

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



2015

Public sitting

held on Tuesday, 11 August 2015, at 10 a.m.,
at the International Tribunal for the Law of the Sea, Hamburg,

President Vladimir Golitsyn presiding

THE “ENRICA LEXIE” INCIDENT

(Italy v. India)

Verbatim Record

<i>Present:</i>	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 <i>ad hoc</i>	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 Diljeet Titus, Advocate, Titus & Co., Advocates; Member of the Delhi Bar, India,

Dr Philippa Webb, Lecturer in Public International Law, King's College London; Member of the New York Bar,

as Counsel;

Ms Francesca Lionetti, Freshfields Bruckhaus Deringer,

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 Nanterre (CEDIN), University of Paris Ouest Nanterre la Défense, 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.

1 **THE PRESIDENT:** Good morning. The Tribunal will continue today its hearing in the
2 case concerning the *Enrica Lexie* Incident. We will hear this morning the second
3 round of oral arguments presented by Italy but before I give the floor to the
4 representative of Italy, in light of yesterday's oral presentation, Judge Cot has a
5 question. It was communicated just now to the parties in writing but I would like to
6 invite Judge Cot to ask is question.
7

8 **JUDGE COT** (*Interpretation from French*): Thank you, Mr President. On behalf of
9 Italy, Sir Daniel Bethlehem proposed to transform the surety of 300,000 euros in
10 respect of each of the marines – I am quoting him – “through some appropriate
11 arrangement into a surety given to India in accordance with the stipulations of an
12 order of this Tribunal”. Could Italy be more specific as to the proposal. And does
13 India wish to react to such a proposal? Thank you, Mr President.
14

15 **THE PRESIDENT:** As indicated in the written communication to the parties, the
16 answer to this question could be either provided during these oral hearings or in
17 writing by tomorrow noon.
18

19 Now we will resume our consideration and I will give the floor to Sir Daniel
20 Bethlehem to begin his statement.
21

22 **SIR DANIEL BETHLEHEM:** Thank you, Mr President, Members of the Tribunal. Let
23 me say at the outset that we will take the opportunity to reply in writing to Judge Cot
24 by tomorrow, as indicated.
25

26 Mr President, Members of the Tribunal, I will open Italy's reply submissions. I will be
27 followed by Sir Michael Wood. He will be followed in turn by Professor Guglielmo
28 Verdirame. Italy's Agent will conclude Italy's reply with some substantive remarks as
29 well as the formal statement of the provisional measures that Italy requests.
30

31 Mr President, Members of the Tribunal, we heard a rising tide of rhetoric yesterday
32 afternoon accusing Italy of dissembling, dishonesty and delay. This case, it was said,
33 is about a double murder committed by the Italian marines that has only an incidental
34 connection to the sea, and not one that is sufficient to bring the dispute within the
35 ambit of UNCLOS. It is a remarkable contention. We agree that the most regrettable
36 deaths of the two Indian fishermen require investigation and, as appropriate,
37 prosecution; and the Prosecutor of the Military Tribunal in Rome has an open
38 investigation for the crime of murder that must be pursued to its conclusion.
39

40 But there is an antecedent issue that requires prior determination, which is the
41 subject-matter of the dispute between Italy and India, namely, who has jurisdiction to
42 pursue the investigation and, as appropriate, prosecution, and what account is to be
43 taken of the immunity of State officials. Counsel for India simply ignored this
44 jurisdictional dispute. Indeed, the submissions by India yesterday were a remarkable
45 exhibit of India's unrelenting commitment to continue to exercise its criminal
46 jurisdiction over the marines regardless of the Annex VII proceedings that will now
47 take place.
48

49 The Indian submissions yesterday were also remarkable for their persistence in
50 characterizing the Italian marines as murderers, as if the only issue that remained to

