Dissenting Opinion of Judge Ndiaye

(*Translation by the Registry*)

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

Having, to my great regret, been unable to join in the Order of the Tribunal, I find it necessary to express my dissenting opinion. In this opinion consideration will be given to the procedural requirements applicable to this case, Case 24 concerning *The "Enrica Lexie" Incident* (*Italy* v. *India*), request for the prescription of provisional measures under article 290, paragraph 5, of the United Nations Convention on the Law of the Sea.

1. In Case 24 the International Tribunal for the Law of the Sea (the Tribunal) has been seised of a request, submitted pursuant to article 290, paragraph 5, of the Convention, from Italy for the prescription of provisional measures.

2. The Tribunal must therefore determine whether or not there is a dispute and whether the procedural requirements under article 290, paragraph 5, of the Convention have been met, before deciding whether the Annex VII arbitral tribunal would have *prima facie* jurisdiction to entertain the case and, in consequence, whether the Tribunal has the power to prescribe provisional measures should the circumstances so require.

The dispute: Legal regime

3. Failing a definition of "dispute" in the statutes of international courts and tribunals, their case law must be looked to to ascertain the applicable legal regime, because the role of courts and tribunals in adjudicating cases requires them to hear disputes, which must be settled on the basis of the law. This means that there must be a dispute and it must be justiciable.

4. According to the ICJ:

> A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.
> (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11).

5. Whether there exists a dispute in a particular case is a matter for "objective determination" by the Court.
(*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74)

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

7. In the words of the Court: "The Court's determination must turn on an examination of the facts. The matter is one of substance, not of form."
[*Georgia/Russian Federation, Preliminary Objections, Judgment of 1 April 2011*, para. 30]

8. In principle, the dispute must be in existence at the date the application is submitted to the Court.
(*Aerial Incident at Lockerbie, I.C.J. Reports 1998*, paras. 42–44)

9. As for its subject-matter, the dispute must "concern . . . the interpretation or application of th[e] Convention" and be submitted in accordance with Part XV of UNCLOS.

10. As stated by the ICJ:

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

The Court must

> give . . . the matter the fullest consideration compatible with the requirements of urgency imposed by a request for the indication of provisional measures.
> (*Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*), *Provisional Measures, Order of 10 May 1984*, *I.C.J. Reports 1984*, paras. 24 and 25).

11. According to the Applicant,

> The dispute submitted to an Annex VII arbitral tribunal concerns an incident that occurred approximately 20.5 nautical miles off the coast of India involving the *MV Enrica Lexie*, an oil tanker flying the Italian flag, and India's subsequent exercise of jurisdiction over the incident, and over two Italian Marines from the Italian Navy, Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone (the "Marines"), who were on official duty on board the *Enrica Lexie* at the time of the incident (the "Enrica Lexie Incident").
> (Request, para. 3)

12. India acknowledges that the event which is at the origin of the dispute took place in the Indian EEZ and involved the *M/V Enrica Lexie*, an oil tanker flying the Italian flag. It is also accepted that India envisages exercising jurisdiction over the marines (Response, para. 1.5).

According to the Respondent:

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

13. In response, the Applicant asserts:

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

The principle thus stated is a fundamental one of criminal law: presumption of innocence!

14. To identify the evidence relating to the existence of a dispute between the Parties, the Tribunal must ascertain:

(a) whether the case file shows that there is a disagreement between the two States on a point of law or fact;
(b) whether this disagreement concerns "the interpretation or application" of the Convention;
(c) whether the disagreement existed at the date the application was filed.
(Georgia/Russia, para. 32)

15. It can be seen that there is disagreement on the following points:

- exercise of jurisdiction as between the coastal State and the flag State;
- exercise of law enforcement authority as between the two States, and specifically the question of prosecuting;
- substance of the norms;

- conflict over how the acts should be characterized;
- attributes of sovereignty, with the question of absolute immunity for one party and functional immunity for the other; and finally
- dispute over the choice of forum.

