INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

2015

Public sitting

held on Monday, 10 August 2015, at 3 p.m.,

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

President Vladimir Golitsyn presiding

THE "ENRICA LEXIE" INCIDENT

(Italy v. *India)*

Verbatim Record

Present:	President	Vladimir Golitsyn
	Vice-President	Boualem Bouguetaia

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

Italy is represented by:

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

as Agent;

and

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

as Senior Advisers;

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

as Counsel and Advocates;

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

as Counsel;

Ms Francesca Lynette, Freshfields Bruckhaus Deringer,

as Legal Assistant.

India is represented by:

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

as Agent;

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

as Co-Agent;

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

as Deputy Agent;

and

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

as Counsel and Advocates;

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

as Junior Counsel;

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

as Advisers.

THE PRESIDENT: Please be seated. The Tribunal will now continue the hearing in the case concerning the *Enrica Lexie* Incident. This afternoon, we will hear the first round of oral arguments presented by India.

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

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

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

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

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

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

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

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

When the reports of the killings reached the Indian authorities, it was entirely reasonable for them that, as per the law, they would open an investigation. From the vessel movements in the area, it was ascertained that *Enrica Lexie* was involved in the so-called incident so it was requested to turn back and join the investigation. There was no ruse, no coercion, as alleged by Italy.
There were six Italian marines on board *Enrica Lexie*. Two of them were arrested after it was established that they fired the shots that killed the two fishermen. Legal

proceedings then commenced in Indian courts under the relevant provisions of Indian law, as the victims were Indian nationals and they were killed on board an Indian fishing vessel.

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

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

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

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

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

Therefore, Mr President, it is very clear from a brief recapitulation of this case that there was no collision, no incident of navigation, so as to attract article 97 vesting the jurisdiction to the flag State. Also 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.

Mr President, India is proud of its adherence to rule of law and its judicial system that gives access to justice, ensures due process and equal opportunity to everybody to assert their rights. Throughout the past three years, Italy has benefited from this process. India's courts have acted with the utmost fairness towards both Italy and

the two accused marines, despite being flooded by numerous applications, delays and inconsistent submissions by them. It will be clear from subsequent Indian presentations how Italy has invoked the Indian judicial system to its advantage and now complains against the same system for alleged delays and lack of jurisdiction.

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

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

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

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

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

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

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

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

My colleagues will discuss the above issues in more detail and show that that there is absolutely no justification for Italy's Request for provisional measures. The Annex VII tribunal that is to be constituted would not have jurisdiction in this case and there is no imminent urgency which demands prescribing of provisional measures by this Tribunal pending the setting up of the Annex VII tribunal.

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

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

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

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

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

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

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

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

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

Mr President, I believe that facts must speak for themselves. It will be in my endeavours to show that many of the questions and the issues that have arisen for consideration could actually be resolved in the light of the facts that are correctly

stated. What are these facts? There are four sets of facts that become relevant for our consideration. First, the correct factual background in which Italy has invoked the jurisdiction of the Annex VII arbitration in 2015. This understanding, Mr President, will have a direct bearing on the principle of the *prima facie* view which this Tribunal will have to take on the jurisdiction of the Annex VII tribunal.

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

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

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

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

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

Let us now see the follow-up actions taken immediately after the incident. Upon receiving information about the incident, the State of Kerala, one of the twenty-nine states constituting the Indian Federation, conducted an investigation and arrived at a *prima facie* conclusion of the commission of an offence. This conclusion led to the two marines being taken into judicial custody on the 19 February 2012.[1] Following custody, Italy and the marines approached the highest court of the State of Kerala,[2] the High Court, challenging the jurisdiction of the State of Kerala.

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

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

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

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

Three very important findings were given in the High Court judgment. The first finding is that the submission made on behalf of Italy was accepted. The Supreme Court held the State of Kerala would not have jurisdiction at all. Then the Court said: "We would agree with the state of Kerala and hold that the jurisdiction to try and investigate the case would lie only with the Union of India."

That is one aspect which was very important for the Court to consider in view of the fact that it was an unusual incident which occurred in our country, and if we had subjected them to our regular criminal courts it would have taken a long time. The Supreme Court was concerned about that. It took the Government into confidence and the Court said "We shall in this case ask for the establishment of a Special Court to look into and try this case" and also considered one of the submissions made by them, which is that the Indian Union and the Republic of India does not have jurisdiction to try this case.

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

> We will enable you to raise this plea before the Special Court that has been constituted and the Special Court can go into the matter and decide the question whether India has jurisdiction or does not have jurisdiction. Before it does that, some amount of evidence is necessary. Immediately after the evidence is put in, you can take the plea and the court could as well hold that there is no jurisdiction for India to try this matter at all.

Mr President, it is evident from the judgment of the Supreme Court that Italy was successful in arguing that the State of Kerala has no jurisdiction, and it had also reserved the question of jurisdiction to be re-agitated before the Special Court, where it could well prove that India had no jurisdiction over the incident. Two and a half years after this question was kept open, Italy and the marines have come up with the same prayer before the Annex VII tribunal. This tribunal would definitely be going into this very question as to who has the jurisdiction at all, whether India would

have the jurisdiction at all, which is the question which Italy sought to be kept open for them to be argued specifically, and the Supreme Court agreed and provided that forum for them.

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

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

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

The following facts would show how, instead of participating in the proceedings to be conducted before the Special Court and enabling the Special Court to arrive at its decision on the jurisdiction of India after the recording of evidence as a preliminary issue, Italy and the marines instead chose to adopt a course of filing multiple applications which have brought the entire legal proceedings to a standstill.

In the meantime, even though applications were filed in the Supreme Court, the National Investigation Agency proceeded with the investigation. It commenced the investigation and sought to record the statements of witnesses to the incident. The ship owners who had honoured the commitment made to the Supreme Court at the time of release of the ship by the Supreme Court made available six crew members and their statements were recorded. It is easy to say that there was no difficulty in recording the statements so far as the Italian marines are concerned through video recording, but that incident occurred after repeated prayers. India requested Italy to

secure the presence of the four Italian marines as promised by them to the Supreme Court. The order of the Supreme Court specifically recorded an undertaking given by Italy saying at the time of investigation “When the evidence of these witnesses is to be recorded, we undertake to bring them back for examination.” The Court recorded that statement and permitted the ship to leave the coast of our country.

