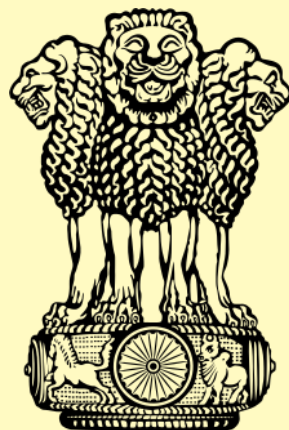


**ARBITRATION UNDER ANNEX VII OF THE UNITED NATIONS
CONVENTION ON THE LAW OF THE SEA
PCA Case No. 2015-28**



सत्यमेव जयते

DISPUTE CONCERNING THE “ENRICA LEXIE” INCIDENT

THE ITALIAN REPUBLIC *v.* THE REPUBLIC OF INDIA

**WRITTEN OBSERVATIONS OF THE REPUBLIC OF INDIA
ON
THE REQUEST OF THE ITALIAN REPUBLIC FOR THE PRESCRIPTION OF
PROVISIONAL MEASURES UNDER ARTICLE 290, PARAGRAPH 1, OF THE
UNITED NATIONS CONVENTION ON THE LAW OF THE SEA**

26 FEBRUARY 2016

ARBITRATION UNDER ANNEX VII OF THE UNITED NATIONS

CONVENTION ON THE LAW OF THE SEA

PCA Case No. 2015-28

DISPUTE CONCERNING THE “ENRICA LEXIE” INCIDENT

THE ITALIAN REPUBLIC *v.* THE REPUBLIC OF INDIA

WRITTEN OBSERVATIONS OF THE REPUBLIC OF INDIA

ON

**THE REQUEST OF THE ITALIAN REPUBLIC FOR THE PRESCRIPTION OF
PROVISIONAL MEASURES UNDER ARTICLE 290, PARAGRAPH 1, OF THE
UNITED NATIONS CONVENTION ON THE LAW OF THE SEA**

26 FEBRUARY 2016

TABLE OF CONTENTS

CHAPTER 1. INTRODUCTION	1
I. The Procedural History.....	3
II. The ITLOS Order of 24 August 2015	4
III. Outline of the Written Observations	5
CHAPTER 2. FACTUAL BACKGROUND	7
I. Deployment of Vessel Protection Detachment on the <i>Enrica Lexie</i>	8
II. The “Incident”	8
III. Alleged Ruse and Coercion by India	9
IV. Events following the Arrival at Kochi Anchorage	10
V. Italy’s Alleged Prompt Exercise of Jurisdiction	11
VI. India’s Compliance with the 24 August 2015 Order of ITLOS.....	17
Chronology of Events	18
CHAPTER 3. INADMISSIBILITY OF ITALY’S REQUEST FOR THE MODIFICATION OF THE PROVISIONAL MEASURES ORDERED BY ITLOS	26
I. A Questioning of the ITLOS Order of 24 August 2015	26
A. <i>The Present Request Has Already Been Addressed and Rejected by ITLOS in its Order of 24 August 2015</i>	26
B. <i>The Conditions for the Modification of the Provisional Measures Prescribed by the ITLOS are Not Met</i>	30
II. No New Circumstances Justify the Modification of the ITLOS Order of 24 August 2015	34
A. <i>No Urgency</i>	35
B. <i>No Risk of Irreparable Prejudice</i>	40
C. <i>The Object of Provisional Measures Must Be to Preserve the Rights of Both Parties</i>	40
D. <i>Italy Assumes Immunity, which is a Merits Question</i>	41
E. <i>Italy’s “Undertaking” To Return Sergeant Girone is Insufficient to Justify Italy’s Request</i>	41
F. <i>The False Allegation of Lack of Due Process</i>	42
III. A Request for Pre-judgment	43
CHAPTER 4. CONCLUSION	47
The Tendentious Character of Italy’s Request.....	47
SUBMISSIONS	49
ANNEXES	50

CHAPTER 1 INTRODUCTION

1.1 These Written Observations to Italy’s Request for the Prescription of Provisional Measures dated 11 December 2015 are filed pursuant to Procedural Order No. 1 signed by the President of the Arbitral Tribunal on 19 January 2016.

1.2 In its Submissions, Italy requests the Arbitral Tribunal to prescribe the following provisional measure:

“India shall take such measures as are necessary to relax the bail conditions on Sergeant Girone in order to enable him to return to Italy, under the responsibility of the Italian authorities, pending the final determination of the Annex VII Tribunal.”¹

Italy makes no request with respect to Sergeant Latorre.

1.3 Italy casts its submission as a request to prescribe what it terms an “additional provisional measure” under Article 290, paragraph 1, of UNCLOS.² Presumably, Italy is referring to the fact that the International Tribunal for the Law of the Sea has previously issued an Order prescribing provisional measures on 24 August 2015. The present request is therefore described as being “additional” in order to convey the impression that it is something new, or over and above what ITLOS has already prescribed. However, the Request does not reflect this.

1.4 In the first place, Italy requested virtually the same provisional measure with respect to Sergeant Girone before ITLOS, and its request was rejected in the Order that ITLOS rendered. In reality, what Italy is seeking is not an “additional provisional measure” under Article 290, paragraph 1 of UNCLOS, but rather a *modification* of the provisional measure issued by ITLOS

¹ Italy’s Request for the Prescription of Provisional Measures under Article 290, Paragraph 1, of the United Nations Convention on the Law of the Sea, 11 December 2015 (“Italy’s Request”), p. 33, para. 112.

² *Ibid.*, p. 3, para. 6.

in its Order of 24 August 2015, and a chance to re-litigate a matter that it has already extensively argued, both in written and oral pleadings before ITLOS.

1.5 This leads to the second point, which is that Italy, while purporting to rely on Article 290(1),³ should have also reflected on Article 290, paragraph 5, which provides as follows:

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

1.6 It should be recalled that, before ITLOS, Italy requested two provisional measures.⁵ The first was aimed at obtaining a stay of Indian judicial and administrative proceedings, a request that ITLOS did not accept in the form sought, prescribing instead a measure directed at both Parties.⁶

1.7 Italy’s second request was made in the following terms:

“India shall take all measures necessary to ensure that the 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”.⁷

ITLOS did not accept this request, ruling that it did not consider the request to be appropriate.⁸

³ Italy’s Request, p. 3, para. 6.

⁴ Emphasis added.

⁵ Request of the Italian Republic for the Prescription of Provisional Measures under Article 290, paragraph 5, of the United Nations Convention on the Law of the Sea, 21 July 2015 (“Italy’s ITLOS Request”) (Annex IT-32).

⁶ *The “Enrica Lexie” Incident (Italy v. India), Provisional Measures*, Order of 24 August 2015, para. 141(1).

⁷ Cited at para. 29 of the Order of ITLOS.

⁸ *The “Enrica Lexie” Incident (Italy v. India), Provisional Measures*, Order of 24 August 2015, para. 127.

1.8 Italy is requesting this Tribunal, now that it has been constituted as foreseen under the last sentence of Article 290(5), to modify the ITLOS Order of 24 August 2015 with respect to Sergeant Girone.

1.9 As India will show in Chapter III, the legal or factual grounds should have been there for such a request. Italy's Request for provisional measures in the present proceedings was lodged less than four months after ITLOS issued its Order. Nothing has changed during that period that in any way changes the situation with respect to Sergeant Girone except that the duration of the Annex VII proceedings is now known after the adoption of the Rules of Procedure on 18 January 2016.

1.10 Italy's Request puts forth the same arguments it advanced before ITLOS. The version of the facts recounted by Italy in its Request is nearly the same it submitted to ITLOS. The circumstances and considerations upon which Italy bases its request listed at paragraphs 7 and 103 of its Request are repetitions of assertions advanced earlier and not accepted. Italy's jurisdictional arguments have not changed and nor have the legal arguments and jurisprudence cited by Italy in support of provisional measures. Given this, in India's view, the result should be the same.

1.11 India will therefore limit itself at this stage to summarizing the relevant events that took place before ITLOS.

I. The Procedural History

1.12 The incident which gives rise to the present proceedings occurred on 15 February 2012. It stems from the killing of two Indian fishermen, plying their trade within India's Exclusive Economic Zone on their small fishing vessel, the *St. Antony*, by gunfire directed at the vessel from Sergeants Latorre and Girone, who were stationed on the Italian flagged oil tanker *Enrica Lexie*. Italy only instituted the proceedings under Article 287 and Annex VII, Article 1, of UNCLOS some three years and four months later by means of a written Notification dated 26 June 2015.

1.13 The Notification included a statement of Italy's claim and the grounds upon which it was based, as well as an indication that Italy intended to request two provisional measures: the first seeking a stay of Indian judicial and administrative proceedings until the Annex VII arbitral tribunal had rendered a final determination; the second seeking a relaxation of the bail conditions for Sergeants Latorre and Girone to enable Sergeant Latorre to remain in Italy, and Sergeant Girone to travel to and remain in Italy, until the end of the Annex VII proceedings. Sergeant Latorre was at that time in Italy pursuant to leave that had been granted by Supreme Court of India for medical reasons. Sergeant Girone was in India, subject to relaxed bail conditions that allowed him to reside in New Delhi at the residence of the Italian ambassador.

1.14 On 21 July 2015, pending the constitution of the Annex VII tribunal, Italy filed a request for provisional measures with ITLOS under Article 290, paragraph 5, of UNCLOS.

1.15 India filed its Written Observations to Italy's Request on 6 August 2015. In those Observations, India rebutted the arguments that Italy had advanced in its Request, including with respect to Italy's second request, namely regarding Sergeants Latorre and Girone.

1.16 Oral hearings were convened in Hamburg on 10-11 August 2015. During those proceedings, Italy raised the same arguments about the status of Sergeant Girone that it now relies on in its current request to this Tribunal.

1.17 In other words, the issues that Italy raises in its new Request were canvassed in the written and oral proceedings before ITLOS.

II. The ITLOS Order of 24 August 2015

1.18 In its Order of 24 August 2015, the Tribunal did not accept either of Italy's requests.

1.19 With respect to Italy's first request seeking a stay of Indian judicial and administrative proceedings, ITLOS prescribed a provisional measure directed at both Parties,

“Italy and India shall both suspend all court proceedings and shall refrain from initiating new ones which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal or might jeopardize or prejudice the carrying out of any decision which the arbitral tribunal might render”.⁹

As Italy itself confirms, both Parties have taken steps to comply with the suspension of proceedings ordered by ITLOS.¹⁰

1.20 As for Italy’s second request seeking a relaxation of the Marines’ bail such that, in so far as it concerned Sergeant Girone, he be allowed to travel to and remain in Italy until the end of the Annex VII proceedings, the Tribunal did not accept Italy’s submission. ITLOS was well aware that humanitarian concerns are applicable to all. As the Tribunal observed, “the Order must protect the rights of both Parties and must not prejudice any decision of the arbitral tribunal to be constituted under Annex VII”.¹¹ It may be noted that the Tribunal thus did not prescribe any provisional measure changing the status of either of the Marines.

1.21 In the meantime, the Parties have complied with the Order of ITLOS and the Annex VII Arbitral Tribunal has been constituted. Yet neither of these factors substantially changes the situation and nor do they constitute a new circumstance for Italy’s present request.

III. Outline of the Written Observations

1.22 Following this Introduction, the balance of India’s Written Observations is structured as follows.

1.23 In Chapter II, India will address the facts. A brief summary of some of the key facts is necessary in order to render a correct account of the facts presented in Italy’s Request. To this end, Chapter II will address:

⁹ *The “Enrica Lexie” Incident (Italy v. India), Provisional Measures*, Order of 24 August 2015, para. 141(1).