16. At the critical date do the acts at the root of Case 24 fall within the scope of the Respondent's internal law of criminal procedure or do they not?
If so, were the Tribunal to uphold the claims of the Applicant, would this constitute interference by the Tribunal in the substance of criminal proceedings pending in the Indian courts?
How should the actions taken by the Applicant and those taken by its nationals in the context of the Respondent's legal system be interpreted in international law?
All these questions reflect on the existence or not of a dispute under international law.

17. When seised of a request under article 290, paragraph 5, of the Convention, the Tribunal may prescribe, modify or revoke provisional measures . . . if it considers that *prima facie* the arbitral tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. That in essence is what this article says.

18. In order to satisfy these two procedural conditions, the Tribunal must: establish a close link between (i) the alleged basis of jurisdiction necessary to enable the Annex VII arbitral tribunal to hear the case on the merits and (ii) the claims asserted by the Applicant; and verify that there is the required correlation between the claim on the merits and the request for the prescription of provisional measures. The Tribunal must also carefully establish the facts of the case and their relevance so that it can determine whether or not the urgency of the situation requires the prescription of provisional measures.

19. The fundamental legal issue in this dispute, and both Parties so recognize, is the exercise of jurisdiction, that is to say the competence to act in the matter.

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

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

What do the Parties argue?

Italy

Italy claims, pursuant to UNCLOS, in particular Parts II, V and VII, and notably Articles 2(3), 27, 33, 56, 58, 87, 89, 92, 94, 97, 100 and 300 of the Convention, and customary international law, that India has breached its international obligations (Request, para. 29, see also PV.15/C24/1).

In the Statement of Claim dated 26 June 2015 (Annex A to the Request), Italy states:

In accordance with the provisions of UNCLOS, Italy respectfully requests the Annex VII Tribunal to adjudge and declare that:

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

(b) The assertion and exercise of criminal jurisdiction by India is in violation of India's obligation to respect the immunity of the Italian Marines as State officials exercising official functions.

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

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

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

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

The combination of such juxtaposed conducts and attitudes unquestionably reveals a disagreement between Italy and India which amounts to a dispute over the interpretation and application of the Convention and the international rules invoked by Italy in the present proceedings (PV.15/C24/1, see also PV.15/C24/1, p. 20, l. 4–7).

It [India] even invokes its declaration under article 310 of the Convention. These are clearly matters for the merits (PV.15/C24/1)

Italy considers that the law and the facts of the present case manifestly show that the Annex VII tribunal under constitution will have more than simply *prima facie* jurisdiction over the merits of this dispute (PV.15/C24/1, PV.15/C24/1, p. 21, l. 42–45).

India's argument seems to confuse the *prima facie* jurisdiction requirement with the separate requirement that the rights claimed be at least plausible. In considering *prima facie* jurisdiction, India states that "the question of the dispute does not fall within the jurisdictional scope of the Convention". India seems to be arguing that there is no dispute between the Parties "concerning the interpretation or application of [the] Convention". In this connection it focuses on the allegations put forward by Italy under article 97 and on the immunity of State officials (PV.15/C24/1, p. 22, l. 11–20, PV.15/C24/1, p. 18, l. 50 and 51, and p. 19, l. 1 and 2).

On the *prima facie* test, see PV.15/C24/1, pp. 28–36.

India

[T]he Annex VII tribunal, which Italy requests be constituted, does not have jurisdiction to rule on the case that it seeks to submit to it (PV.15/C24/2, pp. 13–14).

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

[T]he subject-matter of the dispute does not fall within the ambit of the Convention. . . . Italy mischaracterizes the subject-matter of the dispute, which is not an incident of navigation, let alone a collision, in the high seas, but a murder committed by two Italian nationals of two Indian nationals in a maritime area under the jurisdiction of India (Response, para. 3.5; on the subject-matter of the dispute see also Response, para. 1.6 and PV.15/C24/2, p. 14, l. 11–16).

Professor Tanzi went to a great deal of trouble yesterday to demonstrate that there was a dispute between India and Italy. Well, I am happy to grant him that – but a dispute about what? (PV.15/C24/4, p. 10, l. 5–7).