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

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

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

Paragraph 6:

> Having heard the learned Attorney General for India and Mr Mukul Rohatgi for the Petitioners, we do not see why this Court should be called upon to decide as to the agency that is to conduct the investigation. The direction which we had given in our judgment dated 18 January 2013 was in the context of whether the Kerala Courts or the Indian Courts or even the Italian Courts would have the jurisdiction to try the two Italian marines. It was not our desire that any particular Agency was to be entrusted with the investigation and to take further steps in connection therewith. Our intention in giving the direction for formation of a Special Court was for the Central Government to first of all entrust the investigation to a neutral agency, and, thereafter, to have a dedicated Court having jurisdiction to conduct the trial. Since steps have been duly taken for the appointment of a Court of competent jurisdiction to try the case, the Central Government appears to have taken steps in terms of the directions given in our judgment dated 18 January 2013. It is for the Central Government to take a decision in the matter.

The next paragraph, paragraph 7, is important.

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

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

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

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

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

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

The later portion is important.

> In view of the earlier order … passed by a three-Judge Bench of this Court … and in such a fact situation, it is desirable to hear the parties limited to the extent and on that issue being a pure question of law. However, to meet the technicalities, Mr Mukul Rohatgi, learned senior counsel has pointed out that he would like to file an application to that effect.

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

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

Unfortunately, however, now the marines alone approached the Supreme Court of India and instituted a fresh case[3] (Writ Petition No. 236/2014) with questions similar to those that are being raised before the Annex VII tribunal. The Supreme Court heard the marines and, at their request, passed an order dated 28 March 2014, which issued notice to the Union of India and also granted complete abeyance of the trial before the Special Court. By issue of this order the proceedings before the Special Court have come to a standstill.

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

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

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

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

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

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

The next request was made to the Supreme Court when an application was filed on behalf of Mr Latorre[5] seeking the permission of the court to leave for Italy on health grounds. When the Supreme Court enquired from the Government its view on the relaxation of the bail conditions, I appeared and represented the Government at that

[3] Writ Petition No. 236/2014 instituted by the two Italian Marines in the Supreme Court. (Vol. 2 – Annex 40 – Written Observations by India)
[4] Order dated 22.02.2013 passed by the Supreme Court in I.A. No. 4/2013 in SLP(C) No. 20370/2012. (Vol. 2 – Annex 16 – Written Observations by India)
[5] Application for Directions and relaxation of Bail Conditions dated 05.09.2014 (Vol. 2 – Annex 21 to Annex A – Italy Request for Provisional Measures)

point of time. The Government very clearly instructed me that we are not adversarial in this matter, particularly when a man is unwell – why should there be any objection? I reflected the views of my Government to the Court and there was no further adjudication on that. There was no examination as to whether or not it was true. It was unnecessary for us to get into the merits of the matter and the merits of the documents to prove ill health. We were unconcerned about that. The statement that he was not well was sufficient for us. We would not need to go any further. We accepted it at its face value and said that if he is unwell he is entitled to go abroad and have medicine. That order is on record. It clearly reflects the statement made by me that we have no objection to him leaving the country.

Mr President, even before the expiry of the four months granted by the Supreme Court, Mr Latorre[6] filed another extension for a further period of four months on health grounds. Simultaneously, another application was also filed on behalf of Mr Girone[7] requesting that he too may be allowed to travel to Italy. It may be true that the court might not have been inclined to both, but then the reality is that both these applications were withdrawn.[8] There is no adverse order that Italy faced at any point of time from the Supreme Court in respect to grant of permission to leave the country.

Mr Latorre, who was already in Italy, made a third application to the Supreme Court seeking an extension of stay. This request was heard by the Supreme Court on 14 January 2015[9] and a further extension of three months of his stay in Italy was permitted to Mr Latorre.

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

Mr Latorre then made his fourth application immediately prior to his return, seeking a further extension of his stay in Italy for health and medical reasons. This application was again heard by the Supreme Court which did not deny him the relief he sought and passed an order on 9 April 2015.[10] By the same order, the Court also directed that the main petition be listed for hearing.

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

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

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[6] Interim Applications No.7-10 in SLP(C) No. 20370/2012 (Bail condition relaxation for Massimiliano) (Vol. 2 – Annex 22 to Annex A – Italy Request for Provisional Measures)
[7] Interim Applications No.7-10 in SLP(C) No. 20370/2012 (Bail condition relaxation for Salvatore Girone) (Vol. 2 – Annex 23 to Annex A – Italy Request for Provisional Measures)
[8] Order dated 16.12.2014 by the Supreme Court (Vol. 2 – Annex 29 to Annex A – Italy Request for Provisional Measures)
[9] Order of the Supreme Court dated 14.01.2015 (Vol. 2 – Annex 30 to Annex A – Italy Request for Provisional Measures)
[10] Order of the Supreme Court dated 09.04.2015 (Vol. 2 – Annex 31 to Annex A – Italy Request for Provisional Measures)

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

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

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

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

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

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

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

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

> India shall refrain from taking or enforcing any judicial or administrative measures against Sergeant Massimiliano Latorre and Sergeant Salvatore Girone in connection with the *Enrica Lexie* incident and from exercising any other form of jurisdiction over the '*Enrica Lexie*' incident.

This, in my submission, is accomplished by the fact that the Supreme Court has actually stayed it. It would not be going too far to say that until the tribunal is constituted and hears the matter, there is no compelling assumption that the matter will be taken up and that there will be an adverse decision against them.

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

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

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

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

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

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

The "*Enrica Lexie* incident" makes one think that this is an event of secondary importance, even though generally unfortunate in nature, to quote the *Larousse*[1] dictionary; whereas the events that have given rise to this case, which is very unfortunate indeed, are not secondary at all. It is about the death of two Indian fishermen, Mr Ajeesh and Mr Valentine, crew members on the *St. Antony.* You can see the vessel on the screen. They were victims of the irresponsible firing of automatic weapons by two Italian marines on board the tanker *Enrica Lexie*. You can see a picture of that now on the screen.

It goes without saying, Mr President, that if you look at the respective sizes of the two ships, *Enrica Lexie* wins hands down, but the incident occasioned no damage whatsoever to the tanker. It is the *St. Antony* and its occupants that have been victims of the shooting: two men dead; trauma for the other nine fishermen; and serious damage to the ship. In point of fact, what we are dealing with here is the Case of the *St. Antony*; and let no one come and tell us that the reality of the facts is open to challenge, despite the untruths and machinations of the marines on the *Enrica Lexie*.[2] The facts have been confirmed by the detailed investigation carried out by the Kerala State police[3] and then by the Indian National Investigation Agency, and by the simple fact that Italy has already paid compensation to the victims' next of kin and to the owner of the *St. Antony*.[4] Who could be convinced that anyone in their right mind could take the *St. Antony* to be a dangerous pirate ship, bent on attacking the *Enrica Lexie,* a tanker protected by barbed wire and six members of the Italian armed forces?