¹⁰ Italy’s Request, p. 2, para. 5.

¹¹ *The “Enrica Lexie” Incident (Italy v. India), Provisional Measures*, Order of 24 August 2015, para. 125.

- The discrepancies in Italy's description of the facts;
- The killing of the two Indian fishermen;
- The investigation carried out by India and
- The proceedings before the Indian courts.

1.24 Chapter III will then take up the inadmissibility of Italy's Request. In it, India will address:

- The conditions for the modification of provisional measures under Article 290 of UNCLOS;
- The fact that there are no new circumstances for the modification of the ITLOS Order of 24 August 2015;
- The lack of urgency underlying Italy's new request;
- Absence of risk of irreparable prejudice justifying Italy's request; and
- The fact that Italy's request is tantamount to a request for a pre-judgment.

1.25 In Chapter IV, India will conclude by demonstrating the misleading character of Italy's request to modify the provisional measures prescribed by ITLOS.

1.26 At the end of these Written Observations, India presents its Submissions.

1.27 These Written Observations are accompanied by a few documentary annexes.

CHAPTER 2

FACTUAL BACKGROUND

2.1 Italy's Statement of Claim and Request for provisional measures give a one-sided account of the facts and incomplete information. While much of this is more appropriately dealt with at the merits stage of the proceedings, India will address some of the more grievous misstatements.

2.2 Italy alleges that it has been hindered in providing a definitive account of incident, and thwarted in exercising jurisdiction, as a result of India's keeping the Italian Marines under the custody of its courts and initiating criminal investigations, notwithstanding Italy's prompt assertion of jurisdiction.

2.3 Italy's position tacitly acknowledges that India may have jurisdiction in the case, but that India should not have exercised it after Italy's assertion of jurisdiction. Italy does not cite any provision of the United Nations Convention on the Law of the Sea (UNCLOS), or any other related principle of international law, for this alleged *a priori right*, which would have the effect of precluding India from exercising the jurisdiction.

2.4 Italy's argument is factually incorrect given that it was India that initiated an investigation into the firing incident and began to exercise its jurisdiction on the very day the incident took place – 15 February 2012.

2.5 The assertion that India failed to respond to Italy's request for cooperation is also not correct. On 26 February 2012, a five-member team of Italian naval officials visited India and examined the fishing boat *St. Antony* berthed at Neendakara fishing harbour. That team was also given access to Sergeants Latorre and Girone, the captain of the *Enrica Lexie* and its crew, the other four Marines stationed on the vessel and the two accused Marines again when they were allowed to travel back to Italy twice.

2.6 Italy's repeated assertion¹² that, up to the present, no charge-sheet has been filed against the Marines in violation of due process, is also misleading. As India showed during the provisional measures proceedings before ITLOS, and will do so again in these Written Observations, it is the Republic of Italy and the accused Marines that have repeatedly hindered India's attempt to have formal charges framed against the Marines, and to begin the trial, by their petitions and applications before the Indian courts.

2.7 Italy also attempts to cast doubts on India's exercise of criminal jurisdiction and the conduct of the investigation by the National Investigation Agency (NIA) in order to create the impression that India has not acted responsibly. This line of argument is regrettable, and not relevant for the present application.

I. Deployment of Vessel Protection Detachment on the *Enrica Lexie*

2.8 Italy mentions its Government Decree No. 107 of 2011 (subsequently converted into Law No. 130 of 2 August 2011), which provided for the deployment of Vessel Protection Detachments ("VPDs") from the Italian Navy on board vessels flying the Italian flag.

2.9 Italy has since stopped providing Vessel Protection Detachments for embarkation on Italy-flagged merchant vessels, as well as participating in NATO's Operation Ocean Shield.¹³

II. The "Incident"

2.10 On 15 February 2012 at about 4.30 p.m. Indian Standard Time, an Indian fishing boat, the *St. Antony*, engaged in fishing activity in India's Exclusive Economic Zone at a distance of about 20.5 nautical miles off the Indian coast at Kollam, Kerala (at a position 09 degree 17.2 Minutes North Latitude and 076 Degree 01.8 minutes East Longitude), faced a volley of bullets

¹² See Italy's Request, p 13.

¹³ This statement by the Italian Defence Minister was in response to a parliamentary inquiry on the *Enrica Lexie* case. See G.M. Farnelli, "Vessel Protection Detachments and Maritime Security: An Evaluation of Four Years of Italian Practice", *Maritime Safety and Security Law Journal*, 2015, p. 15.

fired from sophisticated automatic firearms from two uniformed persons on board an oil tanker ship, which was about 200 meters from the boat operating in clear weather. Two fishermen on St. Antony were fatally hit by the bullets fired from *the Enrica Lexie*, and the lives of nine other fishermen on the boat were endangered due to the firing. Valentine Jelastine, who was at the helm of the boat, received a bullet to his head; Ajeesh Pink, who was at the bow, received bullet hit on his chest. Both died on the spot. In addition to the casualties, the incident caused serious damage to the boat endangering the safe navigation of the fishing vessel.

III. Alleged Ruse and Coercion by India

2.11 Italy's Request asserts that India used trickery and coercion to force the *Enrica Lexie* into Kochi Port. While this is a merits question, the allegation is patently wrong.

2.12 The local coastal Police Station received information about the incident through a call from the sea. The Indian Coast Guard and the Marine Rescue Coordination Centre ("MRCC"), Mumbai, were thereafter alerted, which led to the identification of the *Enrica Lexie* as the probable vessel involved in the incident.¹⁴ The vessel, which was within the Exclusive Economic Zone of India, was requested to return to the coast and join the investigation. The captain agreed and brought the vessel to Kochi Port at 10:35 pm.

2.13 India denies that the ship was subjected to any kind of coercion. Italy also does not assert that the ship at any point of time was threatened with the use of force or other consequences. The ship was merely asked to turn back and join the investigation. Given that two unarmed Indian fishermen had been killed while fishing in India's Exclusive Economic Zone by firing from military grade weapons from the *Enrica Lexie*, it was appropriate for India to seek to question the individuals on board for their version of this serious case.

2.14 Since the Coast Guard and other Indian agencies were still investigating, they could not have definitively established at the time that the *Enrica Lexie* was the only suspect ship. But it

¹⁴ See Diary of Events of Coast Guard, 2012 (Annex IN-1); Statement of Commandant, Coast Guard, Officer in-Charge, MRCC, dated 16 July 2013 (Annex IN-4 – confidential).

was clearly a vessel of interest, and India informed it accordingly. It follows that the allegations of ruse are efforts by Italy to shift the focus away from the main issue, which was the killing of two innocent Indian nationals by fire arms.

2.15 Italy asserts that India used ruse or coercion to cause the *Enrica Lexie* to alter course. In this connection, it refers to the use of reconnaissance aircraft and ships to locate and escort the *Enrica Lexie*. But the use of such assets is entirely normal for matters relating to the maritime security of India, as they would be for any State. India was justified in investigating the matter in view of the reports received of the killing of Indian fishermen legitimately fishing in its Exclusive Economic Zone. India, as a past victim of terrorism emanating from the sea, has to be vigilant about the security of its State and its citizens. Therefore, India was well within her right to dispatch reconnaissance aircraft and armed Coast Guard vessels to investigate the matter. This was all the more so given that a declaration made by India when it ratified UNCLOS on 29 June 1995 clarified that:

“The provisions of the Convention do not authorize other States to carry out in the exclusive economic zone and on the continental shelf military exercises or manoeuvres, in particular those involving the use of weapons or explosives without the consent of the coastal State.”¹⁵

2.16 In view of the above, and in the light of the fact that it was reported that the use of military grade weapons in India’s EEZ was involved in the fatalities of Indian nationals, the alerting of, and investigation by, Indian investigative authorities and its Coast Guard cannot be characterized as coercion.

IV. Events following the Arrival at Kochi Anchorage

2.17 India had taken cognizance of the complaint¹⁶ filed by the surviving fishermen on board *St. Antony* at the Coastal Police Station, Neendakara, Kollam, Kerala at about 11:15 PM on the

¹⁵ http://www.un.org/depts/los/convention_agreements/convention_declarations.htm.

¹⁶ First Information Statement of Freddy, 15 February 2012 (Annex IN-2) (Translated version from the vernacular language). The complaint clearly explains the unprovoked firing from the ship, the fatal nature of the injuries suffered by the two fishermen, the damage to the navigation and the trauma faced by the surviving fishermen.

day of the incident through the owner of the boat and eye witness accounts. It was entirely within India's rights to seek to question the individuals on board the *Enrica Lexie* as part of investigation into the killing of two unarmed Indian fishermen.

2.18 The allegations of coercion directed at the vessel and those stationed on it after arrival at Kochi are also not true. The assistance sought by officers of the Kerala police from armed police should not be seen as coercion. The extra precautions were required while dealing with investigations involving the Marines, who were allegedly wielding military grade weapons and apparently authorized by Italian law to use lethal force. The boarding team was within its rights and duty bound to interrogate the crew and master of the ship to acquire the requisite information about the incident. These are normal procedures in any criminal investigation.

V. Italy's Alleged Prompt Exercise of Jurisdiction

2.19 As noted earlier, Italy's alleged prompt exercise of jurisdiction cannot preclude India from investigating a matter concerning the killing of two of its citizens on board an Indian fishing vessel. Italy also recognized this, and even undertook before the Supreme Court of India¹⁷ to ensure the presence of the four other Marines on board the *Enrica Lexie* for purposes of NIA's investigation into the matter. Unfortunately, as discussed in the next chapter, Italy subsequently failed to fully honour that undertaking.

2.20 Italy's contention of "exclusive jurisdiction" even if true, cannot override the India's claims to jurisdiction, although India would note that this is a matter to be addressed at the merits stage on the basis of the applicable law.

¹⁷ Civil Appeal No. 4167/2012 (arising out of S.L.P. (Civil) No. 11942 of 2012), which was taken on record by the court and reflected at para 26(2) as follows: "The assurance given by the Republic of Italy that if the presence of the four Marines, namely, Voglino Renato (Sergeant), Andronico Massimo (1st Corporal), Fontano Antonio (3rd Corporal) and Conte Alessandro (Corporal), is required by any court or lawful authority or Investigating Officer, the Republic of Italy shall ensure their presence before such court or lawful authority or Investigating Officer is accepted. Such assurance shall, however, not affect the right of the above four Marines to challenge such summons/notice issued by any court or Investigating Officer or any other lawful authority before a competent court in India" (Annex 10 to the Written Observations of India, 6 August 2015).

2.21 The two accused Marines, Sergeants Latorre and Girone, were arrested on 19 February 2012 by the Kerala Police pursuant to a thorough investigation into the incident after collecting sufficient evidence against them, and by following due process of law.

2.22 The initial investigation by the Kerala Police *prima facie* established that Sergeants Latorre and Girone fired the shots that killed the Indian fishermen and damaged the *St. Antony*. On 18 May 2012, on completion of investigation and having collected sufficient evidence in the course of investigation, the Kerala Police submitted a Final report of investigation termed as charge-sheet against both the accused in the Magistrate's court charging both the accused for various penal offences under Indian law.¹⁸ By means of an Order dated 25 May 2012, the case was committed to the Sessions Court for commencement of trial. Thereafter, the Republic of Italy and the two accused Marines approached the higher courts on various counts and succeeded in having the investigation and trial conducted de-novo and moved to Delhi and ultimately stayed.