The only legal issue is to know what State or States – because there could be concurrent jurisdiction – has or have jurisdiction to try the perpetrators of this shooting, which led to the death of two Indian fishermen. In this respect the Montego Bay Convention is silent (PV.15/C24/4, p. 11, l. 9–12).

India denies that Italy can invoke the benefit of any immunities recognized by UNCLOS in favour of the two Marines concerned (Response, para. 3.5).

No one denies that the Italian marines were on board a merchant vessel. Therefore, the Government of India was not obliged to recognize their claim of immunity under the Convention or any other principle of international law (PV.15/C24/2, p. 2, l. 32–38; see also PV.15/C24/2).

3.1.1 Alleged breaches of provisions of the Convention

Italy

India's breaches of the provisions of UNCLOS follow, *inter alia*, from: (a) India's unlawful arrest and detention of the *Enrica Lexie*; (b) India's interference with Italy's freedom of navigation; (c) India's exercise of jurisdiction over the Enrica Lexie Incident and the Marines notwithstanding Italy's exclusive jurisdiction over the same by virtue of the

undisputed fact that the Incident took place beyond India's territorial sea, some 20.5 nautical miles off the Indian coast; (d) India's exercise of criminal jurisdiction over the Italian Marines, who, as State officials exercising official functions pursuant to lawful authority, are immune from criminal proceedings in India; and (e) the failure to cooperate in the repression of piracy by exercising criminal jurisdiction over the Enrica Lexie Incident and the Italian Marines (Request, para. 30, see PV.15/C24/1, p. 4, l. 25–30).

India

Italy seizes on the pretext of its Request for the Prescription of Provisional Measures to develop arguments made in its Statement of Claim as to the substance of the case. India will not do so since it is [in] contradiction with the clear prescriptions of Article 290 of the UNCLOS, which limits the purpose of provisional measures to preserving "the respective rights of the parties to the (. . .) dispute pending the final decision". Nonetheless, India makes it very clear that its abstention to refute Italy's arguments related to the merits does not imply any acceptance of those arguments (Response, para.3.1).

It is not sufficient just to enumerate a whole lengthy litany of provisions of this that might have a vague linkage with the facts and causes, as Professor Tanzi and Sir Michael did this morning, to establish the jurisdiction of the Court. The real question is whether or not the dispute between the Parties is covered by one or some of the provisions of the Convention. *Prima facie* this is not the case if you focus on the real subject-matter of the dispute (PV.15/C24/2, p. 14, l. 23–27).

Italy's request to enjoin any further Indian judicial and administrative actions would also effectively prejudge claims (b), (c) and (d) advanced in Italy's Notification (claim (e) will be addressed with respect to Italy's second provisional measures submission) (Response, para. 3.55).

The essence of these claims centres on whether the Indian courts have jurisdiction over the incident and whether the Italian Marines enjoyed immunity from suit although the claims are cast in terms of alleged breaches of the UNCLOS (Response, para. 3.55).

Concerning the specific claims set forth in the Statement of Claim:

On article 2 of the Convention, see PV.15/C24/4, p. 10, l. 20.

On the alleged violation of article 27, paragraph 5, of the Convention:

> The premise that India used ruse and coercion to cause the vessel to berth at the Kochi anchorage is completely untrue . . . given that two unarmed Indian fishermen had been killed . . . it was appropriate for India to seek to question the individuals on board for their version of this serious event (Response, para. 3.50).
>
> There was no ruse, no coercion, as alleged by Italy (PV.15/C24/2, p. 1, l. 50).
>
> With respect to the marines, Italy never claimed that India did not have the right to interrogate them (Response, para. 3.51).
>
> Italy has provided no evidence of the institution of proceedings against the two marines in Italy (Response, para. 3.53).

On article 33 of the Convention, see PV.15/C24/4, p. 10, l. 22.

On articles 56 and 58 of the Convention, see PV.15/C24/4, p. 10, l. 22–26.

On articles 87 and 89 of the Convention, see PV.15/4, p. 10, l. 28/29.