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[1] http://www.larousse.fr/dictionnaires/francais/incident/42245; see also, for example, http://fr.thefreedictionary.com/incident); http://www.thefreedictionary.com/incident.

[2] See Statement of Mr Vitelli Umberto, Captain of the *MV Enrica Lexie*, 15 June 2013 (Written Observations of India (WO), Annex 27); Statement of Mr Sahil Gupta, Crew Member of the *MV Enrica Lexie*, 26 June 2013 (WO, Annex 29) and Statement of Mr Victor James Mandley Samson, Crew Member of the *MV Enrica Lexie*, 24 July 2013 (WO, Annex 29).

[3] Kerala Police Charge Sheet, 15 February 2012 (WO, Annex 3).

[4] A. Katz, "Brother Shot Dead Fishing Tests Armed Guards' Accountability", *Bloomberg*, 29 November 2012 (WO, Annex 12). A. Banerji, "India Has Jurisdiction to Try Italian Marines for Fishermen Deaths: Court", *Reuters*, 18 January 2013 (http://www.reuters.com/article/2013/01/18/us-india-italy-marines-idUSBRE90H07E20130118). See also Supreme Court of India, Order confirming the release of the *MV Enrica Lexie* and its crew, 2 May 2012 (WO, Annex 10).

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

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

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

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

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

> The rights and jurisdiction of the coastal State in such zone do not include the right to obtain notification of military exercises or manoeuvres or to authorize them.[5]

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

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[5] Declaration by the Republic of India upon ratification of the United Nations Convention on the Law of the Sea of 10 December 1982, 29 June 1995 (https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en&clang=_en).

[6] See Statement of Mr Vitelli Umberto, Captain of the *MV Enrica Lexie*, 15 June 2013 (WO, Annex 27).

[7] See Notification (N), para. 7.

[8] *Contra*, see Statement of Mr Vitelli Umberto, Captain of the *MV Enrica Lexie*, 15 June 2013 (WO, Annex 27); Statement of Mr Sahil Gupta, Crew Member of the *MV Enrica Lexie*, 26 June 2013 (WO,

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

This chart comes from the internet site of the NATO Shipping Centre[9] and it illustrates the different alerts and actual attacks which took place during 2012.

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

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

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

Mr President, Italy can no more invoke articles 100 *et seq.* of the Convention of 1982 than it can rely on article 97. The same applies to article 32 of the Convention. That is the only article relative to immunity, apart from the articles relating to the Authority[10] and your own immunities,[11] distinguished Members of the Tribunal. Article 32, on which Italy does not rely, relates to immunities of warships and other government ships operated for non-commercial purposes. We are not talking here about the immunities of the *Enrica Lexie*, which, moreover, is not covered by this provision, but to immunities which Italy claims for the marines who were on board, about which the Convention says nothing whatsoever.

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

> *(Read in English)*
> at this stage of the proceedings, the Tribunal does not need to establish definitively the existence of the rights claimed by Argentina and yet, before prescribing provisional measures, the Tribunal must satisfy itself that the

Annex 29) and Statement of Mr Victor James Mandley Samson, Crew Member of the *MV Enrica Lexie*, 24 July 2013 (WO, Annex 29).

[9] http://www.shipping.nato.int/Pages/LargeAlertMap2012.aspx.

[10] See article 177 et seq. of the Convention.

[11] Annex VI, Statute of ITLOS, article 10.

> provisions invoked by the Applicant appear prima facie to afford a basis on which the jurisdiction of the Annex VII arbitral tribunal might be founded[12]

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

> *(Read in English)*
> does not need to settle the Parties' claims […or to] determine definitively whether the rights which [the Parties] wish to see protected exist.[13]

(Interpretation from French) However, as Sir Michael and Professor Tanzi recalled this morning, the Tribunal must decide if the rights claimed by Italy on the merits and on which Italy seeks protection are plausible.[14]

This pre-condition for establishing the jurisdiction of the future Annex VII tribunal is not met prima facie. As opposing counsel insisted this morning, any deeper assessment by this Tribunal would suppose a review of the facts. A review, distinguished Members of the Tribunal, which you are even less entitled to undertake, given that you are not judges on the merits. Were you to do so you would encroach on the jurisdiction of the future tribunal which will have to rule *seconda facie,* since under the terms of article 290, paragraph 5, of the Convention

> *(Read in English)*
> 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.

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

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

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[12] *"ARA Libertad" (Argentina* v. *Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012,* p. 332, para. 60.

[13] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Provisional Measures, Order of 22 November 2013, I.C.J. Reports 2013*, at p. 360, para. 27. See also *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, Separate Opinion of Judge Abraham, I.C.J. Reports 2006,* at pp. 140-141.

[14] *Ibid.;* 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*, at p. 19, paras. 56-58, citing *Aegean Sea Continental Shelf (Greece* v. *Turkey), Interim Protection, Order of 11 September 1976, I.C.J. Reports 197*, at pp. 10-11, para. 31, and *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996*, at p. 22, para. 39.

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

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

> *(Read in English)*
> Any dispute between States Parties concerning the interpretation or application of this Convention may be submitted to the procedures provided for in this section

– *(Interpretation from French)* this being the section on compulsory procedures entailing binding decisions –

> *(Read in English)*
> only after local remedies have been exhausted where this is required by international law.

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

Although Italy claims otherwise,[15] in reality it is acting to protect rights of its nationals: the two accused on the one side, and the Italian-flagged tanker *Enrica Lexie* on the other. The words used by Italy leave no room for doubt. Its intention is clear in the Notification of 26 June, whereby in its first submission Italy requests the Annex VII tribunal to adjudge and declare that – and I quote:

> *(Read in English)*
> 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.

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

> *(Read in English)*
> India shall refrain from taking or enforcing any judicial or administrative measures against Sergeant Massimiliano Latorre and Sergeant Salvatore Girone in connection with the Enrica Lexie Incident, and from exercising any other form of jurisdiction over the Enrica Lexie Incident.

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

Here is the second:

> *(Read in English)*

[15] See N, paras. 43-46.

> 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.