2.23 Italy complains that for nearly three-and-a-half years, the Marines have been subjected to the jurisdiction of the Indian courts and to bail restraints, although they have not been formally charged with any offence.

2.24 In advancing this assertion, Italy is highlighting the time taken at various stages of the case without giving the full picture of events. Italy fails to mention that, at each stage of the case, it was Italy's actions that prevented India's efforts to proceed with the case expeditiously. The time periods indicated in Appendix 4 of Italy's Request are periods which, in our view, any court would view as normal given the number of applications Italy and the Marines made. It was always open for Italy to seek urgent hearings in the case if it genuinely thought its interests were being prejudiced, but neither Italy nor the Marines ever did so.

¹⁸ The Marines were charged by the Kerala Police with, Sections 302 (murder), 307 (attempt to murder), 427 (mischief causing damage) read with 34 (common intention) of the Indian Penal Code and Section 3 of the Suppression of Unlawful Acts Against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act of 2002 (the "SUA Act").

2.25 A brief recapitulation of the events is given below to show the expeditiousness with which India attempted to bring the case to a quick closure in contrast with Italy's use of all possible means to impede the process at every stage.

Based on the findings of the investigation, Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone were arrested on 19 February 2012. The Kerala Police filed its charge-sheet in the local court on 18 May 2012 i.e., within 90 days after the arrest of the accused persons.¹⁹

2.26 On 25 May 2012, the case was committed to Sessions Court for a criminal trial. On 30 May 2012, the High Court of Kerala granted bail to the Marines subject to the fulfilment of certain conditions. The accused Marines were released from prison on 2 June 2012, and thereafter have been free on bail on the condition that they periodically report at a local police station.

2.27 On 23 February 2012, the Republic of Italy and the accused Marines introduced Writ Petition No. 4542 before the High Court of Kerala, challenging the jurisdiction of the Kerala Police. On 29 May 2012, the High Court of Kerala dismissed the Writ Petition and upheld the jurisdiction of the Kerala Police to investigate the matter. Even while the matter of criminal jurisdiction was being heard by the High Court of Kerala, on 19 April 2012 the Republic of Italy and the Marines approached the Supreme Court of India challenging the jurisdiction of the Kerala police.²⁰ After losing their case in the High Court of Kerala, the petitioners filed a second petition against the judgment in the Supreme Court. These two petitions were jointly heard by the Supreme Court. On 18 January 2013, the Supreme Court held that the Union of India, not the Kerala Police, would henceforth deal with the criminal case. It directed the Government of India to set up a Special Court for the criminal trial.²¹

¹⁹ Police of Kerala, Charge Sheet, 15 February 2012 (Annex 3 to the Written Observations of India, 6 August 2015).

²⁰ Writ Petition (Civil) No. 135 of 2012 under Article 32 of the Constitution of India, challenging the legality of the investigation and alleging violation of their fundamental rights under Articles 14 and 21 of the Constitution of India (Annex 16 to Italy's ITLOS Request).

²¹ *Republic of Italy & Ors v. Union of India & Ors*, Supreme Court of India Judgment of 18 January 2013 (Annex IT-19). Relevant extracts of the operative portion of the judgment read as follows: "The Union of India is, therefore, directed, in consultation with the Chief Justice of India, to set up a Special Court to try this case and to dispose of the same in accordance with the provisions of the Maritime Zones Act, 1976, the Indian Penal Code, the Code of

2.28 Meanwhile, on 20 December 2012, the High Court of Kerala temporarily relaxed the bail conditions²² set on the Petitioners and permitted them to travel to Italy for two weeks during the Christmas vacation. The Marines returned to India within the deadline fixed by the High Court of Kerala.

2.29 In compliance of the Supreme Court's Orders, on 1 April 2013, the Ministry of Home Affairs entrusted the investigation of the matter to the National Investigation Agency, and on 15 April 2013, the Ministry notified the Special Court and Special Public Prosecutors to prosecute and try the case.²³ However, once again Italy and the Marines approached the Supreme Court challenging the decision to entrust the investigation to the NIA. The Court declined to intervene in the matter, stating that its earlier judgment took care of the interests of the Petitioners, and they would be able to challenge jurisdiction before the Special Court.

2.30 The NIA expeditiously proceeded with the investigation and concluded the collection of evidence by August 2013 except for the witness examination of the four Italian Marines who were also on board the *Enrica Lexie*. In spite of a sovereign commitment earlier given by the Republic of Italy before the Supreme Court of India,²⁴ efforts to secure the presence of the Marines in India, which commenced in May 2013 and continued through diplomatic channels up to November 2013, yielded no result. As a result, the NIA had to conduct the examination of the

Criminal Procedure and most importantly, the provisions of UNCLOS 1982, where there is no conflict between the domestic law and UNCLOS 1982 [...] This will not prevent the Petitioners herein in the two matters from invoking the provisions of Article 100 of UNCLOS 1982, upon adducing evidence in support thereof, whereupon the question of jurisdiction of the Union of India to investigate into the incident and for the Courts in India to try the accused may be reconsidered. If it is found that both the Republic of Italy and the Republic of India have concurrent jurisdiction over the matter, then these directions will continue to hold good".

²² High Court of Kerala, Bail Relaxation Order, 20 December 2012 (Annex IN-3).

²³ Ministry of Home Affairs Notification No. 17011/27/2012-IS-IV (Annex 21 to the Written Observations of India, 6 August 2015).

²⁴ Civil Appeal No. 4167/2012 (arising out of S.L.P. (Civil) No. 11942 of 2012), which was taken on record by the court and reflected at para 26(2) as "The assurance given by the Republic of Italy that if the presence of the four Marines, namely, Voglino Renato (Sergeant), Andronico Massimo (1st Corporal), Fontano Antonio (3rd Corporal) and Conte Alessandro (Corporal), is required by any court or lawful authority or Investigating Officer, the Republic of Italy shall ensure their presence before such court or lawful authority or Investigating Officer is accepted. Such assurance shall, however, not affect the right of the above four Marines to challenge such summons/notice issued by any court or Investigating Officer or any other lawful authority before a competent court in India"(Annex 10 to the Written Observations of India, 6 August 2015).

witnesses through video conferencing between India and Italy, that too after a delay of almost 6 months, on 11 November 2013, which was hardly an appropriate outcome.

2.31 On 27 November 2013, the NIA completed its investigation and submitted the Investigation Report to the Ministry of Home Affairs to obtain sanction for prosecution under the relevant provisions of Indian Criminal Law, which requires such prior sanction. Simultaneously, the NIA moved for transfer of the legal custody of the Marines to the Special Court as envisaged by the Supreme Court. This was opposed by the Marines by challenging the jurisdiction of the Special Court. Subsequently, on 13 January 2014, the accused persons and the Republic of Italy filed an application in the Supreme Court seeking to prevent NIA from filing the final Report. Meanwhile, the Indian Government decided to extend a partial reprieve to the Marines by allowing NIA to limit prosecution only under the sections of murder, attempt to murder and other incidental offences, and communicated its decision to the Supreme Court on 24 February 2014. The accused nonetheless challenged the validity of the NIA investigation. The Supreme Court allowed this petition, and stayed the proceedings before the Special Court until the matter could be argued and disposed of.

2.32 In spite of repeated rulings of the Supreme Court that the issues of jurisdiction would be heard by a court of appropriate jurisdiction in India (namely, the Special Court), and gave full liberty to the parties to argue their case there, and in spite of the criminal case being ripe for the framing of charges, the formal commencement of the trial was stopped at the instance of Italy and the Marines twice: once before the Kerala courts in 2012, and a second time before the Special Court constituted for the purpose in early 2014 by obtaining a stay from the Supreme Court. On 20 April 2014, the Marines filed another writ petition²⁵ challenging the jurisdiction of India and claiming functional and sovereign immunity. This matter was due to be heard in July 2015. However, the Marines then requested a deferment of their own petition, which prevented matters from going forward.

2.33 Based on the foregoing, it will be appreciated that the Republic of Italy and the Marines have thwarted the proceedings in India repeatedly.

²⁵ Writ Petition (Civil) No. 236 of 2014 under Article 32 of the Constitution of India, 6 March 2014 (Annex IT-56).

2.34 In contrast, on various occasions the Supreme Court of India acted in a highly sympathetic manner to the applications made by the Marines, and favourably responded to the matter of relaxation of bail conditions. For example:

a. On 20 December 2012, the Marines were permitted to visit their family members in Italy to celebrate Christmas for a period of two weeks.

b. On 22 February 2013, the Supreme Court allowed the Marines to travel to Italy in order to cast their votes in the Italian elections. However, India's good will was not reciprocated. On 11 March 2013, the Italian Foreign Ministry announced that the Petitioners would not be returning to India despite the personal assurances given by Italy's Ambassador in India. The Marines returned to India on 02 April 2013, only after the Supreme Court took exception to the conduct of Italy and after intense diplomatic efforts.

c. On 8 September 2014, Sergeant Latorre filed an application before the Supreme Court seeking permission to leave for Italy for rehabilitation and further medication citing brain ischemia. The Government of India did not object and, on humanitarian grounds, the Court allowed him to leave the country, initially for a period of three months – a period that was subsequently extended and that now through the Supreme Court's latest Order dated 13 January 2016, allows him to continue to stay in Italy till 30 April 2016.²⁶

Such relaxations are not granted routinely to any accused charged with similar offences of murder under Indian Criminal Procedural law. Thus, while it is true that the Marines' liberty of movement has been limited in some respects, the conditions under which Sergeant Girone is currently living are benign in comparison with the alleged offense.

2.35 It is evident from the above that Italy, having invoked various avenues to slow down the process and delay the trial, now seeks to use that delay as a reason to modify the earlier Order of ITLOS.

²⁶ Order of the Supreme Court of India, 13 January 2016 (Annex IN-5).

VI. India's Compliance with the 24 August 2015 Order of ITLOS

2.36 After the Order of the International Tribunal for the Law of the Sea prescribing that “both Italy and India suspend all court proceedings and refrain from initiating new ones which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal or might jeopardize or prejudice the carrying out of any decision which the arbitral tribunal may render”, India and Italy approached the Supreme Court to defer the proceedings during the pendency of Annex VII proceedings. The Supreme Court by means of its Order dated 26 August 2015 deferred the proceedings in the Indian Courts until further orders.

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

Chronology of Events

LIST OF DATES IN THE ITALIAN MARINES CASE

Sl. No.	Date	Details
1.	06.02.2012	Six Italian marines were deployed on Board the Italian ship <i>MV Enrica Lexie</i> as Vessel Protection Deployment (“VDP”).
2.	11.02.2012	The team of marines embarked on the ship from Galle in Sri Lanka.
3.	15.02.2012 4:30 p.m.	<i>MV Enrica Lexie</i> encountered an Indian fishing vessel, the <i>St. Antony</i> at a distance of about 20.5 nautical miles from the Indian sea coast off Kollam, Kerala at around 4:30 p.m.(“IST”) at the position 09 degree 17.2 Minutes North Latitude and 076 Degree 01.8 minutes E Longitude. Two Italian Marines on Board, namely Sergeant Latorre and Sergeant Girone, allegedly fired 20 rounds through their Automatic Weapons on the fishing vessel killing two fishermen, and caused damage to the boat endangering the life of nine other fishermen and safe navigation of the fishing vessel.
4.	15.02.2012 5:40 p.m.	Neendakara Coastal Police Station, Kollam, Kerala received information through a mobile phone communication from a sailor, who was in turn informed of the incident through a wireless communication from the owner of the boat, an eye witness of the incident. The Coastal Police Station, Neendakara alerted Coast Guard District Headquarters-4, Kochi alerted the MRCC, Mumbai. MRCC, Mumbai which in turn accessed the AIS Plot and identified that the <i>MV Enrica Lexie</i> as the probable vessel involved in the incident, and asked the captain to change course to Kochi and informed the Coast Guard HQ, Kochi of the matter. The vessel <i>LaxmiBhai</i> of the Coast Guard and Dornier Aircraft sailed from Kochi and identified the merchant vessel.
5.	15.02.2012 10:35 p.m.	<i>MV Enrica Lexie</i> escorted to the Kochi Port where it anchored at 10:35 p.m.