On article 92 of the Convention, see PV.15/4, p. 10, l. 29–36.

On article 94 of the Convention, see PV.15/4, Pellet, p. 10, l. 38–40.

On the alleged violation of article 97, paragraph 3, of the Convention:

> This case is not covered by Article 97 of the UNCLOS, but rather is about a double murder at sea (Response, para. 1.11).

> There was in reality no 'incident of navigation', nor any collision between the two ships. They had no physical contact and Article 97 of the UNCLOS . . . is irrelevant by any means (Response, para. 1.8; see also PV.15/C24/2, p. 2, l. 43–45).

On article 100 of the Convention:

> There was no piracy attack or threat thereof that could justify the killing of two Indian fishermen so as to attract the application of the Convention and thus the prima-facie jurisdiction of an Annex VII tribunal (PV.15/C24/2, p. 2, l. 45–47; see also PV.15/2, p. 14, l. 40/41, 47–49 and PV 15/4, Pellet, p. 10, l. 44).

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

20. On the jurisdictional issue the Tribunal must take particular care in examining the Convention provisions relied on by the Applicant and subject to disagreement between the Parties. To find that *prima facie* the Annex VII tribunal has jurisdiction it is not enough for an applicant simply to cite Convention provisions which, when read in the abstract, may theoretically offer a basis of jurisdiction.

It is also necessary for the court or tribunal to take account of facts within its knowledge at the time it decides whether or not to prescribe provisional measures. In particular, the adjudicator must satisfy itself that *prima facie* jurisdiction over the merits may be established on this basis in relation to the Convention provisions relied on by the applicant.

21. The Tribunal has determined that:

> before prescribing provisional measures the Tribunal need not finally satisfy itself that it has jurisdiction on the merits of the case and yet it may not prescribe such measures unless the provisions invoked by the Applicant appear *prima facie* to afford a basis on which the jurisdiction of the Tribunal might be founded.
> (*M/V "SAIGA" (No. 2)*, para. 29)

It must however do so on the basis of the above-stated principles, given that jurisdiction must be established *proprio motu*. It is to be recalled that under article 288 of the Convention the Tribunal has jurisdiction over any dispute concerning the interpretation or application of the Convention if the parties to the dispute have in accordance with article 287 of the Convention chosen the Tribunal as a means of settlement.

22. In respect of the *prima facie* jurisdiction of the Annex VII arbitral tribunal, which is a condition to be satisfied in order for the International Tribunal for the Law of the Sea to have jurisdiction, the Applicant has put forward a host of Convention provisions on which to found its Application: articles 2(3), 27, 33, 56, 58, 87, 89, 92, 97, 100 and 300.

The role of the Tribunal here is to satisfy itself that these provisions are of relevance to the dispute to be settled.

23. In light of the provisions invoked by the Applicant, it can be seen that the Parties disagree on the scope of application of their obligations under the Convention and on the relevance of the Convention. In fact, article 2, paragraph 3, concerns sovereignty over the territorial sea, whereas the incident took place in India's exclusive economic zone. The same is true of article 27, concerning criminal jurisdiction on board a foreign ship in the territorial sea. Article 33, dealing with the contiguous zone, was not again mentioned by the Parties even though there are references to it in the Applicant's Notification and Application.

The irrelevance to the case of articles 56 and 58, concerning the rights of coastal States and other States in the EEZ, lies in the fact that the Convention is silent on both the subject of military use of the EEZ and the question of criminal jurisdiction over crimes and other unlawful acts committed in the exclusive economic zone.

As for articles 87 and 89 of the Convention, they bear on freedom of the high seas, particularly freedom of navigation. That is why the Applicant claims that there have been "breache[s of] the Convention" resulting from

"(a) the unlawful arrest and detention by India of the *Enrica Lexie*;
(b) India's interference with Italy's freedom of navigation".

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

Given that the incident occurred at a place where the relevant body of Indian law, that is to say criminal law, applies, the Indian judiciary may exercise its criminal jurisdiction without thereby breaching international law.