(Interpretation from French) I repeat:

> *(Read in English)*
> 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.

(Interpretation from French) I could also refer to what Professor Verdirame said this morning:

> *(Read in English)*
> The Marines, and in consequence Italy, would have suffered irreparable damage.

(Interpretation from French) It is indeed, to use the well-known expression from *Mavrommatis* concerning diplomatic protection, "in the person of its nationals"[16] that Italy seeks to ensure respect for international law.

It is clearly the marines, Sergeant Girone and Sergeant Latorre, who are to be protected. Thus this is about diplomatic protection. However, as we know, the exercise of diplomatic protection is subject to two indispensable conditions.[17] First, that the beneficiaries of the protection must have the nationality of the protecting State – this condition is met – and that local remedies must have been exhausted. As the Solicitor General has underlined, they have assuredly not been. We have already said so and we will return to this. As the ICJ has underlined, this is "a well-established rule of customary law"[18] and even "an important principle" of that law.[19]

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

> *(Read in English)*
> to decide whether the claim is "direct" or "indirect" where it is "mixed", in the sense that it contains elements of both injury to the State and injury to the nationals of the State.[20]

(Interpretation from French) However, in the instant case, as demonstrated by the passages I have quoted from Italy's written pleadings, there can be no doubt that the

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[16] See *Mavrommatis Palestine Concessions, Judgment No. 2, [30 August] 1924*, *P.C.I.J., Series A, No. 2*, p. 12.
[17] See articles 3, 4, 5 and 14 of the ILC Draft articles on diplomatic protection annexed to United Nations General Assembly resolution 62/67 of 6 December 2007.
[18] *Interhandel, Preliminary Objections, Judgment [of 21 March 1959], I.C.J. Reports 1959,* p. 6, at p. 27.
[19] *Elettronica Sicula S.p.A. (ELSI), Judgment [of 20 July 1989]*, *I.C.J. Reports 1989,* p. 15, at p. 42, para. 50.
[20] Article 14 of the ILC Draft articles on diplomatic protection, *ibid.*, para. 10 of the commentary.

criterion of preponderance laid down in paragraph 3 of article 14 of the ILC draft articles – the only criterion by which according to the ILC the distinction can be made[21] – is met:

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

Here, as in *ELSI*, for example,

> *(Read in English)*
> the matter which colours and pervades the claim as a whole, is the alleged damage to [the two Italian nationals] said to have resulted.[22]

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

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

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

First, to attempt to obtain the adjournment or discontinuance of the prosecution against Messrs Latorre and Girone, Italy petitioned the Indian courts.[23] The Solicitor General explained this and Mr Bundy is going to revisit it shortly.

Second, these proceedings have not run their full course: they remain pending. This is specifically the case of the proceedings before the Special Court; as we have just heard from the Solicitor General, this is not some exceptional court, contrary to what our friends on the other side insinuate. This court has jurisdiction to rule on all aspects of the case, including on the question of jurisdiction of

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[21] *Ibid.*, para. 11.
[22] *Elettronica Sicula S.p.A. (ELSI), Judgment [of 20 July 1989]*, *I.C.J. Reports 1989,* p. 15, at p. 43, para. 52. See also *Interhandel, Preliminary Objections*, *Judgment [of 21 March 1959], I.C.J. Reports 1959,* p. 6, at p. 28.
[23] See WO, paras. 1.16-1.20, 2.9-2.13 and 3.22-3.28.

the Indian courts. This is a key element of the matter as a whole and of the instant proceedings in particular. Let me refer to the judgment of the Supreme Court of India dated 18 January 2013 transferring the case to a special court so that "the same shall be disposed of expeditiously".[24] You can find the relevant passage under tab 13 of your Judges' folders. It follows – and I am still quoting paragraph 101 – that:

> *(Read in English)*
> 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.

(Interpretation from French) And even more neatly at paragraph 102:

> *(Read in English)*
> once the evidence has been recorded, it will be open to the Petitioners to re-agitate the question of jurisdiction before the Trial Court which will be at liberty to reconsider the matter in the light of the evidence which may be adduced by the parties and in accordance with law.

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

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

What that means in the kind of situation before us is that there is an obligation not to change judicial forum. Once you have elected one, you have to stick to it. Of course this does not mean that you cannot subsequently appeal to another forum, if that is open to you. Like many elementary principles of international law, this one can be said in Latin. In short, *electa una via,* and if you want to appear more learned you might say *electa una via, non datur recursus ad alteram* which sounds particularly felicitous in Italian: *Scelta una via, non è ammesso il ricorso ad un'altra*

This principle is more commonly applied in investment law,[25] for example, than in public international law because it is rare for a State to appear before a domestic

[24] *Republic of Italy & Ors* v. *Union of India & Ors*, Supreme Court of India, Judgment of 18 January 2013 (N, Annex 19, p. 83, para. 101).
[25] For an old example, see Mixed Claims Commission United States-Venezuela, *Woodruff case* (1903), *R.I.A.A.*, Vol. IX, at pp. 222-223; more recently, see for example: *Pantechniki S.A. Contractors & Engineers* v. *Albania*, ICSID Case No. ARB/07/21, Award of 10 July 2009, paras. 31 and 64; or *Getma International* v. *Guinea*, ICSID Case No. ABR/11/29, Decision on jurisdiction of 29 December 2012, paras. 129 and 134.

court of another State, as Italy has done, at the risk of losing its immunity from jurisdiction (as Italy has done in our case).

This being said, the reasons of procedural economy and fairness which justify application of the *electa una via* principle in transnational frameworks are equally if not more cogent in inter-State disputes. In the instant case Italy has chosen to have recourse to Indian courts. These courts have announced their intention to examine the question of their jurisdiction or lack thereof to judge the two accused. Italy cannot now, without acting in bad faith, turn her back on those courts, those courts that Italy itself seized, and now request an international judicial body to rule, whereas the cases brought by Italy are still pending in India and there is nothing – were it not for the dilatory tactics of the persons concerned and of Italy herself – to give reason to think that the cases will not be concluded in a reasonably short time.

Distinguished Members of the Tribunal, the murder case before you cannot be settled by the application of the law of the sea, of which you are the watchful guardians. And thus you cannot entertain this case, no more than can the Annex VII tribunal whose constitution Italy seeks. Neither that tribunal nor you have any reason to take the place of the Indian courts to which Italy first turned to settle the matter which it now seeks to put before an international tribunal without the Indian courts having been allowed to rule on their own jurisdiction or lack thereof. In any event – and this is a different argument – as it is mainly a case of protecting the rights and interests of Messrs Girone and Latorre, no international court anywhere could have jurisdiction at this time given that the local remedies have not been exhausted.