6.	15.02.2012 11:15 p.m.	The surviving fishermen on board <i>St. Antony</i> reached the Coastal Police Station, Neendakara, Kollam, Kerala at about 11:15 p.m. and lodged a complaint through Freddy, the owner of the boat and an eye witness of the incident. On the basis of the same, FIR No. 02/2012 was registered under Section 302 of the Indian Penal Code and the FIR was submitted to the Chief Judicial Magistrate Court, Kollam, Kerala. Kerala Police started an investigation.
7.	16.02.2012	The Circle Inspector inspected the deceased Ajeesh Pink and Valentine Jelastin and the civil surgeon of the Governmental Hospital conducted the <i>post-mortem (Autopsy)</i> . A ballistics expert examined the body of the deceased and the fishing boat and collected the evidence. The Coast Guard and police officers of Kochi City boarded the ship in view of collecting evidence around 11 a.m., after the ship was brought to the Cochin Oil Terminal.
8.	19.02.2012	During the investigation, Kerala Police examined the crew members, and identified and arrested Sergeant Latorre and Sergeant Girone.
9.	21.02.2012	The Director General of the Kerala Police issued Order No. T3-16/673/12, thus constituting a special investigation team.
10.	23.02.2012	Writ Petition No. 4542 of 2012 filed by Italy and Marines before the High Court of Kerala under Article 226 of the Constitution, challenging the jurisdiction of the State of Kerala to conduct a criminal investigation.
11.	24.02.2012	Parallel Criminal Proceedings No. 9463 of 2012 were filed against the two Italian accused in Italy under Section 575 of the Italian Penal Code.
12.	26.03.2012	The Investigating Officer of the case Crime No. 02/2012 filed a memorandum before the Chief Judicial Magistrate, Kollam, regarding the incorporation of the additional Sections, i.e. Section 3 on the Suppression of Unlawful Activities Against the Safety of Maritime Navigation Act of 2002 (the "SUA Act") and Sections 307 and 427 of the Indian Penal Code into the charges.
13.	29.03.2012	A single judge of the High Court of Kerala disposing of Writ Petition 6083/12 ordered release of the ship under certain conditions.

14.	02.04.2012	The legal heirs of the deceased filed an appeal before the Division Bench against the Judgment releasing the ship.
15.	04.04.2012	The High Court of Kerala directed the ship owners to approach the Magistrate.
16.	10.04.2012	The shipping company filed Special Leave Petition 11942/2012 before the Supreme Court of India.
17.	19.04.2012	Writ Petition No. 135 of 2012 filed by Italy and in the Supreme Court challenging the legality of the investigation and the alleged violations of Articles 14 and 21 of the Constitution of India.
18.	02.05.2012	The Supreme Court, in Civil Appeal No. 4167/2012 arising out of S.L.P. (Civil) No. 11942 of 2012, authorized the release of the <i>MV Enrica Lexie</i> the ship owners made assurances that they would produce the six crew members before the Supreme Court or the investigating agency. The Italian Government also made assurances that it would produce the four other marines of the VPD for the purposes of the investigation and the trial.
19.	07.05.2012	The ship was released.
20.	18.05.2012	Kerala Police filed a charge sheet (police report) against the accused under Sections 302, 307 and 427, read with Section 34 of the Indian Penal Code, and under Section 3 of the SUA Act of 2002.
21.	22.05.2012	The accused filed Bail Application No. 3517/12 before the High Court of Kerala and bail was granted on 30 May 2012.
22.	25.05.2012	The case was committed to the Sessions Court for a criminal trial.
23.	29.05.2012	The High Court of Kerala dismissed the Writ Petition (Civil) No. 4542 of 2012 challenging jurisdiction and invoking sovereign immunity.
24.	11.07.2012	Special Leave Petition (Civil) No. 20370 of 2012 in the matter of Writ Petition (Civil) Appeal No. 135/2012 was filed against the Judgment of the High Court of Kerala of 29.05.2012.
25.	18.07.2012	The accused asked the Supreme Court to stay the trial proceedings of the Kollam court.

26.	20.12.2012	The High Court of Kerala vide Criminal Miscellaneous Application No. 8204/2012 agreed to temporarily relax bail conditions for both Italian Marines by allowing them to travel to Italy for two weeks (Christmas break).
27.	04.01.2013	Italian Marines returned after the Christmas break to Kerala before the deadline fixed by the High Court of Kerala.
28.	18.01.2013	The Supreme Court disposed of the Special Leave Petition (Civil) No. 20370 of 2012 and Writ Petition (Civil) No. 135 of 2012 and found that the State of Kerala had no jurisdiction to investigate the case as this jurisdiction vests in Union of India. Union of India directed to set up a Special Court. The question of the applicability of Article 100 of the 1982 UNCLOS and the determination of jurisdiction was left open to be decided by this Special Court.
29.	22.02.2013	A bench headed by the Chief Justice of India disposed of Interim Application (I.A.) No. 4/2013 and allowed the accused, Mr. Lattore and Mr. Girone, to travel to Italy, under the control and custody of the Ambassador of Italy in India, to cast their ballot in the elections scheduled for February 24 and 25.
30.	11.03.2013	Embassy of Italy in New Delhi communicated to the Ministry of External Affairs through note verbale dated 11 March 2013 that the two Italian Marines will not return to India on the expiration of permission granted to them.
31.	14.03.2013	The Supreme Court directed that Mr. Daniele Mancini, Ambassador of Italy, was not to leave India without the permission of the Court.
32.	22.03.2013	The two accused individuals returned from Italy.
33.	01.04.2013	The Ministry of Home Affairs issued Notification No. 11011/19/2013-IS-IV to transfer the case to the NIA to conduct the investigation.
34.	04.04.2013	The NIA re-registered the case as RC 04/2013/NIA/DLI and took up the investigation.

35.	15.04.2013	The Ministry of Home Affairs vide Notification No. 17011/27/2012-IS-IV, notified the Chief Metropolitan Magistrate, Patiala House Court, New Delhi, to deal with the case and the Additional Sessions Judge-01, Patiala House Court, New Delhi as Special Designated Court, for the case. The Government also appointed two Special Public Prosecutors in this case. Further, the earlier notification ordering the NIA investigation was modified to include a mention of the Supreme court directions. However, the petitioners moved again to the Supreme Court to challenge the entrustment of the investigation to the NIA.
36.	26.04.2013	The Supreme Court agreed with the steps taken by the Government in compliance with the Judgment of 18 January 2013, and advised the petitioners to raise the question of jurisdiction in the appropriate forum (i.e. before the Special Court).
37.	26.04.2013	The NIA started its investigation.
38.	04.05.2013	The NIA requested the Chief Judicial Magistrate, Kollam to transfer documents and material objects.
39.	07.05.2013	Notices under Section 160 of the Indian Criminal Procedure Code (for witness examination) were prepared and sent to the Ministry of External Affairs for the service of the same to the four Italian marines who were stationed in Italy.
40.	11.05.2013	Notices under Section 160 of the Indian Criminal Procedure Code were prepared and served to the six crew members of the Vessel <i>MV Enrica Lexie</i> .
41.	20.05.2013	Sessions Judge Kollam transferred the documents and material objects to the High Court of Kerala.
42.	11.06.2013	The High Court of Kerala transferred the documents and material objects to the Chief Metropolitan Magistrate, Patiala House Courts, Delhi.
43.	20.06.2013	The entire documents and articles connected to the case were received by the Chief Metropolitan Magistrate Court, Patiala House Court, New Delhi.

44.	03.06.2013 to 09.08.2013	The six crew members of the Vessel <i>MV Enrica Lexie</i> were supposed to appear before the investigating officer for the purpose of the investigation. Despite summons, the four Italian marines who were stationed in Italy, did not appear for the purpose of the investigation. They responded through their counsel through letters dated 11 June 2013, 21 June 2013 and 8 July 2013, that they were not in a position to appear even though they had given a commitment to the Supreme Court in Writ Petition (Civil) 4167 of 2012.
45.	20.09.2013	The investigation was completed except for the examination of these four Italian marines. Efforts to secure the presence of the marines continued through diplomatic channels.
46.	11.11.2013	The four Italian marines witnesses, who were stationed in Italy, were examined through audio-video means due to the repeated refusal of the Government of Italy to send them to India in spite of their earlier commitment to the Supreme Court in Writ Petition (Civil) 4167 of 2012.
47.	27.11.2013	The NIA, having completed its investigation, submitted its Investigation Report to the Ministry of Home Affairs, New Delhi, for sanction of prosecution under the SUA Act.
48.	06.12.2013	The accused individuals failed to appear before the designated Special Court, for transfer of custody, as ordered by the Supreme Court in its Judgment dated 18 January 2013.
49.	08.01.2014	Accused submitted to the Special Court that they would not appear before it because of some technical and jurisdictional issues.
50.	13.01.2014	The accused and Italy filed an interim application with a prayer to prevent the NIA from filing a final report under the SUA Act.
51.	15.01.2014	Petitioners approached the Supreme Court with a prayer to close the right of the Union of India and the NIA to file any final report/criminal case against the petitioners. The Supreme Court issued notices to the parties.
52.	17.01.2014	The Ministry of Home Affairs accorded sanction to prosecute under Section 3(1)(a), read with Section 3(1)(g)(i) of the SUA Act of 2002.

53.	06.02.2014	The Ministry of Home Affairs modified the prosecution sanction by according sanction for prosecution under Section 3(1)(a) of the SUA Act of 2002.
54.	24.02.2014	The Ministry of Home Affairs filed an affidavit before the Supreme Court expressing its opinion that the SUA Act is not attracted in this case. The accused challenged the NIA investigation as, SUA removed. The Supreme Court allows the limited legal question of NIA jurisdiction for hearing and directed the petitioners to file an application in this regard. All proceedings in the criminal case were stayed until the disposal of this application.
55.	07.03.2014	The Central Government communicated its order withdrawing from the sanction to prosecute the sections of the SUA Act, leaving the NIA at liberty to charge-sheet the case (file a police report) under the sections of the Indian Penal Code relating to murder, attempt to murder and causing damage to the fishing boat.
56.	26.03.2014	Both the accused filed Writ Petition No. 236/2014 challenging India's jurisdiction over the case.
57.	08.09.2014	Sergeant Latorre filed an interim application seeking permission to leave for Italy for rehabilitation and further medication citing brain ischemia.
58.	12.09.2014	The Supreme Court allowed the petition of Mr. Latorre to leave for Italy and stay for three months.
59.	10.12.2014	Mr. Girone filed an application for relaxation of his bail conditions to allow him to visit Italy.
60.	16.12.2014	Mr. Girone withdrew his petition.
61.	14.01.2015	The permission of Mr. Latorre was extended by the Supreme Court for three additional months.
62.	09.04.2015	The permission was further extended upto 15 July 2015.
63.	26.06.2015	By a notification addressed to the Republic of India, Italy submitted the present dispute to Annex VII Arbitration under the UNCLOS.