Articles 92 and 94 concern the status of ships and the duties of the flag State. In light of the subject-matter of the dispute, they are wholly irrelevant, since the vessel itself is not being charged but, rather, accusations of murder have been brought against individuals who moreover are not members of the crew.

24. Under these circumstances it is difficult to see how the arrest and detention of the *Enrica Lexie* in connection with criminal proceedings can be interpreted as a violation of the freedom of navigation on the high seas. If they were so construed, the principle of freedom of navigation would protect vessels against any and all legal proceedings because their arrest would be regarded as an infringement of the flag State's right to enjoy freedom of navigation, with the result that there would no longer ever be any legal order in effect on the seas and oceans.

25. Article 97 concerns penal jurisdiction in matters of collision or other incidents of navigation. It is clear from the case file that there was neither any collision nor any other incident of navigation and that there was no physical contact between the *Enrica Lexie* and the *St. Anthony* fishing boat that could establish the applicability of article 97, paragraph 3, of the Convention.

What is more, the 29 June 1995 declaration of India under article 287 of the United Nations Convention on the Law of the Sea states:

> The Government of the Republic of India understands 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.
> [United Nations, 95/600, (XXI. 6) (XXI.6 (a) CN. 199. 1995. TREATIES-5 (Depositary Notification), RATIFICATION BY INDIA].

It is apparent from the foregoing that article 97, paragraph 3, is inapplicable and cannot be asserted against India. Article 100 deals with the "duty to cooperate in the repression of piracy". This duty stands in no direct relation with the subject-matter of the dispute as it has been acknowledged by the two Parties. Finally, the last provisions relied on by the Applicant concern article 300 of the Convention, on good faith, and the ICJ has made clear that this principle "is not in itself a source of obligation where none would otherwise exist". [ICJ, Judgment of 20 December 1998, *I.C.J. Reports 1998*, para. 94].

26. In truth, the Convention hardly applies in respect of this incident, which could have occurred in the mouth of just about any river in the world and would have had the same characteristics as the dispute in the present case.

This means that the Annex VII arbitral tribunal would not have jurisdiction because the subject-matter of the dispute does not relate to the law of the sea proper but rather:

(a) the exercise of jurisdiction as between a coastal State and a flag State;
(b) the exercise of law enforcement and criminal justice authority as between the two States;
(c) the dispute over the characterization of the acts;
(d) the attributes of sovereignty, together with the question of immunity; and
(e) the dispute over the choice of forum.

The Convention provisions which the Applicant claims have been violated by the Respondent provide no basis on which to establish the jurisdiction of the Annex VII arbitral tribunal over the merits of the case. And the International Tribunal for the Law of the Sea is without jurisdiction to entertain a case having nothing to do with the interpretation or application of the Convention.

27. We must now examine the second procedural requirement laid down in article 290, paragraph 5: the urgency of the situation.

Let us first review the arguments of the Parties.

Italy

Italy repeats and relies on all the facts and matters . . . which show that the rights in question are suffering irreversible prejudice or damage or at the very least under a real and imminent risk of suffering irreversible prejudice or damage. India's conduct is ongoing and further action is likely to be taken before the Annex VII arbitral tribunal will be "in a position to 'modify, revoke or affirm those provisional measures'." (Request, para. 52, see para. 25; see also PV.15/1, p. 5, l. 18–24).

> The risk of prejudice to Italy's rights has risen sharply over the last months (Request, para. 53). The prejudice to Italy's rights has increased each day that the Marines have been subjected to the jurisdiction of the Indian courts. The prejudice has been exacerbated by the medical issues addressed in the Confidential Addendum (Request, para. 54).
>
> For that entire period [three-and-a-half years] Italy's rights to investigate the conduct of its Marines . . . and, as appropriate, either to take action against them or to return them to the service of Italy, and in either case to ensure their health, have been prejudiced. Italy has a legal duty of care to the Marines (Request, para. 54).
>
> Urgency . . . is both humanitarian and legal (PV.15/1, p. 45, l. 26, see also PV.15/3, p. 7, l. 25–37).

