedings are pending. The Second Request therefore follows, as a necessary consequence, from the first one.

The second ground on which Italy is requesting the lifting of all restrictions on the liberty and movement of the marines is that these restrictions are contrary to international standards of due process applicable under the law of the sea.

To develop this second ground, we must begin by recalling the *Camouco* and *Monte Confurco* decisions. The issue in those cases was whether the Master of the vessel was in a state that could be properly characterised as "detention", having been placed under court supervision and having had his passport taken away from him. The Tribunal held in those two cases that the circumstances did amount to detention and ordered his release.[82] The conditions imposed on Sergeant Girone are far

[81] Written Observations of India, paras. 1.6, 1.11, 1.14, 3.77.

[82] *"Camouco" (Panama* v. *France)*, *Prompt Release*, *Judgment*, *ITLOS Reports 2000*, p. 10, at pp. 32-33, para. 71; *"Monte Confurco" (Seychelles* v. *France)*, *Prompt Release*, *Judgment*, *ITLOS Reports 2000*, p. 86, at p. 112, para. 90.

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stricter than those in *Monte Confurco* and *Camouco*, and Sergeant Latorre is at risk of being placed under similarly strict conditions unless the Tribunal orders that this particular exercise of Indian jurisdiction be suspended.

As in *Camouco* and *Monte Confurco*, we are faced here with a special category of unlawful detention, namely detention which the law of the sea specifically characterises as unlawful, in this particular case by virtue of the fact that the detention is not premised on a permissible exercise of jurisdiction and violates immunity.

The restrictions on the liberty and movement of the marines further breach the law of the sea because they violate international standards of due process which, as this Tribunal has held on several occasions, must inform the operation of the law of the sea.

Mr President, Members of the Tribunal, at tab 24 of the Judges' Folder you will find a passage from the *Juno Trader* case. The Tribunal held in that case:

> The obligation of prompt release of vessels and crews includes elementary considerations of humanity and due process of law.[83]

There was no dissent from this passage. At least three of the judges writing separate opinions endorsed it explicitly, also by reference to human rights.[84]

Due process of law must be engaged even more critically in this case, where there is a clear dispute under UNCLOS concerning the exercise of jurisdiction.

At tab 25 of your folder, you will find another reference to due process in the context of prompt release proceedings. In *Tomimaru*, the Tribunal observed that domestic proceedings

> "*inconsistent with international standards of due process of law*" could breach article 292 of the Convention.[85]

Due process is not mentioned expressly in article 292 of the Convention, but, in both of these cases, the Tribunal found that it applied to the exercise of domestic jurisdiction.

In *Louisa*, which is at tab 26 of your folder, even though the Tribunal found that it lacked jurisdiction, it emphasised as follows:

> The Tribunal holds the view that States are required to fulfil their obligations under international law, in particular human rights law, and that

[83] *"Juno Trader" (Saint Vincent and the Grenadines* v. *Guinea-Bissau)*, *Prompt Release*, *Judgment*, *ITLOS Reports 2004*, p. 17, at pp. 38-39, para. 77.
[84] *"Juno Trader" (Saint Vincent and the Grenadines* v. *Guinea-Bissau)*, *Prompt Release*, Separate Opinion of Judge Treves, *ITLOS Reports 2004*, p. 71; ibid., Joint Separate Opinion of Judges Mensah and Wolfrum, *ITLOS Reports 2004*, p. 57, at pp. 57-58, paras. 3-4.
[85] *"Tomimaru" (Japan* v. *Russian Federation)*, *Prompt Release*, *Judgment*, *ITLOS Reports 2005-2007*, p. 74, at p. 96, paras. 76 and 79.

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> considerations of due process of law must be applied in all circumstances.[86]

The other important case in the Tribunal's jurisprudence is *Arctic Sunrise*. In the provisional measures proceedings in that case, the Tribunal ordered the release of individuals placed in detention, also in the light of due process considerations. I will return to this case later, but before doing so I would like to reflect on the crucial aspects of the present situation in terms of due process.

There are at least three dimensions in which international standards of due process are critically engaged here.

First, there is the obligation to formulate charges promptly. Mr President, Members of the Tribunal, this is a basic standard of due process and procedural fairness, encapsulated in articles 9(2) and 14(3)(a) of the International Covenant on Civil and Political Rights, to which both Italy and India are parties.