64.	08.07.2015	The accused filed an application for deferring the Writ Petition, pending the Award of the Annex VII Arbitral Tribunal in the present case and for extending the stay of accused Sergeant Latorre during this pendency.
65.	13.07.2015	The Supreme Court of India relaxed the bail condition of Mr. Latorre for six additional months on health grounds. The Union of India was asked to file a Counter Affidavit within four weeks, regarding the prayers filed by Italy. The matter listed for hearings on 26 August 2015.
66.	21.07.2015	Italy submits a request for the prescription of provisional measures before the International Tribunal for the Law of the Sea.
67.	24.08.2015	ITLOS in its Order prescribes that both the parties suspend all court proceedings and refrain from starting new proceedings that may aggravate the dispute. Makes no Order on the situation of Marines because it touches on issues related to merits of the case.
68.	26.08.2015	Indian Supreme Court stays the proceedings till further orders. Posts the case on 13 th January 2016. Relaxes the bail condition of Sergeant Latorre till January 17, 2016.
69.	13.01.2016	Supreme Court extends the bail conditions of Sergeant Latorre to 30 April 2016. Posts the case for 13 th April and directs India to apprise on the duration of Annex VII proceedings.

CHAPTER 3
INADMISSIBILITY OF ITALY’S REQUEST FOR THE MODIFICATION OF THE
PROVISIONAL MEASURES ORDERED BY ITLOS

3.1 Italy’s Request is a mere restatement of the Request for provisional measures it introduced before ITLOS on 21 July 2015 and that the Tribunal rejected in a large part in its Order prescribing provisional measures of 24 August 2015 (Section I.); Yet, as will be shown in the second Section of this Chapter, no new circumstance is offered to justify the modification of the ITLOS Order of 24 August 2015 (Section II).

I. A Questioning of the ITLOS Order of 24 August 2015

A. The Present Request Has Already Been Addressed and Rejected by ITLOS in its Order of 24 August 2015

3.2 In its Request of 11 December 2015, Italy asks the Tribunal to “prescribe the following *additional provisional measure*:

India shall take such measures as are necessary to relax the bail conditions on Sergeant Girone in order to enable him to return to Italy, under the responsibility of the Italian authorities, pending the final determination of the Annex VII Tribunal.”²⁷

3.3 Italy claims that this request is made pursuant to Article 290(1) of UNCLOS,²⁸ which grants the Tribunal the power to “prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute (...) pending the final decision.”²⁹ The reference to the first paragraph of Article 290 is probably meant to convey the impression that Italy’s present request is new. This is misleading.

²⁷ Italy’s Request, p. 3, para. 6 – emphasis added.

²⁸ Italy’s Request, p. 1. See also p. 3, para. 6 and p. 18, para. 58.

²⁹ Article 290(1) of UNCLOS.

3.4 In its first Request, Italy requested ITLOS 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.”³⁰

3.5 Italy reiterated these requests in its final submissions, at the end of the hearings held on 10 and 11 August 2015.³¹

3.6 The comparison between the two Requests is telling: while drafted in slightly different terms, they have precisely the same object as far as Sergeant Girone is concerned.

3.7 The two provisional measures requested by Italy have been fully addressed and rejected by the ITLOS in its Order of 24 August 2015, after a careful examination of the Parties’ arguments.³² The Tribunal explained that it did not “consider the two submissions by Italy to be appropriate”³³ because “if accepted, [they] will not equally preserve the respective rights of both Parties”.³⁴

3.8 In its Order, ITLOS did not consider Italy’s two submissions appropriate³⁵ and did not uphold Italy’s first Request; rather it prescribed a different provisional measure pursuant to Article 290(5) of UNCLOS. This provision confers on ITLOS the power to prescribe provisional

³⁰ Italy’s ITLOS Request, para. 57 – emphasis added. See also, para. 5.

³¹ ITLOS/PV.15/C24/3, 11 August 2015, morning, p. 20, lines 7-25 (Mr Azzarello) (Annex IT-34(c)). See also *The “Enrica Lexie” Incident (Italy v. India), Provisional Measures*, Order of 24 August 2015, para. 29.

³² *The “Enrica Lexie” Incident (Italy v. India), Provisional Measures*, Order of 24 August 2015, paras. 74-124.

³³ *Ibid.* para. 127.

³⁴ *Ibid.* para. 126.

³⁵ *Ibid.*, para 127.

measures “[p]ending the constitution of an arbitral tribunal to which a dispute is being submitted”, it being noted that the measures prescribed may be different from those requested by the Parties.³⁶ ITLOS’ prescribed provisional measure reads as follows:

“Italy and India shall both suspend all court proceedings and shall refrain from initiating new ones which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal or might jeopardize or prejudice the carrying out of any decision which the arbitral tribunal may render.”³⁷

3.9 Italy seeks to take advantage of the fact that the Annex VII Tribunal has now been constituted to seek to re-litigate a request with respect to Sergeant Girone that has been fully argued between the Parties and rejected by the ITLOS in its Order of 24 August 2015.

3.10 Paragraph 5 of Article 290 is not designed to give a Party the chance to seek the same provisional measures twice over the same grounds: in other words, for Italy to seek the same provisional measure before the Annex VII arbitral tribunal after its original request was rejected by ITLOS. Nor does it establish an appeal procedure against ITLOS’ orders on provisional measures. When prescribed, even though they are provisional, these measures are binding between the Parties until the final judgment or award. This is the essence of the *res judicata* principle:³⁸

“For the Court [or any judicial or arbitral body] *res judicata pro veritate habetur*, and the judicial truth within the context of a case is as the Court has determined it, subject only to the provision in the Statute for revision of judgments. This result is required by the nature of the judicial function, and the universally recognized need for stability of legal relations.”³⁹

³⁶ See Article 89(5) of the Rules of the ITLOS. See also e.g. *The M/V “SAIGA” (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, *Provisional Measures*, Order of 11 March 1998, para. 47 and *ibid*.

³⁷ *Ibid.*, para. 141(1).

³⁸ As Professor Robert Kolb rightly argues, “the Order originally refusing Provisional Measures is a *res judicata*” (*The International Court of Justice*, Hart Publishing, 2013, p. 365); see also: Karin Oellers-Frahm, “Article 94 UN Charter” in A. Zimmermann, C. Tomuschat, K Oellers-Frahm and C. Tams eds., *The Statute of the International Court of Justice – A Commentary*, Oxford UP, 2nd ed., 2012, pp. 189-190.

³⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *Judgment*, *I.C.J. Reports 2007*, p. 101, para. 139.

3.11 Decisions having the force of *res judicata* “cannot be reopened by the parties as regards the issues that have been determined, save by procedures, of an exceptional nature, specially laid down for that purpose.”⁴⁰

3.12 Article 290(5), which confers upon the Annex VII Tribunal the power to “modify, revoke or affirm” the provisional measure prescribed by ITLOS, is precisely a procedure of an exceptional nature specially laid down for allowing the reopening of proceedings in case “the circumstances justifying them have changed or ceased to exist.”⁴¹ As shown below,⁴² since ITLOS’ Order of 24 August 2015, there has been no change of circumstances justifying the modification of the decision of ITLOS. Italy’s present request is therefore inadmissible.

3.13 Without entering into the doctrinal debate whether a decision on provisional measures is covered by the principle of *res judicata* properly speaking, there can be no doubt that provisional measures prescribed by ITLOS are legally binding until possibly reviewed in conformity with Article 290(5). Moreover, they are covered by the rule *ne bis in idem*, which has been described in a landmark article by Professor Maarten Bos as the procedural side of the principle of *res judicata*.⁴³ The principle *ne bis in idem* “precludes the one who asked the judge to intervene from bringing a second action against the same person and for the same cause”. It is “a purely procedural rule” which “prevents any action by the applicant that is merely a reiteration of a previous action.” In other words, “one is only allowed to bother the judge once, any repetition is to be avoided.”⁴⁴

⁴⁰ *Ibid.*, p. 90, para. 115.

⁴¹ Article 290(2) of UNCLOS.

⁴² See Chapter III(B).

⁴³ *La terminologie juridique réunit communément l’argument du ne bis in idem et celui de l’autorité de la chose jugée sous un seul nom, savoir celui de ‘force de chose jugée’. Nous nous proposons de ne pas suivre cet usage et de désigner la règle processuelle par son propre nom. Par là, nous évitons en même temps de propager l’opinion erronée que cette règle n’a d’effet que lorsqu’un jugement a été rendu.* (M. Bos, *Les conditions du procès en droit international public*, Leyde, E.J. Brill, 1957, p. 30) – India’s translation: “Legal terminology commonly brings the *ne bis in idem* argument and the authority of *res judicata* argument under one name, namely that of ‘*res judicata*’. We propose not to follow this practice and to designate the procedural rule by its own name. By the same token, we avoid the erroneous opinion that this rule is effective only when a judgment has been delivered.”]

⁴⁴ *Ibid.* India’s translation from the French original: *Le principe du ne bis in idem « défend à celui qui a demandé l’intervention du juge d’intenter une deuxième action contre la même personne et concernant la même chose ». Il s’agit d’« une règle pure processuelle » qui « empêche toute activité du demandeur qui n’est que la réitération d’une activité précédente ». En d’autres termes, « on n’a qu’une fois le droit de déranger le juge, tout répétition étant à éviter ».*

3.14 Since a decision has already been made concerning Italy's present request, the only option opened to Italy is to request the *modification* of that decision. But such a request for modification must satisfy the conditions laid down in Article 290 of UNCLOS.

B. The Conditions for the Modification of the Provisional Measures Prescribed by the ITLOS are Not Met

3.15 Article 290(5) of UNCLOS provides that, once an Annex VII tribunal is constituted, it "may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4" of Article 290.⁴⁵ It follows that Italy's present Request must comply with the requirements of these four paragraphs. As demonstrated below, it does not.⁴⁶

3.16 Paragraphs 3 and 4 of Article 290 of UNCLOS set out the procedural conditions for the modification of the provisional measures prescribed by ITLOS. These paragraphs read as follows:

"3. Provisional measures may be prescribed, modified or revoked under this article only at the request of a party to the dispute and after the parties have been given an opportunity to be heard.

4. The court or tribunal shall forthwith give notice to the parties to the dispute, and to such other States Parties as it considers appropriate, of the prescription, modification or revocation of provisional measures."

There is no dispute between the Parties concerning the application of paragraphs 3 and 4 of Article 290.

3.17 Paragraphs 1 and 2 of Article 290 set out strict substantive conditions for the modification of provisional measures prescribed by ITLOS. According to paragraph 2, provisional measures may be modified or revoked if and only if "the circumstances justifying

⁴⁵ Article 290(5) of UNCLOS.

⁴⁶ See paras. 3.17-3.27 and Chapter III(B).

them have changed or ceased to exist.”⁴⁷ A party seeking the modification of provisional measures is therefore required to show that new facts have appeared since the prescription of these provisional measures justifying their modification.