On the first requested measure:

> In circumstances where irreparable harm is being suffered by Italy through each and every exercise of jurisdiction, urgency is demonstrated by the fact that the exercise of jurisdiction is ongoing. Here we know for a fact that that is so. As Sir Daniel Bethlehem has drawn to your attention, a hearing is scheduled to take place before the Indian Supreme Court on 26 August to address the article 32 Writ Petition deferment application that is rooted in the commencement of the Annex VII proceedings. The Additional Solicitor General for India is required to submit the Indian Government's views on that application today. And, of course, both marines are still under the bail conditions

> of the Indian Supreme Court. These exercises of jurisdiction are certain and ongoing (PV.15/1, p. 30, l. 4–13).
>
> India has left no doubt that it wants to proceed to the trial . . . India blames Italy for the delay, on the one hand, but relies on delay on the other to reassure the Tribunal that there is no urgency (PV.15/1, p. 36, l. 42–46).

On the second requested measure:

> the status quo in relation to the marines is one where their rights and Italy's rights are suffering irreparable damage on a daily basis. Every additional day in which a person is deprived of these rights must be regarded as one day too many (PV.15/1, p. 43, l. 31–34). India is also prejudging the marines' guilt before charging them, and by doing so, it has aggravated the prejudice, and brought all the risks connected to the ongoing exercise of criminal jurisdiction into even sharper relief (PV.15/1, p. 44, l. 4–7, see also PV.15/3, p. 15, l. 30–41).

On the test for urgency, see PV.15/3, p. 16, l. 2–p. 17, l. 10.

On the notion of urgency (temporal limit): "the key date is when the arbitral tribunal is itself in a position to act" (PV.15/1, p. 23, l. 20–21).

> The measures [the Tribunal] prescribes may in principle last through to the arbitral tribunal's final award on the merits (PV.15/1, p. 23, l. 42–43).
>
> It is entirely proper for Italy to request provisional measures extending to the final award of the arbitral tribunal (PV.15/3, p. 10, l. 33–34).

On the duration of the dispute:

> urgency is not to be assessed by the length of time since the dispute has arisen but by an appreciation that every continuing day that is lost is a day that can never be recovered (PV.15/1, p. 45, l. 45–47). India is conflating two analytically distinct issues: the duration of the dispute

> and the assessment of urgency (PV.15/1, p. 44, l. 11–13). It is not uncommon for disputes over the exercise of jurisdiction and immunity of State officials to be brought to an international forum after some domestic proceedings (PV.15/1, p. 44, l. 24–26). The well-foundedness of the application must be assessed without reference to the issue of delay in filing it. The preconditions for seeking the prompt release may have been satisfied before, but failing to act as soon as those preconditions arise does not . . . render . . . the application inadmissible (PV.15/3, p. 18, l. 8–12).

India

Neither the first nor the second Italian submission fulfils either the 'aggravated urgency' standard resulting from article 290, paragraph 5, of the UNCLOS or even the 'basic' standard of urgency (Response, para. 3.13).

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

On the notion of urgency (temporal limit):

> Italy places no time limit on its request (PV.15/2, p. 22, l. 4–5). But this is not what article 290, paragraph 5, says (PV.15/2, p. 22, l. 17). [T]here is a temporal limitation to the duration of any provisional measures that may be prescribed by this Tribunal (PV.15/2, p. 22, l. 28–29). [The] Tribunal is not called on to consider any provisional measures that will remain in force throughout the duration of the Annex VII arbitral tribunal. . . . The question is only whether there is any urgency over the next few months, after which the Annex VII arbitral tribunal will have been constituted and will be in a position to deal with the matter (PV.15/2, p. 22, l. 39–43; see also PV.15/4, p. 5, l. 22–25).
>
> In these circumstances, there is no risk that Italy will suffer any prejudice with respect to these proceedings, no urgency of the situation that would justify provisional measures and no grounds for restraining the Indian judicial and administrative process, which operated in an

exemplary fashion, notwithstanding the various tactics employed by Italy to disrupt the proceedings (Response, para. 3.23).