1 be determined is the extent of their guilt, issues of mitigation and so forth. It is a little
2 more basic and fundamental than that, I'm afraid. The marines contest the allegation
3 that they fired the shots that killed the unfortunate Indian fishermen. It is not
4 accepted that the fatal shooting took place from the *Enrica Lexie*. There were other
5 vessels in the area at the time and other reports of pirate attacks. While it is
6 accepted that the marines fired shots into the water to warn off what was
7 apprehended to be a pirate attack, the rest is disputed. And, I must emphasize, the
8 marines have not even been charged with murder under Indian law. Even allowing
9 for differences in appreciation between civil lawyers and common lawyers – *pace*,
10 Professor Pellet – there is a baseline standard that operates in this field: a person is
11 not guilty of an offence unless and until convicted by a properly constituted court or
12 tribunal on the basis of charges of which they are informed in a timely manner and to
13 which they have had an opportunity to respond. If the Tribunal is tempted down the
14 road that Counsel for India is paving, it will find itself an outlier. There is nothing
15 redeemable about India's approach on this issue. It is wrong. It is dangerous. You
16 ought to have no regard for it whatever.

17
18 Mr President, Members of the Tribunal, much of what you heard yesterday on the
19 Indian proceedings is irrelevant to the case now before you. We may get there in due
20 course, if India submits objections to the jurisdiction of the Annex VII tribunal on the
21 basis of the points that it put before you yesterday, but these issues do not go
22 directly to the questions before you in these proceedings. They were advanced by
23 Counsel for India yesterday for one reason and one reason only: as an attempt to
24 create prejudice, to taint Italy in some manner as coming before you as an abusive
25 applicant.

26
27 It is a dangerous game that India plays. It has constructed a house of cards. A
28 number of examples will illustrate the shortcomings of its case.

29
30 Let me begin with the contention that the incident in question could not possibly have
31 been apprehended to have been a pirate attack, a proposition advanced in an
32 attempt to remove the incident from the ambit of UNCLOS and to call into question
33 the *prima facie* jurisdiction of the Annex VII tribunal to deal with the merits of the
34 case and also, therefore, of this Tribunal to prescribe provisional measures. Counsel
35 for India sought to substantiate the point by reference to declining statistics of piracy
36 off the west coast of India in 2012 and the suggestion, advanced with incredulity, that
37 no one could possibly believe the *St. Antony* to be a pirate skiff.

38
39 Let me take you to one or two documents in your Judges' folders. The first is the
40 Indian National Maritime Search & Rescue Board Report that I took you to
41 yesterday. It is at tab 5. I would like to take you to page 15, the page to which I drew
42 your attention yesterday but in the interests of time did not read out. Counsel for
43 India were on full notice of this. I did not read it but it bears reading. Let me start with
44 paragraph 3:

45
46 Increasing shipping traffic closer to the Indian coast causes the merchant
47 ships to, at times, transgress the fishing nets. On observing the approaching
48 merchant vessel onto their fishing nets/gear, it is common for the fishing
49 boats to raise alarm and to "sail towards" the merchant ship to attract
50 attention so as to avoid damage to their nets.

1
2 Reports are being received where merchant ships have mistaken the fishing
3 boats to be pirate skiffs. In one such recent incident off the coast of west
4 coast of India, Kerala, a merchant ship fired on the fishermen, killing two of
5 the fishermen. The ship's security guards had assumed the innocent
6 fishermen to be the pirates. In addition, there has been a report of another
7 report of firing of warning shots on Indian fishermen.
8

9 In another case a merchant ship collided with a fishing boat. This resulted in
10 sinking of the boat and the loss of life of three fishermen.
11

12 Skipping to the next paragraph:
13

14 It has been reported that merchant ships are transiting very close to the coast
15 to avoid the High Risk Area which starts 12 nautical miles from the Indian
16 coast.
17