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

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

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

(Short adjournment)

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

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

In this portion of India's pleadings, we will turn to the inadmissibility of the two submissions that appear at the end of Italy's Request for provisional measures. I shall start by addressing Italy's first submission, its requests that the Tribunal order

India to refrain from taking or enforcing any judicial or administrative measures against the two Italian marines in connection with the *Enrica Lexie* incident, and from exercising any other form of jurisdiction over that incident. Following me, Professor Pellet will deal with Italy's second submission, in which Italy asks the Tribunal to take all measures necessary to ensure that the restrictions on the liberty, security and movement of the marines be immediately lifted so as to enable the marines to travel to and remain in Italy throughout the duration of the proceedings before the Annex VII arbitral tribunal.

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

Thus, "urgency" is a critical condition for the Tribunal to prescribe any provisional measures.

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

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

The Special Chamber recently reiterated that in the *Ghana/Côte d'Ivoire* case.[1]

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

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

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

But that is not what article 290, paragraph 5, says. It provides that, "[p]ending the constitution of an arbitral tribunal to which a dispute is being

[1] *Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/ Côte d'Ivoire), Provisional Measures, Order of 25 April 2015*, para. 41, citing *M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain), Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010*, p. 58, at p. 68. para. 72.

submitted," this Tribunal may prescribe provisional measures, and that, "[o]nce constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures …".

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

> the urgency of the situation must be assessed taking into account the period during which the Annex VII arbitral tribunal is not yet in a position to "modify, revoke or affirm those provisional measures".[2]

In other words, contrary to Italy's submissions, recourse to this Tribunal before the Annex VII arbitral tribunal is constituted is an exceptional procedure. With respect, your Tribunal is not called on to consider any provisional measures that will remain in force throughout the duration of the Annex VII arbitration. To do so would trespass on the competence 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.

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

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

The allegation, unfortunately repeated by both Sir Daniel and Professor Verdirame, that there has been a failure of due process before the Indian courts is as offensive as it is wrong. The Tribunal need only examine the record before India's Supreme Court, which has been placed on file in these proceedings, to appreciate the irresponsible character of the allegation. As I will explain, the marines have even gone so far before the Indian courts as to request the Supreme Court of India to rule on the question of jurisdiction and their own alleged immunity. The fact that just one month ago the marines changed their mind and asked the Supreme Court for a

[2] *Land Reclamations in and around the Straits of Johor (Malaysia* v. *Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003,* p. 10, para. 68.

deferral of those proceedings, proceedings which they had introduced, is prejudicial to India's rights to exercise a jurisdiction that the marines themselves resorted to, and it is fatal to the present application for provisional measures.

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

As Professor Pellet and I will show, there is no urgency whatsoever justifying the prescription of provisional measures, and no real and imminent risk that irreparable prejudice may be caused to Italy's alleged rights before the Annex VII arbitral tribunal is in a position to take up the case. To the contrary, it is India's right to see that justice is done for the two dead fishermen, to see that the proceedings which Italy and its marines itself have launched before the Indian courts are allowed to see out their course, and that the families of the fishermen would be seriously prejudiced by the granting of Italy's request in joining the continuation of India's jurisdiction in the matter.

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

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

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

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

But perhaps the most striking example of Italy's abusive behaviour came one month ago, when the two marines filed an application before India's Supreme Court asking for the deferral of a petition that they themselves had lodged in March 2014, requesting the Supreme Court – not you, not an Annex VII arbitral tribunal – to rule on the question of India's jurisdiction over the marines and whether they enjoyed immunity, and seeking to suppress not only the NIA investigation, but also the entire proceedings before the Special Court. How that conduct – the marines' desire to defer proceedings that they themselves commenced – can possibly give rise to a situation of urgency that justifies the prescription of the provisional measures requested by Italy is left unexplained by our opponents.

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

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

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

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

As you have heard, in its order the Supreme Court emphasized that Italy's right to argue the jurisdiction question before the appropriate forum remained preserved.

What should also be recalled is that the action that led to the establishment of the Special Court, and transferring custody over the marines to Delhi, did not come from India. It was the result of the application Italy had made requesting that India secure custody over the latter, and that the Supreme Court pass any other measures it deemed appropriate. Thus Italy, in its formal petition to the Supreme Court left it to the discretion of the Supreme Court how to proceed.

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

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

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

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

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

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

Italy responded by a Note Verbale dated 15 May 2013. In its response, Italy referred to the request by the NIA and expressed "its willingness and commitment to extend all possible co-operation to the investigation in order to establish the unvarnished true and complete facts in the case".

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

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

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

This development also shows the cynicism on Italy's part with respect to India's investigation. None of the Italian Notes concerning the questioning of the four marines ever questioned the authority of the NIA to carry out the investigation. To the contrary, Italy said it was committed to the expeditious completion of the investigation and it eventually allowed the four marines to be questioned by investigating officers from the NIA by videoconference. There was no problem with the NIA questioning these marines and carrying out the investigation, at least when you read the Notes Verbales of Italy during this period in 2013. However, what our opponents do not tell you is that at the very same time this was happening Italy and the two other marines were challenging the NIA's authority and right to conduct the investigation before the Indian Supreme Court; and by doing so, it was Italy and the marines who were responsible for the fact that charges could not be brought against the marines. Charges could only be brought after the investigative report was

submitted to the prosecutor; but the NIA was prevented from submitting that report because the matter was being challenged by Italy and the marines before the Supreme Court. To attempt to lay the blame for that situation at India's door, as Counsel tried to do this morning, is, I suggest, perverse.

Mr President, Members of the Tribunal, I now come to another critical element of the proceedings before the Indian Supreme Court that Italy's written pleadings avoided discussing. This concerns an important application that the two marines filed with the Supreme Court in March 2014, and which the two marines subsequently decided to ask the Supreme Court to defer consideration of just a month ago, on 4 July 2015, shortly before Italy filed its Request for provisional measures. As I shall show, the manner in which the marines framed their application, and then 16 months later asked the Supreme Court to defer consideration of it, totally undermines Italy's argument that a situation of urgency exists that risks causing it irreparable prejudice if India's judicial proceedings are not enjoined. The salient facts of this episode are as follows:

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

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

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

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

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

In the petition the marines also asked the court to declare that the designation of the Special Court to try the case by the Ministry of Home Affairs was illegal and without

jurisdiction, and somehow in conflict with the Supreme Court's Order of 18 January 2013. But the Ministry had acted in full compliance with the instructions of the Supreme Court in that 2013 order.