First provisional measure requested by Italy:

When the facts are placed in their proper context, they show that there is absolutely no situation of urgency that justifies the Tribunal issuing an order restraining India from continuing to take judicial or administrative measures – measures that it has always carried out lawfully and with absolute fairness to Italy and the two marines – or to exercise any other form of jurisdiction (Response, para. 3.21; see also PV.15/2, p. 29, l. 23–24; on facts that "place the misplaced nature of Italy's first request in perspective", see Response, paras. 3.24 to 3.37).

i) Italy has been responsible both for delays in allowing the investigation of the incident to be carried out . . . and delays to the Indian court proceedings (see also PV.15/2, p. 10, l. 37–40; PV.15/2, p. 24, l. 17–20, p. 27, l. 21–27; and PV.15/4, p. 1, l. 36–p. 3, l. 2).
ii) Italy has been treated entirely fairly by the Supreme Court. Many of its, and the two marines', applications have been favourably ruled on . . . (see also PV.15/2, p. 24, l. 22–24).
iii) Italy has, on several occasions, abused the judicial process . . . (see also PV.15/2, p. 29, l. 50–p. 30, l. 1 and p. 28, l. 36–p. 29, l. 1; PV.15/2, p. 36, l. 22–23).
iv) Italy succeeded in obtaining a stay of the Special Court proceedings . . . this means that there is no real and imminent risk of irreparable prejudice to Italy's rights . . . that there is no urgency to the situation . . . If anything, it is India's rights that have been compromised by Italy's conduct (see also PV.15/2, p. 10, l. 27–32 and p. 12, l. 46–p. 13, l. 2). The proceedings before the Special Court are in abeyance. There is no prospect that the stay of those proceedings will be lifted, or that the prosecution will present the results of the NIA investigation or that the defendants will have their opportunity to answer that case. There is no chance that that is going to happen in the near future, and certainly not before the Annex VII arbitral tribunal is set up and running (PV.15/2, p. 29, l. 10–16; see also PV.15/4, p. 5, l. 29–35).

v) On duration of the dispute: [T]he fact that Italy waited over three years to bring the Annex VII Arbitration and to introduce a Request for Provisional Measures itself attests to the lack of urgency. Nothing that has recently taken place with respect to the legal situation in India and the proceedings there even remotely adds any urgency to the matter (Response, para. 3.38, see also para. 3.22 and PV.15/2, p. 30, l. 5–11). If a State delays filing a request for provisional measures when it could have done so earlier, it casts serious doubts over its claim that there is a real and imminent risk of irreparable prejudice (PV.15/4, p. 8, l. 7–11).

Second provisional measure requested by Italy: the second measure cannot be justified on the grounds of urgency as requested by Italy, far less can there be any form of aggravated urgency in bringing proceedings before this Tribunal before the Annex VII tribunal can be constituted (PV.15/2, p. 34, l. 29–32).

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

On the situation of Mr Latorre: New extensions are not to be excluded if necessary on humanitarian grounds (Response, para. 3.42). His state of health is evolving . . . (Response, para. 3.43). Given the renewable six months leave granted by the Supreme Court on 13 July 2015, Italy is ill-advised to invoke any urgency in this matter (Response, para. 3.43; see also PV.15/2, p. 23, l. 20–51).

On the situation of Mr Girone: He is under bail conditions (Response, para. 3.44); the urgency of authorizing him to go back to and stay in Italy is belied by his own behaviour (Response, para. 3.45; see also PV.15/2, p. 34, l. 2–16).

> On deprivation of liberty: the marines are not in prison. They are not detained. They are at large under light supervision (PV.15/4, p. 18, l. 14–15).

28. Provisional measures are intended to preserve the rights of the parties to the case and to prevent irreparable harm. In order to deal with the urgency of a situation before the dispute can be resolved in law on the merits, the court must act by prescribing provisional measures. In regard to the urgency, the court must satisfy itself that harm is likely and imminent.