Two cases of the Human Rights Committee illustrate the importance and the functioning of this standard. At tab 27 of your folder, you will find *Campbell v. Jamaica*. The author of this individual communication had been detained before being formally charged with murder for three months. The Human Rights Committee concludes at the end of that passage that the delay does not meet the requirements of article 9, paragraph 2.[87]

Another relevant decision is *Grant v. Jamaica*, at tab 28 of your folder. At the beginning of the passage, the Human Rights Committee

> observes that the State party is not absolved from its obligation under article 9, paragraph 2, of the Covenant to inform someone of the reasons of his arrest and of the charges against him, because of the arresting officer's opinion that the arrested person is aware of them.

The author of this communication had been detained for seven days before being charged with murder and the Committee concludes that there was a violation of the basic standard of due process in article 9, paragraph 2, of the Covenant."[88] It is confirmed in other cases, delay in bringing charges, and I quote from *Kelly v. Jamaica*, "should not exceed a few days".[89]

Mr President, Members of the Tribunal, one thousand two hundred and sixty-nine (1269) days have gone by since the marines were first arrested by the police in the Indian State of Kerala, and the marines have not yet been charged formally in a legally valid way. India cannot rely on the charge sheet issued by the State of Kerala for the purposes of fulfilling its obligation to charge promptly, in circumstances where its own Supreme Court found, two years and eight months ago, that the Kerala

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[86] *M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain)*, *Judgment*, *ITLOS Reports 2013*, p. 4, at p. 46, para. 155.
[87] *Campbell* v *Jamaica*, Communication No. 248/1987, in General Assembly, *Official Records*, *Forty-seventh session*, *Supplement No. 40* (A/47/40), p. 232, at p. 238, para. 6.3.
[88] *Grant* v *Jamaica*, Communication No. 597/1994, General Assembly, *Official Records*, *Fifty-first session*, *Supplement No. 40* (A/51/40), p. 206, at p. 212, para. 8.1.
[89] *Kelly* v *Jamaica*, Communication No. 253/1987, UN Doc. CCPR/C/41/D/253/1987, at para. 5.8.

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Police – and I quote from the Supreme Court judgment – did not have "jurisdiction to investigate into the complaint" and that the State of Kerala had no jurisdiction "to investigate and, thereafter, to try the offence".[90]

The Kerala charge sheet is consequently *ultra vires* and India cannot rely on it as a formal charge in this case.

Mr President, Members of the Tribunal, the due process requirement to inform a person of the charges brought against him or her promptly is not an abstract legal formality. It is a fundamental check on the exercise of State power. It is also a basic safeguard, designed to create some measure of certainty, and thus to minimise anguish and distress of individuals who are innocent. In this regard I refer you to Italy's submissions in camera.

India seeks to conceal this fundamental failure of due process behind convoluted expressions in its Written Observations. It refers to the present situation as one of "non-framing of charges"[91] and it also refers to the "criminal case being ripe for the framing of charges".[92]

Three and a half years and we are still nearly at the point where the criminal case is "ripe for the framing of charges" but no valid charges.

The facts in this respect are so unequivocal that the Chief Justice of the Indian Supreme Court remarked at a hearing in December 2014: "Even the charge sheet has not been filed".[93]

India is also running the absurd argument that the reason why the marines have not yet been charged is because they and Italy have not been cooperative. Mr President, in some legal systems a person has the right to remain silent upon arrest. But that does not exempt a State from its obligation to formulate charges promptly.

The criminal system in every country deals with individuals who are entirely uncooperative (which anyway was not the case here). That does not mean that the State can place them in indefinite custody without charges. The State must still charge them, and must do so promptly, and it must do so properly.

The second critical due process dimension in this case concerns the manner in which India wants to try the marines. Even from a domestic point of view, the exercise of criminal jurisdiction by India over the *Enrica Lexie* incident and over the marines was so exceptional and so fraught with legal difficulties that there was no way of dealing with it under ordinary legislation. So the Supreme Court directed the Government to set up an *ad hoc* Special Court to try the marines. This is in clear breach of another fundamental standard of due process, encapsulated in article 14(1) of the International Covenant on Civil and Political Rights, which provides that

[90] Judgment of the Indian Supreme Court, 18 January 2013, annex 19 to annex A, paras. 93, 94, 111.
[91] Written Observations of India, para. 1.17.
[92] Written Observations of India, para. 2.13.
[93] Request, para. 49 and fn. 28.

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> everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

A tribunal designated *ad hoc* and *ex post facto*, without foundation in Indian legislation, to try two specific individuals manifestly fails to fulfil this requirement.