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

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

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

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

That remains the case today. 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, which has been blocked by the application of Italy and the marines, that it will present that report to the Special Court, or that the defendants will have their opportunity to answer that case. There is no chance that that is going to happen in the near future, and certainly not before the Annex VII arbitral tribunal is set up and running.

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

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

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

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

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

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

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

Italy's Request is premised on the assumption that "Italy's rights will suffer irreversible damage" if India is allowed to continue to exercise jurisdiction over the

marines and the incident. I have shown that this is simply not the case. Italy and its marines have used over and over again – indeed one might say abused – the Indian judicial process. Given the impartial way in which India's Supreme Court has treated their applications, coupled with the nature of the applications that the marines have themselves made to the Court, there is no failure of due process whatsoever and no risk of irreparable harm to Italy's rights and no need to enjoin India from the ability to continue exercising its jurisdiction, despite the impediments that Italy and the marines have sought to place into the Indian proceedings.

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

Italy argues that if India's courts and administrative authorities are allowed to continue exercising jurisdiction, Italy will suffer irreversible harm because of the – and I quote from Italy's written pleadings – "risk of prejudice to the carrying out of future decisions of the Annex VII arbitral tribunal".

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

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

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

THE PRESIDENT: Thank you, Mr Bundy. I now give the floor again to Mr Pellet to continue the oral argument of India.

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

> *(Read in English)*
> 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.

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

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

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

Before demonstrating that the urgency claimed by Italy is a figment of its imagination, I think it would not be a bad thing to go back to the facts. After the preliminary investigation of the killing of the two Indian fishermen, Messrs Girone and Latorre were arrested by the Kerala State Police on 19 February 2012.[1] On 19 April, before the investigation had been completed, the accused and Italy challenged the legality of the investigation before the Supreme Court.[2]

The final report of the investigation, which confirmed the charges, was completed on 15 May 2012.[3]

[1] See WO, para. 2.5.
[2] See Writ Petition No. 135 of 2012, 19 April 2012 (N, Annex 16).
[3] See Kerala Police Charge Sheet, 15 February 2012 (WO, Annex 3). See also WO, para. 2.5.

The accused then appeared on 30 May before the High Court of Kerala, which ordered their release on bail.[4]

The accused, having once been let out of prison, could and should have been tried very promptly if, along with Italy, they had not challenged the jurisdiction of the High Court of Kerala and brought proceedings before the Supreme Court on 19 April.[5]

This did not prevent them from requesting of the High Court a relaxation of their bail conditions and permission to go and spend two weeks in Italy for the Christmas holidays. The court granted that request on 20 December.[6] They returned to India on 3 January 2013, as agreed and expected.

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

This did not prevent the Supreme Court once again from granting Mr Latorre's request that his obligation to report periodically to the police station be waived due to his health problems.[9]

The Supreme Court also granted the request of the same accused to go to Italy for medical reasons for four months. This was granted in the form of an order of 12 September 2014.[10]

The same thing for the next two requests from Mr Latorre that the period of his stay in Italy be extended. A three-month extension was granted by a Supreme Court order of 14 January 2015,[11]

A further three-month extension was granted on 9 April 2015.[12]

Even after the filing of the Notification of 26 June, the Supreme Court further extended this authorization for an additional six months.[13]

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[4] See High Court of Kerala, Order, 30 May 2012 (WO, Annex 11). See also WO, para. 2.5.
[5] See Writ Petition No. 135 of 2012, 19 April 2012 (N, Annex 16).
[6] See High Court of Kerala, Order permitting Mr Latorre and Mr Girone to return to Italy for a period of two weeks (Christmas break), 20 December 2012 (WO, Annex 13). See also WO, para. 2.15.
[7] Supreme Court of India, Order permitting Mr Latorre and Mr Girone to return to Italy for a period of four weeks (elections), 22 February 2013 (WO, Annex 16).
[8] See WO, paras. 2.16-2.18.
[9] Supreme Court of India, Order, 8 September 2014 (WO, Annex 42). See also WO, para. 2.19.
[10] Supreme Court of India, Order permitting Mr Latorre to return to Italy for a period of four months for medical treatment, 12 September 2014 (WO, Annex 43). See also WO, para. 2.20.
[11] Supreme Court of India Order of 14 January 2015 granting an extension to Sergeant Latorre (N, Annex 30). See also para. 2.22.
[12] Supreme Court of India Order of 9 April 2015 granting a further extension to Sergeant Latorre (N, Annex 31). See also para. 2.23.
[13] See Supreme Court of India, Order of 13 July 2015 (Request by Italy (R), Annex F) and WO, paras. 2.24-2.25.

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

Contrary to what Italy would have us believe,[14] the Union of India did not take exception to Mr Girone's request of 9 December 2014,[15] and for the most compelling of reasons. The request was officially withdrawn, as noted in the Supreme Court Order of 16 December 2014.[16] As to Girone's request of 4 July 2015, India was invited to respond by an order of the same court of 13 July, which provides for a hearing to be held on 26 August for that purpose – the 26th of this month, in other words.

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

Regarding the former, Mr Latorre, he, of course, is already in Italy. The leave to remain there was extended by the Supreme Court on 13 July, admittedly only for an additional six months,[17] whereas he and Italy were requesting that he be allowed to stay there until the end of proceedings before the Annex VII tribunal[18] – which, incidentally, does not seem to show a burning desire on the part of Italy for a rapid conclusion of the proceedings. Sir Michael's remarks this morning are not reassuring on this point. *(Read in English)* "We do not know when the Annex VII tribunal will be constituted, or when it will be in a position to act."