3.18 Interpreting similar provisions in the Rules of Court,⁴⁸ the International Court of Justice explained that:

“[...] whereas an Order indicating, or declining to indicate, provisional measures may be revoked or modified, as stated in Article 76 of the Rules of Court; whereas however according to that text, the Court cannot revoke or modify an Order unless, ‘in its opinion, some change in the situation justifies’ doing so, and where a request for measures has been rejected, any fresh request must, according to Article 75, paragraph 3, of the Rules of Court, be ‘based on new facts’; whereas the same applies when additional provisional measures are requested [...]”⁴⁹

3.19 Moreover, the modification of provisional measures “cannot, as such, be based on any “change in the situation” that gave rise to the indication of provisional measures [...]”⁵⁰ The party requesting the modification of the provisional measures must further prove that its Request meets the conditions set out in paragraph 1 of Article 290 of UNCLOS, and that the modification is “appropriate under the [new] circumstances to preserve the respective rights of the parties to the dispute [...], pending the final decision.”⁵¹

⁴⁷ See also Article 92 of the Rules of ITLOS, which reads as follows: “The rejection of a request for the prescription of provisional measures shall not prevent the party which made it from making a fresh request in the same case based on new facts.”

⁴⁸ Articles 75(3) (“The rejection of a request for the indication of provisional measures shall not prevent the party which made it from making a fresh request in the same case based on new facts”) and 76(1) (“At the request of a party the Court may, at any time before the final judgment in the case, revoke or modify any decision concerning provisional measures if, in its opinion, some change in the situation justifies such revocation or modification”) of the Rules of Court.

⁴⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures*, I.C.J. Reports 1993, p. 337, para. 22. See also *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Order of 16 July 2013, *Provisional Measures*, I.C.J. Reports 2013, p. 234, para. 17 and *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, *Provisional Measures*, Order of 22 April 2015, para. 12.

⁵⁰ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Order of 16 July 2013, *Provisional Measures*, I.C.J. Reports 2013, p. 237, para. 27.

⁵¹ Article 290 (1) of UNCLOS.

3.20 This implies that new facts have arisen since the original Order was issued that have created a situation of urgency. As ITLOS has stated: “urgency is required in order to exercise the power to prescribe provisional measures, that is to say the need to avert a real and imminent risk that irreparable prejudice may be caused to rights at issue before the final decision is delivered.”⁵²

3.21 In the present proceedings, however, Italy has been unable to present any new facts that would justify the modification of the ITLOS decision.

3.22 At paragraph 7 of its present request, Italy set out the reasons why the prescription of the provisional measure it already requested in July 2015 would be appropriate:

“(a) All court proceedings are stayed in consequence of the ITLOS Order. Italian and Indian judicial authorities have taken steps to comply with the ITLOS Order.

(b) Italy has offered solemn undertakings to the effect that it will comply with an award of the Annex VII Tribunal requiring the return of the Marines to India.

(c) It is a fundamental principle of due process that measures depriving individuals of their liberty need a proper basis in law. There is no such basis in this case. Sergeant Girone is not charged with any offence under Indian law. There is no justification for this failure of due process.

(d) Criminal proceedings cannot take place in India because of the stay. Accordingly, pending the final decision in the Annex VII proceedings, Sergeant Girone cannot be charged in India or in Italy; nor can he be put on trial.

⁵² *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean (Ghana/Côte d’Ivoire)*, Provisional Measures, Order of 25 April 2015, para. 42. See also *The M/V “Louisa” Case (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Provisional Measures, Order of 23 December 2010, para. 72 and *The “Enrica Lexie” Incident (Italy v. India)*, Provisional Measures, Order of 24 August 2015, para. 87. See also *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011, pp. 21-22, para. 64; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007, p. 13, para. 42; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009, pp. 152-153, para. 62; *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand)*, Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011, p. 548, para. 47 and *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014, para. 32.

(e) As of the date of the filing of the present Request, Sergeant Girone had been deprived of liberty for over 3 years and 9 months. In the four Annex VII arbitrations that concluded with the rendering of an award, proceedings lasted an average of 3 years, 3 months and 23 days. Absent any provisional measure from this Tribunal, Sergeant Girone may therefore end up being deprived of his liberty, without charge, for a total of over seven years.

(f) Sergeant Girone's deprivation of liberty is disproportionate, arbitrary and unlawful in the present circumstances.

(g) Sergeant Girone is an officer of the Italian armed forces, who was exercising official functions at the time of the events leading to his arrest, and Italy is entitled to his immunity from Indian criminal jurisdiction.

(h) Every additional day Sergeant Girone is compelled by India to stay within its jurisdiction and is deprived of his liberty constitutes an exercise of Indian jurisdiction that causes irreversible prejudice to Italy's rights in this dispute."

3.23 Points (b), (c), (e), (f), (g) and (h) do not refer to any new fact. They simply repeat Italy's arguments made during the provisional measures proceedings before ITLOS:

- Point (b): Italy already gave undertakings that it will return the Marines if required by the final award of the Annex VII Tribunal;⁵³

- Points (c), (e), (f) and (h): Italy already claimed that the bail conditions on Sergeant Girone were in breach of the principle of due process,⁵⁴ and that each additional day Sergeant Girone is compelled to stay in India causes irreparable prejudice to Italy's rights;⁵⁵ and

- Point (g): Italy already argued that, as member of Italian armed forces, Sergeant Girone is entitled to immunity from Indian criminal jurisdiction.⁵⁶

3.24 Points (a) and (d) refer to the only "new" fact invoked by Italy: the stay of proceedings ordered by the ITLOS in its Order of 24 August 2015. It is correct that during the pendency of the matter before the Annex VII Tribunal, the trial proceedings before the Supreme Court of India are presently stayed.

⁵³ See ITLOS/PV.15/C24/1, 10 August 2015, morning, p. 39, lines 25-31 (Mr Bethlehem) (Annex IT-34(a)) and ITLOS/PV.15/C24/3, 11 August 2015, morning, p. 19, lines 28-33 (Mr Azzarello) (Annex IT-34(c)).

⁵⁴ Italy's ITLOS Request, paras. 49-51.

⁵⁵ Italy's ITLOS Request, para. 54.

⁵⁶ See Italy's ITLOS Request, paras. 18, 25, 30, 34, 35(c) and 45.

3.25 It is also correct to say that no criminal trial can take place in either State until the Annex VII Tribunal has rendered its award.

3.26 The underlying argument is clear. The fact that would supposedly justify the lifting of the bail conditions on Sergeant Girone is the August 2015 ITLOS Order on provisional measures itself, which prescribed the suspension of domestic proceedings in both countries, but did not prescribe any order changing the status of Sergeant Girone.

3.27 However, an order on provisional measures can hardly qualify as a “new” fact within the meaning of Article 290 of UNCLOS since, by definition, it is based on a set of circumstances which led one of the Parties to request the prescription of provisional measures in the first place. In this respect, ITLOS considered:

“that the first and the second submissions by Italy, if accepted, will not equally preserve the respective rights of both Parties until the constitution of the Annex VII arbitral tribunal as required by article 290, paragraphs 1 and 5, of the Convention [and] that due to the above the Tribunal does not consider the two submissions by Italy to be appropriate [...]”⁵⁷

II. No New Circumstances Justify the Modification of the ITLOS Order of 24 August 2015

3.28 In this section, India will show that there are no new circumstances that justify a modification of the Order on provisional measures that ITLOS issued on 24 August 2015. In particular, in the three and one-half months that transpired between the date of the ITLOS Order and the filing of Italy’s Request on 11 December 2015, nothing has happened creating a situation of urgency justifying Italy’s Request; nor has any such new circumstance arisen since then (Section 1). By the same token, there are no new circumstances that have given rise to a risk of irreparable prejudice if the ITLOS Order is not modified or a new provisional measure not granted (Section 2).

⁵⁷ *The “Enrica Lexie” Incident (Italy v. India), Provisional Measures*, Order of 24 August 2015, paras. 126-127. See also para. 3.7 above.

A. No Urgency

3.29 In its Request, Italy asserts that, “[a]lthough urgency may not be a requirement under Article 290(1), the prescription of the requested measure [relating to Sergeant Girone] is urgent.”⁵⁸ At the same time, Italy acknowledges that urgency has been defined by the Special Chamber of ITLOS in the *Ghana/Côte d’Ivoire* case as the “need to avert a real and imminent risk that irreparable prejudice may be caused to the rights in interest.”⁵⁹

3.30 Apart from the fact that Italy’s Request falls to be assessed under the last sentence of Article 290(5) in so far as it is in reality a request to modify ITLOS’s earlier Order, contrary to Italy’s contention, it is well established that urgency is inherent in the notion of avoiding a real and imminent risk. In its Order of Provisional Measures in the *Ghana/Côte d’Ivoire* case, the Special Chamber of ITLOS expressly confirmed that “urgency is required in order to exercise the power to prescribe provisional measures.”⁶⁰ The same point has been emphasized by the International Court of Justice:

“The power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights in dispute before the Court gives its final decision.”⁶¹

3.31 However, there is no such risk here, and hence no urgency. Italy can point to no new developments with respect to Sergeant Girone since ITLOS issued its Order in August, in which it did not find any urgency justifying Italy’s request to allow Sergeant Girone to return to and remain in Italy, other than the fact that ITLOS issued its Order on Italy’s earlier requests on 24

⁵⁸ Italy’s Request, p. 31, para. 107.

⁵⁹ *Ibid.*, citing *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d’Ivoire)*, Provisional Measures, Order of 25 April 2015, para. 41.

⁶⁰ *Ibid.*, Order of 25 April 2015, para. 42.

⁶¹ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I), p. 21, para. 63. See also, amongst other precedents, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009, pp. 152-153, para. 62; *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Provisional Measures, Order of 17 June 2003, I.C.J. Reports 2003, p. 107, para. 22.

August 2015 and the Annex VII Arbitral Tribunal has been constituted in the meantime.⁶² Yet, the Order of 24 August does not change the situation or provide grounds for modifying that Order.

3.32 In its Request to this Tribunal, Italy complains that, as of the date of the Request, Sergeant Girone “had been deprived of liberty for over three years and nine months”. It adds that this period is likely to extend for another three years before the Arbitral Tribunal renders a decision on the merits,⁶³ and that every day the *status quo* continues Italy suffers irreversible prejudice.⁶⁴ Based on these assertions, which are simply a repetition of arguments Italy advanced before ITLOS,⁶⁵ Italy claims that the elements of imminence and real risk are satisfied.⁶⁶ The humanitarian aspect of prolonged confinement of Sergeant Girone is pertinent and factual. The Supreme Court of India, as stated above, has been quite sympathetic to these concerns allowing him to travel to Italy twice and Government of India also in fact not opposed the requests for relaxation of bail conditions if circumstances so demanded.

3.33 While all this was fully canvassed in the proceedings before ITLOS, it is important to recall certain background facts to provide perspective. Sergeant Girone has been allowed to travel to Italy twice and after that after almost two years he made a request in December 2014 and withdrew it. Thereafter Italy’s Notification of 26 June 2015, and its subsequent Request for Provisional Measures before ITLOS of 21 July 2015 made a plea for Sergeant Girone to be allowed to return to and remain in Italy. The fact that some two and one half years had thus elapsed with no further request on behalf of Sergeant Girone, and that almost three and a half years passed between the date of the incident and Italy’s Notification, shows that there was no urgency.⁶⁷

⁶² The 13 January 2016 hearing before the Supreme Court of India was concerned with Sergeant Latorre and had nothing to do with Sergeant Girone.

⁶³ Italy’s Request, p. 3, para. 7(e) and p. 32, para. 110.

⁶⁴ *Ibid.*, p. 4, para. 7(h).

⁶⁵ See, for example, Italy’s Request for Provisional Measures dated 21 July 2015, para. 54, and ITLOS/PV.15/C24/1, 10 August 2015, morning, p. 37 (Verdirame) (Annex IT-34(a)).