Again, India seeks to resort to euphemisms to conceal this violation of clearly applicable international standards of due process, describing the Special Court as an "exclusive court".[94] Far from placing the marines in a privileged position, India's decision to try them in an exclusive *ad hoc* court has produced more problems and greater uncertainty. The marines cannot be blamed for seeking to defend themselves as best they can in these unique "exclusive" circumstances, not provided for under Indian law. Without charges, without a court established by law, without a clear legal framework governing the procedure, and against the background, now made explicit in the Indian Written Submission, that the outcome of the trial is a foregone conclusion, in these circumstances the marines are simply doing their best to exercise their fundamental right of defence.

Thirdly, we have seen that the marines' right to defend themselves has been attacked in its most basic dimension: the presumption of innocence. There can be few more blatant breaches of due process than a State declaring, in no uncertain terms, in the solemnity of inter-State proceedings in front of this Tribunal, the guilt of two individuals, before the trial has taken place and before charges have been formally brought. We must not forget that the marines have maintained their innocence throughout.

Each of these three relevant and applicable standards of international due process vitiates the exercise of jurisdiction by India, quite aside from that exercise of jurisdiction not being founded in UNCLOS. It also shows the acute and irreparable prejudice that Italy would suffer if the measures restricting the marines' liberty are not lifted promptly. These acute concerns are relevant to both prejudice and due process.

Mr President, Members of the Tribunal, let me now turn to *Arctic Sunrise*. In the part of the Order dealing with reasons, the Tribunal drew attention to a passage in the Written Statement of the Netherlands which is particularly relevant here.[95] The Netherlands argued in that passage, which is referred to by the Tribunal under its reasons, that

> the crew would continue to be deprived of their right to liberty and security as well as their right to leave the territory and maritime areas under the jurisdiction of the Russian Federation

adding that

[94] Written Observations of India, para. 1.19.

[95] *"Arctic Sunrise" (Kingdom of the Netherlands* v. *Russian Federation)*, *Provisional Measures*, *Order of 22 November 2013*, *ITLOS Reports 2013*, p. 230, at p. 249, para. 87.

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> [t]he settlement of such disputes between two states should not infringe upon the enjoyment of individual rights and freedoms of the crew of the vessels concerned.

This passage, to which the Tribunal referred in giving its reasons for the Order, concluded:

> every day spent in detention is irreversible.

Italy relies on similar arguments. The present Request also rests on stronger grounds than the successful Dutch request in *Arctic Sunrise*. This is so for at least four reasons.

First, the violations of applicable standards of due process are more severe in this case. The crew members in *Arctic Sunrise* had been charged, and their detention had not gone on for nearly as long as in this case.

Secondly, the marines are agents of the Italian State, who were engaged in official activities clearly and closely connected with the prevention and repression of piracy. That is another important distinguishing factor from *Arctic Sunrise*.

India seeks to rely on immunity to argue that this is a factor that distinguishes both *Arctic Sunrise* in its favour. Mr President, Members of the Tribunal, that argument is clearly misplaced. The opposite is true. The existence of immunities in this case makes the prescription of Italy's Second Measure both more appropriate and more urgent than in *Arctic Sunrise*. As noted by the International Court of Justice in the Advisory Opinion on the Immunity of the Special Rapporteur,[96] immunities must be addressed *in limine litis*, but the Indian Supreme Court was silent on immunities in its January 2013 Judgment. The Second Request would certainly not prejudge the question of immunities, but it would prevent the irreparable prejudice that would inevitably result from a continued breach of immunities.

The third factor that distinguishes this case from *Arctic Sunrise* is that India cannot claim that its exercise of jurisdiction in the Exclusive Economic Zone comes under one of the cases expressly contemplated under articles 56 or 60 of the Convention.

The fourth factor is the medical circumstances discussed in camera. These four factors distinguish *Arctic Sunrise* and strengthen our reliance on that precedent.

To conclude on the issue of prejudice suffered by Italy, the circumstances of this case make the nature of prejudice which Italy would suffer if the Second Measure is not granted more acute and extreme than in *Arctic Sunrise*. Failure to grant this measure would entail a significant departure from that decision and from the jurisprudence of this Tribunal.

Mr President, Members of the Tribunal, I will now turn to the question of undue burden in relation to the Second Request. India alleges that Italy would not comply

[96] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, *Advisory Opinion*, *ICJ Reports 1999*, p. 62, at p. 88, para. 63.

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with an award in India's favour so that India would, on balance, be placed under greater risk if the marines are both in Italy.