(Interpretation from French) Such pessimism is unjustified. My hardworking assistant, Benjamin Samson, has done his maths and he says that it takes on average barely three months to set up an Annex VII tribunal. Nothing, incidentally, would justify such an extension, and certainly not urgency. Mr Latorre is allowed to remain in Italy until 15 January next, in other words far beyond the time it will take to constitute the Annex VII tribunal, and, from all indications, the Supreme Court will be agreeable to an extension of his stay in Italy if and as required by his state of health. I would not want to discuss the contents of the confidential medical file that Italy has appended to its submissions, but I would like to refer you, Members of the Tribunal, to a few excerpts from that file, as copied in paragraph 3.43 of our Written Observations, which establish that, contrary to what you have been told, the state of health of the accused is not only changing, as confirmed by Sir Daniel this morning, *(Read in English)* "as a static consideration", *(Interpretation from French)* but additionally his health is on the mend.[19] This obviously would justify a medical check

[14] See R, para. 49.
[15] See Application for Directions and Relaxation of Bail Conditions on Behalf of Sergeant Major Salvatore Girone, 9 December 2014 (N, Annex 22).
[16] See Application for Directions and Relaxation of Bail Conditions on Behalf of Sergeant Major Salvatore Girone, 9 December 2014 (N, Annex 22).
[17] Supreme Court of India, Order of 13 July 2015 (R, Annex F).
[18] Interim Application No. 13 of 2015 in SLP (C) No. 20370/2012 (WO, Annex 55).
[19] See WO, para. 3.43, footnote 138, which refers inter alia to: Application for Directions and Relaxation of Bail Conditions on Behalf of Chief Master Sergeant Massimiliano Latorre dated 5 September 2014, pp. 28 and 31 (N, Annex 21); Medical Case Summary of Dr Rajashekar Reddi, Principal Consultant and Head of Unit Neurology, Max Institute of Neurosciences, Max Super Speciality Hospital, 9 September 2014, p. 4 (R, Annex K); Reports of Dr Mendicini, Specialist Neurologist, Military Hospital in Taranto, 14 October 2014 and 14 November 2014, p. 1 (N, Annex 24);

every now and again. It certainly does not justify an indefinite extension on the grounds of urgency.

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

Mr President, Members of the Tribunal, 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. That reason alone makes the request inadmissible, but it is not the sole reason.

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

Very briefly, I will once again display the second provisional measure requested by Italy, the one we are interested in for the time being. Its aim is for you to prescribe that India "take all measures necessary to ensure that restrictions on the liberty, the

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Clinical Report of Doctor Mendicini, Head of Neurology, Military Hospital in Taranto, 2 January 2015, p. 1 (R, Annex M) and Clinical Report of Doctor Mendicini, Head of Neurology, Military Hospital in Taranto, 31 March 2015, p. 1 (R, Annex N).

[20] http://indianexpress.com/article/india/india-others/the-plight-of-italian-marines-family-visits-cafe-outings/.

[21] See Application for Directions and Relaxation of Bail Conditions on Behalf of Sergeant Major Salvatore Girone, 9 December 2014 (N, Annex 22).

[22] See Supreme Court of India, Order of 16 December 2014 recording the withdrawal of the applications (N, Annex 29).

[23] Application for Deferment of Article 32 Writ Petition, 4 July 2015 (R, Annex E).

security" – as if their security were in jeopardy – "and movement of the marines be immediately lifted so that they may travel to and remain in Italy throughout the duration of the proceedings before the Annex VII tribunal".

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

In its request under point (d) Italy asks the Tribunal to rule that "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". However, if this Tribunal were to grant Italy's request, the Annex VII tribunal would find itself with nothing left to decide. The two accused could enjoy a quiet time in Italy without being subject to any measure of restraint since those measures would have been lifted by your Tribunal. That would be a prejudgment, Mr President, which would entirely nullify Italy's claim on the merits.

Such a decision would be incompatible with the very purpose of provisional measures, which is to preserve the rights of the Parties pending the judgment on the merits, not to prefigure that judgment or to bring about a situation where, ultimately, there is nothing left to decide. As the Tribunal has repeatedly held, an order prescribing provisional measures: "in no way prejudges the question of the jurisdiction of the Annex VII arbitral tribunal to deal with the merits of the case, or any questions relating to the merits themselves".[24]

The Special Chamber formed in *Ghana/Côte d'Ivoire* made exactly the same point recently: "The Order must not prejudice any decision on the merits".[25] This requirement is also in line with the settled jurisprudence of the International Court of Justice.[26]

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

Firstly, and above all, by prescribing the provisional measure requested by Italy, you would prejudge not only the merits of the case in its favour but you would also seriously undermine, perhaps irremediably, the claims that India intends to assert and, secondly, it would not be appropriate for this Tribunal, which is not the "natural" forum for deciding this case on the merits, if I may say so, to replace the Annex VII tribunal whose constitution has been requested by Italy and which alone is authorized to rule on the merits.

On the first point, and this is just a reminder but it does concern an important feature, this case has been brought before you, Members of the Tribunal, almost "by default"

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[24] *"ARA Libertad" (Argentina* v. *Ghana), Provisional Measures, Order of 15 December 2012*, *ITLOS Reports 2012,* p. 332, para. 106. See also: *M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain), Provisional Measures, Order of 23 December 2012, ITLOS Reports 2008-2010*, at p. 70, para. 80, or *"Arctic Sunrise" (Kingdom of the Netherlands* v. *Russian Federation), Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013*, p. 224, para. 100.

[25] Special Chamber, *Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015,* para. 98.

[26] Cited in footnote 100 of the WO.

because the instance which in principle has jurisdiction to rule on the case has not yet been constituted. Of course, that does not prevent the Parties from deciding by common agreement to bring the case before this Tribunal, as happened in the *Bangladesh/Myanmar* case, or, as the case may be, before a Special Chamber, which is what Côte d'Ivoire and Ghana decided in the case I have just mentioned, but until that happens – and it has not happened yet – your Tribunal must, I believe, act with particular caution and restraint, all the more so since it is necessary to assess facts which, unless the Parties agree otherwise, will be discussed and adjudged in another forum.

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

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

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

One cannot overstress the fact that provisional measures prescribed by a judicial body, whatever it is, are intended to preserve the rights of both Parties. Like the Special Chamber in *Ghana/Côte d'Ivoire*, the Tribunal "must be concerned to safeguard the respective rights which may be adjudged in its Judgment on the merits to belong to either Party".[27]

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

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

[27] Special Chamber, *Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015*, para. 40.

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

> *(Read in English)*
> … agreeable to give an assurance to the Supreme Court of India that if the presence of these marines is required by any Court or in response to any summons issued by any Court or lawful authority, then (subject to their right to challenge such summons or the legality of any such order for production) Italy shall ensure their presence before the appropriate court or authority.[28]

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

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

> *(Read in English)*
> The said respondent [i.e. Daniele Mancini, Ambassador of Italy in India] has also affirmed an Affidavit of Undertaking on 9th February, 2013, whereby he has taken full responsibility for the petitioner Nos. 1 and 2 [that is the two marines] to proceed to Italy in the custody and control of the Government of Italy and to ensure their return to India in terms of this Order.[29]

And I repeat:

> to ensure their return to India.