⁶⁶ Italy’s Request, p. 32, para. 109.

⁶⁷ ITLOS/PV.15/C24/2, 10 August 2015, afternoon, p. 36 (Pellet) (Annex IT-34(b)).

3.34 As noted above, in its Order of 24 August 2015, ITLOS did not find any situation of urgency with respect to either Sergeant Girone or Sergeant Latorre justifying the prescription of provisional measures. Given that nothing has changed in the interim which was not foreseen in the earlier proceedings, it cannot be argued that a situation of urgency has now arisen justifying a modification of the 24 August 2015 Order. Sergeant Girone continues to live at the residence of the Italian Ambassador in Delhi.

3.35 Notwithstanding this, Italy contends that the urgency and prejudice to its rights are even more acute than in other cases like *Arctic Sunrise*, where similar measures were prescribed.⁶⁸ Once again, this is an example of Italy's desire to reargue before this Tribunal what it previously argued (without success) before ITLOS.

3.36 In the proceedings before ITLOS, India explained how Italy's reliance on cases such as *Arctic Sunrise*, *Camouco* and *The M/V "SAIGA" (No. 2)* was misguided because cases involving prompt release are inapposite to the present situation.⁶⁹ Not only did the cases cited by Italy not involve the serious crime of murder, they arose under entirely different provisions of the 1982 Convention.⁷⁰ As regards Italy's contention of application of consideration of humanity to the law of the sea, in our view, this is for the Tribunal to decide.

3.37 Italy also asserts that "India manifestly failed to determine the issue of immunity *in limine litis*, as it was allegedly obligated to do, as further justification for its request".⁷¹ However, this argument turns the facts on their head.

3.38 In the first place, the question of the Marines' alleged immunity is a question for the merits, which should not be pre-judged by a request for provisional measures. Section III below will elaborate on this point. Moreover, neither Article 95 of the Convention dealing with the immunity of warships on the high seas, nor Article 96 dealing with the immunity of ships owned and operated by a State and used only on government, non-commercial service, have any

⁶⁸ Italy's Request, p. 31, para. 108.

⁶⁹ ITLOS/PV.15/C24/4, 11 August 2015, afternoon, p. 8 (Bundy) (Annex IT-34(d)).

⁷⁰ See ITLOS Order of 24 August 2015, Declaration of Judge Paik, para. 7.

⁷¹ Italy's Request, p. 24, para. 78 and p. 32, para. 108.

relevance. *The Enrica Lexie* was a commercial oil tanker that was not operated by Italy and not engaged on government service. UNCLOS says nothing about any immunities for marines stationed on such a vessel.

3.39 Second, Italy ignores the fact that it was the Government of Italy itself and the Marines who, by means of repeated applications to the Supreme Court of India, blocked the Special Court that had been established to rule on the matter from making a determination. Without repeating all that has been said in the previous proceedings and in Chapter 2 above, it is necessary to bear in mind the steps Italy and the Marines took before the Indian courts.⁷²

3.40 On January 18, 2013, the Supreme Court had specifically noted that Italy and the Marines could raise the jurisdictional issues before the Special Court after the necessary evidence had been submitted – in other words, after the investigation of the matter had been completed.⁷³

3.41 Immediately after this judgment, India took steps to establish the Special Court, which was constituted on 15 April 2013, and to designate the National Investigation Agency (NIA) to conduct the investigation. At this point, however, instead of pursuing the jurisdictional and immunity questions before the Special Court, Italy and the Marines filed an application with the Supreme Court challenging the jurisdiction of NIA to carry out the investigation. The Supreme Court ruled that it was for the Central Government to take a decision with regard to the appropriate investigation authority, but that the petitioners (Italy and the Marines) could always question the same before the appropriate forum.

3.42 The NIA completed the investigation in November 2013. However, before the results of the investigation could be turned over to the Special Court, the Marines petitioned the Supreme Court in January 2014 to enjoin the NIA from even filing charges before the Special Court.⁷⁴ This effectively blocked the results of NIA's investigation from being submitted to the prosecutor or the Special Court. Italy also requested India to amend the charge sheet against the

⁷² For a more detailed account, see ITLOS/PV.15/C24/2, 10 August 2015, afternoon, pp. 5-10 (Narasimha) and pp. 26-31 (Bundy) (Annex IT-34(b)).

⁷³ ITLOS/PV.15/C24/2, 10 August 2015, afternoon, pp. 6-7 (Narasimha) (Annex IT-34(b)).

⁷⁴ Application for Directions, 13 January 2014 (Annex IT-51).

Marines by dropping any reference to the Suppression of Unlawful Activities Act, which India agreed to do.⁷⁵

3.43 Three months later, on 6 March 2014, the Marines filed a petition, which became known as Writ No. 236, in which they asked the Supreme Court to declare the NIA investigation illegal, invalid and null, and to rule that the designation of the Special Court to try the case against the Marines was also illegal and without jurisdiction. In their petition, the Marines also requested the Supreme Court, instead of the Special Court, to declare that they – the Marines – had functional and sovereign immunity from being prosecuted in India.⁷⁶ On 28 March 2014, the Supreme Court ordered that the Special Court proceedings be held in abeyance so that the Writ could be fully considered.⁷⁷

3.44 At the Marines' urging, a hearing before the Supreme Court was scheduled for 13 July 2015 to hear arguments on Writ No. 236. On 4 July 2015, however, the Marines filed a new application with the Supreme Court in which they asked the Court to defer the hearing on their Writ until the Annex VII arbitral tribunal had decided the case.⁷⁸ It will be recalled that Italy had filed its Notification instituting the Annex VII proceedings one week earlier, on 26 June 2015. After that, events were driven by Italy's Request for Provisional Measures before ITLOS.

3.45 Viewed against this backdrop, Italy's complaint that India did not rapidly decide the question of immunity is misplaced. Just as there was no urgency justifying the provisional measure that Italy sought before ITLOS with respect to the status of Sergeant Girone, so also is there no urgency now so India respectfully submits that this Tribunal should reject Italy's request.

⁷⁵ ITLOS/PV.15/C24/2, 10 August 2015, afternoon, p. 9 (Narasimha) (Annex IT-34(b)).

⁷⁶ *Ibid.*, 10 August 2015, afternoon, p. 29 (Bundy) (Annex IT-34(b)); Writ Petition No. 236 of 2014 under Article 32 of the Constitution of India, 6 March 2014 (Annex IT-56).

⁷⁷ ITLOS/PV.15/C24/2, 10 August 2015, afternoon, p. 30 (Bundy) (Annex IT-34(b)); Order of the Supreme Court of India of 28 March 2014 (Annex IT-57).

⁷⁸ ITLOS/PV.15/C24/2, 10 August 2015, afternoon, pp. 30-31 (Bundy) (Annex IT-34(b)).

B. No Risk of Irreparable Prejudice

3.46 Italy's Request asserts that, by the continued detention of Sergeant Girone in India, Italy is suffering irreversible prejudice in so far as it causes an "ongoing, disproportionate and arbitrary deprivation of liberty for an official of the Italian State in respect of whom Italy is entitled to immunity".⁷⁹ Italy also states that it has given an undertaking to return Sergeant Girone if so required by the Tribunal,⁸⁰ and that India will thus suffer no prejudice if the two Marines are allowed to stay in Italy pending a decision of the Annex VII Tribunal.⁸¹ Italy further asserts that its requested provisional measure is appropriate because it is required by basic considerations of due process,⁸² which the Marines have allegedly been deprived of because formal charges have never been brought against them.⁸³ On this latter point, Italy refers extensively to the International Covenant on Civil and Political Rights, which it had also cited in support of its request for provisional measures before ITLOS.⁸⁴

3.47 Notwithstanding that India fully dealt with Italy's arguments as raised before ITLOS, it will briefly address Italy's contentions below.

C. The Object of Provisional Measures Must Be to Preserve the Rights of Both Parties

3.48 Just as it did before ITLOS, Italy persists in thinking that it is the only Party that has rights that need to be preserved pending the final decision of the Tribunal. Thus, its Request focuses on the prejudice that it considers it will suffer unless its request is granted, without paying the slightest attention to the rights that India possesses to see that justice is done for the killing of two of its nationals, as well as for the families and loved ones of the victims and the crew of the *St. Antony*, let alone for the victims of the shooting who were innocently fishing in India's EEZ, and who have suffered the most extreme form of irreversible prejudice. What is truly irreparable in this case is the death of the two fishermen.

⁷⁹ Italy's Request, p. 32, para. 108.

⁸⁰ *Ibid.*, p. 25, para. 82.

⁸¹ *Ibid.*, p. 32, para. 110.

⁸² *Ibid.*, p. 25.

⁸³ *Ibid.*, p. 30, para. 103(c).

⁸⁴ ITLOS/PV.15/C24/1, 10 August 2015, morning, p. 31 (Verdirame) (Annex IT-34(a)).

3.49 The principle that consideration of the rights and interests of both Parties must be taken into account is incontrovertible. It is enshrined in Article 290, paragraph 1, of UNCLOS, which provides in relevant part that a court or tribunal which considers that *prima facie* it has jurisdiction, “may prescribe provisional measures which it considers appropriate under the circumstances *to preserve the respective rights of the parties to the dispute*”.⁸⁵ It was also referred to by ITLOS in its Order of 24 August 2015 where the Tribunal stated that “the Order must protect the rights of both Parties and must not prejudice any decision of the arbitral tribunal to be constituted under Annex VII”.⁸⁶

3.50 Granting Italy’s request would not preserve India’s rights in the matter and, as discussed below, would prejudice India’s ability to exercise jurisdiction over Sergeant Girone should he be allowed to travel to and remain in Italy. This is because there is a risk that he would not return to India in the event India is found to have jurisdiction over the incident.

D. Italy Assumes Immunity, which is a Merits Question

3.51 Italy’s argument that the detention of Sergeant Girone is disproportionate and arbitrary because he enjoys immunity as an official of the Italian State is no more than an attempt to pre-judge the merits on the question of immunity.

3.52 Moreover, there is nothing arbitrary or disproportionate about Sergeant Girone’s bail conditions. The crime he is accused of is extremely serious, and one over which the State has a duty to exercise its jurisdiction.

E. Italy’s “Undertaking” To Return Sergeant Girone is Insufficient to Justify Italy’s Request

3.53 Italy makes much of the fact that it has given an undertaking to return Sergeant Girone to India if he is allowed to remain in Italy for the duration of the arbitration and the final decision is

⁸⁵ Emphasis added.

⁸⁶ Order of 24 August 2015, para. 125. And see also, *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean (Ghana/Côte d’Ivoire), Provisional Measures, Order of 25 April 2015*, para. 40.

in India's favour. However, Italy gave the same undertaking before ITLOS,⁸⁷ in response to which India explained why Italy's undertaking provided absolutely no assurance.⁸⁸

F. The False Allegation of Lack of Due Process

3.54 Lastly, Italy repeatedly argues that the Marines have been deprived of due process before the Indian courts because they have never been formally charged, and that this constitutes an irreparable prejudice.⁸⁹ India has elaborately explained in Chapter 2 the details of proceedings in various Indian courts which show that Italy's assertions are not correct.