Mr President, Members of the Tribunal, this is an allegation that Italy rejects in the most vigorous terms. Italy and India are each committed to the Convention and to the dispute settlement obligations under it. They have a long history of friendly relations between them. The fact is that, notwithstanding the political resonance of this case in Italy, Italy complied with its undertakings before the Indian Supreme Court. In the course of this dispute, it was India which resorted to a glaring breach of international law when it prevented the Italian Ambassador from leaving Indian territory. In these circumstances, it would be entirely inappropriate to proceed on the basis that Italy is in bad faith and would not observe its obligation under the Convention to comply with the award of the Annex VII tribunal, whatever that award says.

Let me now turn to the issue of urgency in relation the Second Request. Urgency here inheres in the nature of the prejudice to Italy's rights. If the Annex VII tribunal finds that India has no jurisdiction, it would follow that the measures restricting the liberty and movement of the marines were unlawful throughout. The marines, and in consequence Italy, would have suffered irreparable damage.

Italy is not calling into question the principle that States have a right, or a power, to arrest, detain, prosecute and punish individuals, but that power is not absolute. There are limitations to it under UNCLOS: a State cannot assert a power to prosecute and punish in respect of alleged offences over which it has no jurisdiction under the Convention. A State has, similarly, no such power *vis-à-vis* individuals who are entitled to immunity from its jurisdiction. In exercising this power, States must respect due process throughout; as this Tribunal said, "in all circumstances".

Where a dispute over the exercise of jurisdiction has arisen and has been submitted for final binding determination, and where violations of due process are ongoing, 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. This was a principle referred to in the Order in *Arctic Sunrise*.[97] Again, I note, Mr President and Members of the Tribunal, that in the light of the duration and of the circumstances of the detention here, and of the other factors to which we have drawn your attention in camera, the considerations of urgency are more urgent and pressing than in *Arctic Sunrise*.

Part of the irreparable damage has of course already occurred but this is no justification for inflicting more of it in the coming weeks and months and during the pendency of the proceedings, particularly since, as Sir Daniel explained, urgency has crystallized quite sharply over the last few weeks, as a result of the developments which Sir Daniel took you through earlier.

[97] *"Arctic Sunrise" (Kingdom of the Netherlands* v. *Russian Federation)*, *Provisional Measures*, *Order of 22 November 2013*, *ITLOS Reports 2013*, p. 230, at p. 249, para. 87.

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Mr President, Members of the Tribunal, India is not only determined to prejudge the outcome of the Annex VII proceedings by pursuing the exercise of jurisdiction all the way to the completion of the trial before the Special Court; as is clear from their Written Observations, 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. The requirement of urgency in respect of Italy's Second Request is clearly met.

Before concluding, I would like to address a final point which may be relevant to the analysis of urgency in relation to both measures. It is well known that this dispute is not new. India makes much of this point in its Written Statement, but India is conflating two analytically distinct issues: the duration of the dispute and the assessment of urgency. This is clear from the jurisprudence under UNCLOS, as shown in the recent order of the Special Chamber of this Tribunal in *Ghana/Côte d'Ivoire*.

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. This is not because of any requirement of exhaustion of local remedies – which clearly does not apply here – but because these disputes will often begin with an exercise of jurisdiction by domestic authorities and they will be challenged before domestic courts.

There is therefore nothing unusual about engagement with the domestic process in disputes over jurisdiction; nor is there anything unusual in a case of this kind for political and diplomatic negotiations to take place. It would be adding insult to injury if the passage of time, due to the nature of the dispute as well as to Italy's best efforts to secure a negotiated solution, were somehow to be held against Italy.

The duration of the dispute, on the contrary, is a factor which, particularly in the context of violations of international due process and the other special circumstances of this case, strengthens the case for urgency.

Mr President, Members of the Tribunal, in conclusion, Italy's First Request is justified by the irreparable prejudice which Italy will suffer if the rights which form the object of this dispute were continued to be exercised by India. It is further justified by the fact that continued exercise of criminal jurisdiction by India could jeopardize the future implementation of an award of the Annex VII tribunal. Italy's Second Request is justified on at least three bases: as a consequence of the First Request; by the applicable international standards of due process; and by the circumstances which have been assessed in camera. Both of Italy's requests are justified by reasons of urgency and in neither case would India be placed under an "undue burden".

Mr. President, Members of the Tribunal, I have now concluded. I would ask you to invite Sir Daniel Bethlehem to the podium.

THE PRESIDENT: Thank you, Mr Verdirame. I now give the floor to Sir Daniel Bethlehem.