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

> the mentioned four Italian Marines [curiously all four of them...] are presently deputed on sensitive postings and it would be difficult to relieve them of their duties.[30]

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[28] Assurances given by the Republic of Italy to the Supreme Court of India ensuring that Mr Renato Voglino, Mr Massimo Andronico, Mr Alessandro Conte and Mr Antonio Fontana will remain at the disposal of India's courts and authorities, 2012 (WO, Annex 9).
[29] Supreme Court of India, Order permitting Mr Latorre and Mr Girone to return to Italy for a period of four weeks (elections), 22 February 2013, para. 5 (WO, Annex 16).
[30] Note Verbale No. 198/1097 from the Embassy of Italy in India to the Ministry of External Affairs of India re. Notice to witnesses, 15 May 2013 (WO, Annex 24); see also Annexes 25 (Note Verbale No. 415/6 from the Ministry of External Affairs of India to the Embassy of Italy in India, 5 June 2013)

As to the accused, yes, as Sir Daniel pointed out this morning, they did return to India after their four weeks of "electoral leave" but only after a period of very high diplomatic tension between the two States[31] after Italy formally declared – and I quote again:

> *(Read in English)*
> the two Italian Marines, Mr Latorre and Mr Girone, will not return to India on the expiration of the permission granted to them.[32]

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

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

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

> *(Read in English)*
> As was upheld several times by this Court, there is no doubt that the fundamental principles of the constitutional order and inalienable human rights constitute a "limit to the introduction (…) of generally recognized norms of international law, to which the Italian legal order conforms under Article 10, paragraph 1 of the Constitution" (…).
> It falls exclusively to this Court to ensure the respect of the Constitution and particularly of its fundamental principles, and thus to review the compatibility of the international norm (…) with those principles.
> (...)
> […S]uch a control is essential in light of Article 10, paragraph 1, of the Constitution, which requires that this Court ascertain whether the customary international norm of immunity from the jurisdiction of foreign States, as interpreted in the international legal order, can be incorporated into the constitutional order, as it does not conflict with fundamental principles and

and 26 (Letter from Titus & Co., Counsel for Mr Renato Voglino, Mr Massimo Andronico, Mr Alessandro Conte and Mr Antonio Fontana re. Notice to witnesses, 11 June 2013).
[31] See WO, paras. 3.69-3.71, N, Annex 20, and WO, Annexes 16 and 51.
[32] Note Verbale 89/635 of 11 March 2013 (N, Annex 20).

> inviolable rights. [On the contrary], if there were a conflict, "the referral to the international norm [would] not operate" (Judgment No. 311/2009). Accordingly, the incorporation, and thus the application, of the international norm would inevitably be precluded, insofar as it conflicts with inviolable principles and rights.[33]

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

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

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

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

> *(Read in English)*
> Immunity from jurisdiction of other States ... can justify on the constitutional plane the sacrifice of the principle of judicial protection of inviolable rights guaranteed by the Constitution, only when it is connected – substantially and not just formally – to the sovereign functions of the foreign State*,* i.e. with the exercise of its governmental powers.[34]

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

The rights that were at issue are certainly not unconnected to this case. In that judgment the Court refers to article 2, relating to the guarantee of "inalienable human rights", and article 24 of the Italian Constitution, on the right of access to the courts,

[33] Constitutional Court of Italy, Judgment of 22 October 2014, sections 3.2, 3.3 and 3.4 (extracts) – see WO, Annex 44.
[34] *Ibid.* section 3.4.

on which Italy may very well rely in the present case in order to release itself from the obligation to comply with the future award by the arbitral tribunal.

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

Does this make Mr Girone a "hostage", as Italy outrageously claims,[35] and as Sir Daniel had the audacity to repeat this morning? Of course not. I refer to the Convention Against the Taking of Hostages of 1979:

> *(Read in English)*
> Any person who seizes or detains and threatens to kill, to injure or continue to detain another person (...) in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ("hostage-taking") within the meaning of this Convention.[36]

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

It would also be an unjust measure which would be perceived as illegitimate by the Indian public, and understandably so. These two individuals, Mr President, are accused of murder.

Being placed under judicial supervision is the normal consequence of such an accusation, even though this is certainly stressful for those involved and those close to them. Having said that, the two marines are benefitting from particularly favourable treatment. I have not heard of any case where people against whom such

[35] R, paras. 23 and 47.
[36] Article 1(1) of the International Convention Against the Taking of Hostages, 17 December 1979, *U.N.T.S.*, vol. 212, 1983, No. 21931, p. 213.

serious charges have been made are more or less free to move as they wish and lead a fairly pleasant life, aside, of course, from Mr Latorre's health problems.

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

It cannot be said that Italy has shown the same compassion towards the victims and their families, who are the forgotten ones in Italy's written submissions. The Notification and the Request, not to mention the oral argument this morning, endeavour to move you to pity the fate of the two accused, but there is no mention of the victims. It is quite simple, Mr President: that word is not used a single time, not once! That goes for the written pleadings and it is also true of this morning's oral argument. I am not in the habit of playing the emotional card, and I am the first one to think that the law must be applied even if it leads to results that may be questionable in human terms – *dura lex, sed lex*. However, that is not the problem here. Italy is using the "compassion argument" by itself, without any connection with the law. Distinguished Members of the Tribunal, what is compassion for one is compassion for all, so I would draw your attention[37] to the fact that two families are mourning the loss of a son, a husband, a father, and in less emotional terms – although this should not be overlooked – a breadwinner who supported the household (albeit an already fairly poor household) through his work.

The owner of the *St. Antony* no longer has any income because he cannot use or sell his boat, and the compensation paid by Italy does not make up for the losses incurred or the loss of earnings.[38]

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

Beyond that, the village community, traditionally gearing to fishing, has been and remains in a state of profound shock to the extent that it seems, according to the local archbishop, that the fishermen are reluctant to go out to sea for fear of being shot like rabbits by incompetent or hot-headed guards.[39]

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

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

Thank you, Mr President.

[37] See also WO, paras. 1.15, 1.25, 3.67 and 3.88.
[38] See WO, para. 3.88 and WO, Annex 46.
[39] See for example: http://www.hindustantimes.com/india-news/fishermen-shootings-marines-chargesheeted/article1-857699.aspx.

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

(The sitting is closed at 6.27 p.m.)