3.55 Following the incident in February 2012, the State of Kerala conducted an investigation and arrived at a *prima facie* conclusion that the Marines had committed an offense. The Marines were thereafter taken into judicial custody.⁹⁰ Both Marines were informed of the charges against them and the Kerala authorities issued a charge-sheet.⁹¹

3.56 On 13 January 2014, the Marines filed an application with the Supreme Court which sought to enjoin the NIA from filing charges with the prosecutor and before the Special Court that had been established to try the case. In that application, the Marines also challenged the fact that the NIA was purporting to investigate the case on a number of grounds, which included the Suppression of Unlawful Activities Act (the "SUA Act"). The application noted that the SUA Act had been dropped from the charge-sheet in the Kerala proceedings and should not form part of NIA's investigation.⁹² It was evident from that application that the charges the Marines were facing were known to the Marines and their counsel. The Government of India accepted to remove the SUA Act from the list of charges,⁹³ and that charge was excluded. This was confirmed by an Order of the Supreme Court dated 26 February 2014.⁹⁴

⁸⁷ ITLOS/PV.15/C24/3, 11 August 2015, morning, p. 19 (Italy's Agent) (Annex IT-34(c)).

⁸⁸ See Paragraph 2.34 (b).

⁸⁹ Italy's Request, pp. 27-28, paras. 91-97 and p. 30, para.103(c).

⁹⁰ ITLOS/PV.15/C24/2, 10 August 2015, afternoon, pp. 5-6 (Narasimha) (Annex IT-34(b)).

⁹¹ ITLOS/PV.15/C24/4, 11 August 2015, afternoon, p. 2 (Narasimha) (Annex IT-34(d)).

⁹² Application for Directions, 13 January 2014 (Annex IT-51), paras. 11-17.

⁹³ Affidavit of N.S. Bisht, Under Secretary, Ministry of Home Affairs of India, 24 February 2014 (Annex IT-54).

⁹⁴ ITLOS/PV.15/C24/2, 10 August 2015, afternoon, p. 9 (Narasimha) (Annex IT-34(b)).

3.57 It follows that Italy and the Marines were fully aware of the charges raised against the Marines. They even moved to amend those charges. The only reason the charge-sheet could not subsequently be filed with the Special Court was because of Italy's and the Marine's challenge to the jurisdiction of that court.

III. A Request for Pre-judgment

3.58 It may be recalled that ITLOS has repeatedly held that an order on provisional measures "must not prejudice any decision on the merits."⁹⁵

3.59 India already demonstrated in the provisional measures proceedings before ITLOS,⁹⁶ that the lifting of the bail conditions on Sergeant Girone, and his return to Italy, would prejudice the merits of the case. It would also seriously put in jeopardy the rights of India in this case as well as the execution of the future award of the Annex VII Tribunal.

3.60 The provisional measure Italy is now requesting for the second time is also identical to one of its submissions on the merits. Submission (d) reads as follows:

"India must cease to exercise any form of jurisdiction over the *Enrica Lexie* Incident and the Italian Marines, *including any measure of restraint with respect to Sergeant Latorre and Sergeant Girone.*"⁹⁷

3.61 The main argument put forward in support of the provisional measure Italy is now seeking,⁹⁸ is also one of the main legal ground it invokes on the merits.⁹⁹ As State officials, the Marines are said to be entitled to immunity from India's criminal jurisdiction. And, once

⁹⁵ *Dispute concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures*, Order of 25 April 2015, para. 98. See also *The "Enrica Lexie" Incident (Italy v. India), Provisional Measures*, Order of 24 August 2015, para. 137.

⁹⁶ See WO of India, 6 August 2015, paras. 3.64-3.75. See also ITLOS/PV.15/C24/2, 10 August 2015, afternoon, pp. 36-44 (Pellet) (Annex IT-34(b)).

⁹⁷ Notification and Statement of Claim of the Italian Republic, in the *Dispute concerning the Enrica Lexie Incident with the Republic of India*, 26 June 2015, para. 33(d) ("ItSC").

⁹⁸ Italy's Request, pp. 3-4, para. 7, p. 23, para. 73, pp. 24-25, paras. 77-81, p. 26, par. 83 and pp. 31-32, para. 108.

⁹⁹ ItSC, para. 29 (g).

again,¹⁰⁰ Italy invokes the *Arctic Sunrise* case. It claims that, “unlike the individuals in *Arctic Sunrise*, the Marines are officials of a State foreign to that exercising jurisdiction, who were engaged in official activities concerning the prevention and repression of piracy.”¹⁰¹ However, as India already explained, this is precisely why the provisional measure cannot be granted. Italy would obtain a prejudgment on the immunity issue *and* the remedies it is seeking on the merits - *i.e.*, the relaxation of the (mild) measures of restraint on Sergeant Girone and his return to Italy.

3.62 Italy further argues that “keeping Sergeant Girone in India pending this Tribunal’s decision is not required by the purpose of bail conditions” under Indian law.¹⁰² To support its position, Italy has cited many provisions of international human rights law to stress that due process of law is being violated by India’s exercise of jurisdiction over the Marines.¹⁰³ It also argues that bail conditions of Sergeant Girone requiring him to be confined in Delhi would have adverse effect on his family.¹⁰⁴

3.63 Sergeant Girone is not in jail. He lives at the residence of the Italian Ambassador in New Delhi. As recalled during the hearings before ITLOS:

“Subject only to the obligation to report once weekly to the police station three kilometres down the road from the Italian Ambassador’s residence,¹⁰⁵ he is having a pleasant time at the residence. His family are entitled to visit him. They have done so on several occasions. His son and his wife have visited him nine times, his sister six times, and his parents five times.”¹⁰⁶

3.64 These are clearly “reasonable conditions” that a court “may impose [...] besides fixing the bail amount for the attendance of the accused”, “[i]n a case involving a non-bailable offence, a Court may impose reasonable conditions.”¹⁰⁷

¹⁰⁰ Italy’s ITLOS Request, para. 45.

¹⁰¹ Italy’s Request, p. 24, para. 77.

¹⁰² Italy’s Request, p. 25, para. 82.

¹⁰³ See Italy’s Request, pp. 27-31, paras. 93-104.

¹⁰⁴ See Italy’s Request, pp. 30-31, paras. 103.

¹⁰⁵ Footnote 57: “<http://indianexpress.com/article/india/india-others/the-plight-of-italian-marines-family-visits-cafeoutings>.”

¹⁰⁶ ITLOS/PV.15/C24/2, 10 August 2015, afternoon, p. 36 (Pellet) (Annex IT-34(b)).

¹⁰⁷ Justice M. L. Singhal, *Sohoni’s Code of Criminal Procedure: Volume 5*, LexisNexis, 21st ed., 2015, p. 612 (Annex IT-46).

3.65 Italy rightly points out, the “[p]rincipal object of bail is to secure the attendance of the accused at the trial and ensure that he does not flee from justice.”¹⁰⁸

3.66 Once again, Italy claims that “[i]f India is required by this Tribunal provisionally to suspend the measures preventing Sergeant Girone’s return to Italy, Italy’s undertaking to ensure his return if this Tribunal’s Award requires it means that India will suffer no prejudice.”¹⁰⁹

3.67 India’s concern relates to securing his presence in India during trial. It would be necessary for India to be assured that in case the Tribunal finds that India has jurisdiction, the presence of Sergeant Girone in India would be ensured.

3.68 Italy fails to disclose that ITLOS already examined each of these arguments before rejecting Italy’s request in its august Order. ITLOS’ reasoning in this respect is clear and complete; it does not call for any additional comment:

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

[...]

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

[...]

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

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

¹⁰⁸ Italy’s Request, p. 25, para. 82.

¹⁰⁹ Italy’s Request, p. 25, para. 81. In footnote 74, Italy refers to the so-called undertaking it gave during the hearings before the ITLOS (“Verbatim Record ITLOS/PV.15/C24/1 (uncorrected), 10 August 2015, morning session, pp. 45-46 (Bethlehem) (Annex IT-34(a)); Verbatim Record ITLOS/PV.15/C24/3 (uncorrected), 11 August 2015, morning session, p. 19, lines 29–33 (Azzarello) (Annex IT-34(c))”).

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

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

126. *Considering* that the first *and the second submissions* by Italy, if accepted, will not equally preserve the respective rights of both Parties until the constitution of the Annex VII arbitral tribunal as required by article 290, paragraphs 1 and 5, of the Convention.”¹¹⁰

3.69 ITLOS concluded that it “does not consider the two submissions by Italy to be appropriate...”¹¹¹ In India’s view they are not appropriate even now.

¹¹⁰ *The “Enrica Lexie” Incident (Italy v. India), Provisional Measures*, Order of 24 August 2015, paras. 111, 113 and 122-126 – emphasis added.

¹¹¹ *Ibid.*, para. 127.

CHAPTER 4 CONCLUSION

The Tendentious Character of Italy's Request

4.1 As India has shown in the present Written Observations, Italy's present Request is tendentious. It constitutes an abuse of process. Italy's present Request corresponds to the definition of this expression given by Professor Marcelo Kohen in a celebrated commentary of the Statute of the International Court of Justice:

“It consists of the use of instruments or procedural rights by one or more parties for purposes that are alien to those for which the procedural rights were established, especially for a fraudulent, procrastinatory or frivolous purpose, for the purpose of causing harm or obtaining an illegitimate advantage, for the purpose of reducing or removing the effectiveness of some other available process or for purposes of pure propaganda.”¹¹²

4.2 There are several reasons which render Italy's present Request difficult to accept.

4.3 *First*, by requesting the Tribunal to prescribe the same provisional measure as the one it requested before ITLOS less than four months after it failed to obtain it before ITLOS, Italy seeks to use Article 290(5) of the UNCLOS in order to obtain from the Annex VII Arbitral Tribunal what ITLOS refused to grant it. Italy's misuse of Article 290(5) amounts to making the Tribunal an “appeal chamber”. But, as explained above, this provision is not meant to give a second chance to the Parties before the Annex VII Tribunal in case they failed before the ITLOS.

4.4 *Second*, Italy cannot overlook the clear conditions set out in Article 290 of UNCLOS for the modification of provisional measures: there must be a new fact creating “a real and imminent

¹¹² R. Kolb, “General Principles of Procedural Law”, in A. Zimmermann, C. Tomuschat, K. Oellers-Frahm and C. Tams (eds.), *The Statute of the International Court of Justice: A Commentary*, O.U.P., 2nd ed., 2012, p. 904. See also Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, C.U.P., 2006, p. 80.

risk that irreparable prejudice may be caused to rights at issue before the final decision is delivered.”¹¹³ As shown above, in the present case there is no new fact at all.

4.5 Italy’s submission is an unreasonable extension of the right to request provisional measures, Italy is delaying the proceedings on the merits of the case by presenting the same request again. These new proceedings add to the burden of this matter.

¹¹³ *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean (Ghana/Côte d’Ivoire)*, Provisional Measures, Order of 25 April 2015, para. 42. See also *The M/V “Louisa” Case (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Provisional Measures, Order of 23 December 2010, para. 72 and *The “Enrica Lexie” Incident (Italy v. India)*, Provisional Measures, Order of 24 August 2015, para. 87. See also *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011, pp. 21-22, para. 64; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007, p. 13, para. 42; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009, pp. 152-153, para. 62; *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand)*, Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011, p. 548, para. 47 and *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014, para. 32.

SUBMISSIONS

For the above reasons and those which India will supplement and develop during the hearings on 30-31 March 2016, the Republic of India requests the Arbitral Tribunal to reject the submissions made by the Italian Republic in its Request for the prescription of provisional measures and to refuse to prescribe any new provisional measure in the present case.

Respectfully submitted,



**Dr Neeru Chadha
Agent of the Republic of India
26 February 2016**