29. Preservation of the rights of the parties pending the constitution of an Annex VII arbitral tribunal is the manifestation of the principle of equality of States and the principle of effective procedural equality of the parties before the tribunal. The rights to be preserved are those subject to adjudication on the merits of the case. And provisional measures may not be prescribed unless irreparable harm is imminent. Thus, there is a close connection between the harm and urgency: if irreparable harm is not imminent, there is hardly any urgency.

30. Whether or not there is a need to act to preserve the rights of the parties and prevent irreversible prejudice or irreparable harm must be determined from the circumstances of the case before the Tribunal. In this connection, a real and imminent risk must be found: hence, the importance of the facts.

31. The circumstances cannot however be relied upon without also taking into consideration the Convention provisions whose alleged violation is cited in support of the request for the prescription of provisional measures. And the court must play a leading role in assessing the correlation between the facts and the legal standard invoked. As Judge Lauterpacht observed: "So to describe the character of the present case [i.e., as grave and urgent] is not to say that the Court should approach it with anything other than its traditional impartiality and firm adherence to legal standards".
(*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 408)

32. This is so because urgency presupposes that the circumstances of the case make action necessary to preserve rights claimed by the parties, rights

whose protection cannot await the award to be decided by the Annex VII arbitral tribunal. As a result, (i) the status of the proceedings when the request is submitted and (ii) the amount of time it will take to constitute the arbitral tribunal, are relevant in determining the urgency of the situation. Similarly, the degree of urgency is linked with the gravity of the harm sought to be prevented by the provisional measure. Thus, if the Tribunal were to find that the potential harm is irreparable, urgency would be established.

33. And that is where the difficulty lies: the facts must be interpreted and given a legal characterization and that is an ongoing point of contention in any case. Sir Hersh Lauterpacht wrote: "A substantial part of the task of judicial tribunals consists in the examination and the weighing of the relevance of facts" (H. Lauterpacht, *The Development of International Law by the International Court*, 1958, p. 48).

In proceedings characterized by urgency, the court's impartial and critical assessment of the factual context is necessarily limited because caught between the urgent need for provisional measures and the pressing requirement to avoid twisting the facts.

34. As Kreca observes:

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

35. In the present case, do the facts put forward by the Applicant in support of its request indicate that the situation is so urgent as to require the prescription of provisional measures? The Tribunal does not really come to a conclusion on the urgency of the situation or, if it does, it is by paralipsis. It states: "*Considering* that the above consideration [continuation of pending proceedings] requires action on the part of the Tribunal to ensure that the respective rights of the Parties are duly preserved".
(Para. 107 of the Order of 24 August 2015)

As shown by the material in the case file however, these views need to be qualified since for more than a year now the first marine has been in Italy for reasons of health, while the second is living in the residence of the Ambassador of Italy to India, where family members have visited him a number of times.

What is more, India gave assurances to the Tribunal and firm undertakings at the hearing (para. 130 of the Order).

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

> The Court further notes that the Agent of Australia stated that "the Attorney-General of the Commonwealth of Australia [had] the actual and ostensible authority to bind Australia as a matter of both Australian law and international law". The Court has no reason to believe that the written undertaking dated 21 January 2014 will not be implemented by Australia. Once a State has made such a commitment concerning its conduct, its good faith in complying with that commitment is to be presumed.
> (*Questions relating to the Seizure and Detention of Certain Documents and Data* (*Timor-Leste* v. *Australia*), *Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, para. 44)

It is indeed the case that, by their written and oral statements, Agents voice the consent to be bound given by the States they represent.

This means that there really is no urgency in the circumstances of this case. The Tribunal should simply have set out in detail the facts having led it to prescribe the measure if it believes that the urgency of the situation required it.

Not having discerned any probable, imminent risks for the marines, I am of the view that the circumstances as they now present themselves to the Tribunal do not specifically require the prescription of provisional measures.

36. In truth, by virtue of the subject-matter of the dispute this case should never have come before the International Tribunal for the Law of the Sea. As India is not a European State, the Hague Court or an *ad hoc* tribunal would have been a more fitting choice.

We respectfully submit this opinion.

(*signed*) T.M. Ndiaye