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MR BETHLEHEM: Mr President, Members of the Tribunal, I return to the podium to make some very brief closing observations to Italy's first-round argument and, in so doing, to underline a number of points on which, in our submission, this case turns. I would like to pick up where Professor Verdirame left off, with irreversible prejudice, urgency and undue burden. I do not repeat his submissions.

On irreversible prejudice, I note only that the risks to Italy's rights, including as regards humanitarian considerations relevant to its officials, are manifest. India, in contrast, can show no irreversible prejudice to its rights in issue in these proceedings. If, however, contrary to Italy's submission, the Tribunal does perceive there to be some risk to India's rights, this could be easily addressed by an order from the Tribunal that is directed in equal terms 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. This would cater perfectly well for any concern that could possibly be apprehended as regards India's rights. Professor Verdirame has addressed you on this in more detail.

As regards the risk of irreversible prejudice to Italy's rights in issue in the international proceedings, however, 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. The status quo is one in which Italy's rights are being prejudiced daily, on an ongoing basis; and the risk of irreparable harm will be readily apparent from the information that has been provided to you.

Urgency, as you have heard, is both humanitarian and legal. It is humanitarian both because of the individual circumstances of the two marines, and because prolonged pre-charge deprivation of liberty is a grave matter of continuing concern. This is not a prompt-release case, in which the issue of deprivation of liberty was explicitly envisaged and addressed in UNCLOS. The circumstances in issue here however are even more egregious. The marines are officials of the State who were on official duties. They are not simply the crew of a vessel flying the flag of the applicant State. The marines have been subject, unlawfully, to India's exercise of jurisdiction not for days, or for weeks, or even for months, as may arise in a prompt-release cases, but for three-and-a-half years. The humanitarian circumstances in issue in this case also distinguish this case from prompt-release cases.

Urgency is legal as, with the failure of efforts to reach a negotiated solution, the dispute has reached a turning point. India's assertion of jurisdiction over the *Enrica Lexie* Incident and over the Italian marines has now crystallized sharply into a violation of Italy's rights that requires urgent attention. If provisional measures are not prescribed, there is a high risk of the aggravation of the dispute as India pushes forward to try the marines. The threat of irreversible prejudice to Italy's rights has thus now crystallized sharply. As both Sir Michael Wood and Professor Verdirame have addressed, urgency is not be 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.

This brings me to undue burden. Professor Verdirame has dealt with this fully. I would make only three observations. The first is that, in the application by Sergeant

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Latorre that was made to the Indian Supreme Court on 4 July, just a few weeks ago, which I addressed in my opening submissions this morning, Italy gave an undertaking to return Sergeant Latorre to India following the final determination of rights by the Annex VII tribunal, if this is required by the award of that tribunal. Italy repeats this undertaking here as an undertaking to this Tribunal in respect of both marines.

My second observation is to recall your *Arctic Sunrise* provisional measures Order and the bond that you required of the Netherlands. Pursuant to the bail order of the Indian Supreme Court in this case, Italy has been required to provide surety in respect of the two marines of approximately €300,000 for each marine, denominated in Indian rupees. Such that there may be any conceivable issue of prejudice to India from the provisional measures requested by Italy in these proceedings, Italy would be prepared to transform that surety through some appropriate arrangement into a surety given to India in accordance with the stipulations of an order of this Tribunal. The amount of the surety that Italy is currently maintaining in India, and is now offering to continue as a bond pursuant to an order of this Tribunal, overshadows that required by the Tribunal in *Arctic Sunrise*, in which the amount stipulated was in respect of the release of the vessel and 30 crew members.

My third observation is that the appropriate course for the Tribunal to adopt in this case, in our respectful submission, is to order the provisional measures that Italy has requested for the period to the end of the Annex VII proceedings. This would properly reflect the risk of irreversible prejudice to Italy's rights that we have described. If circumstances change, or if India for any other reason wishes to contest the measures that are prescribed, its right to do so before the Annex VII tribunal in due course is safeguarded and indeed expressly envisaged by article 290(5) of UNCLOS, which would allow India to apply to modify or revoke the provisional measures prescribed. India's rights are more than adequately safeguarded. The risk of irreversible prejudice to Italy's rights, and the nature of any conceivable burden to India, properly warrants this approach.

Mr President, Members of the Tribunal, that concludes Italy's first-round submissions. I thank you for your attention.

THE PRESIDENT: Thank you, Sir Daniel.

This brings us to the end of the first round of arguments of Italy. We will continue the hearing in the afternoon, at 3 p.m. to hear the first round of oral arguments of India.

The sitting is now closed.

(Luncheon adjournment)

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