18 A number of points emerge from this Notice. First, it affirms the designation of a
19 piracy High Risk Area that starts at 12 nautical miles from the Indian coast. Second,
20 it records explicitly that reports had been received of merchant vessels mistaking
21 fishing boats to be "pirate skiffs". Third, it reports on the *Enrica Lexie* incident,
22 although without identifying it as such, in the context of a misapprehension about
23 pirate attacks. Fourth, it describes a *modus operandi* of fishing boats that may lead
24 them to be mistaken for pirate skiffs. Fifth, it notes a second report of firing of
25 warning shots on Indian fishermen, as well as other incidents involving death and
26 injury.
27

28 Let me take you to another document. It is at tab 31. This is in our original annexes.
29 It is an International Maritime Bureau report that details the *Enrica Lexie* incident. If
30 you look at the bottom of the page, you will see the references and the coordinates
31 of the *Enrica Lexie* incident, giving 1600 local time as the time. If you look to the right
32 of the barely discernible map, you will see reference to a second reported pirate
33 attack in the same vicinity about six hours later in which 20 robbers in two boats
34 approached an anchored tanker and attempted to board her. So, we have two
35 reports of pirate attacks in the same vicinity along the Kerala coast within hours of
36 each other.
37

38 Counsel for India doth protest too much when he tries to make the case that it is not
39 credible for an oil tanker crew to apprehend a fast-approaching fishing boat as a
40 possible pirate attack. Even a cursory review of the monthly statistics published by
41 the International Maritime Organization reporting on acts of piracy indicates that a
42 not uncommon *modus operandi* is for pirate attacks to be launched from skiffs, easily
43 mistaken for fishing boats.¹
44

45 With the greatest of respect to Counsel for India, they are making it up as they go
46 along. There is no serious foundation for the propositions that they put to the
47 Tribunal yesterday on this issue.
48

¹ <http://www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Reports/Documents/184-Apr2012.pdf>.
See, for example, at Annex 2, page 2, item 3; Annex 2, page 3, item 5.

1 Mr President, Members of the Tribunal, let me turn to another allegation made by
2 India's Counsel yesterday that has no basis whatever. In its written statement, India
3 impugned Italy's good faith by saying that Italy had failed to present the other four
4 marines for interview by the Indian agency that was responsible for investigating
5 incidents. Counsel for India went on to say that it was this delay, caused by Italy's
6 obstruction, that caused the agency to fail to issue the charge sheet. To drive home
7 his point, Counsel for India took you to tab 16 of the Indian Judges' folder and read
8 out the language of the Italian Statement regarding the presentation of the four
9 marines for interview. You will recall that the relevant portion of the Statement read:

10
11 The Republic of Italy is agreeable to give an assurance to the Supreme Court
12 of India that if the presence of the marines is required ... Italy shall ensure
13 their presence before an appropriate court or authority.
14

15 Counsel for India dwelt on this language of "ensure their presence",² hammering it
16 again and again, as if the mere repetition of the words would drive home Italy's
17 dissembling unreliability and untrustworthiness.
18

19 I endeavoured, in my opening submissions yesterday, to caution India pre-emptively
20 about this argument, saying that it ought to know its own law better than it described
21 it to the Tribunal. They charged ahead nonetheless. Let me take you, therefore, to
22 section 161 of India's Code of Criminal Procedure, which is at tab 33 of your Judges'
23 folder. This addresses the examination of witnesses by police. Paragraph 1 of
24 section 161 provides that "Any police officer ... may examine orally any person
25 supposed to be acquainted with the facts and circumstances of the case".
26 Paragraph 3 provides that "The police officer may reduce into writing any statements
27 made to him in the course of an examination under this section ...". There follows a
28 sentence in square brackets, denoting that the language was added to the section by
29 Act 5 of 2009. It reads: "Provided that statements made under this sub-section may
30 also be recorded by audio-video electronic means." So, here we have it that audio-
31 video testimony is expressly contemplated and authorized by India's Code of
32 Criminal Procedure.
33

34 So what then of the language of ensuring the "presence" of the marines? Let me
35 take you to the 2003 judgment of the Indian Supreme Court in the *Praful Desai* case.
36 It is at tab 34 of your Judges' folder. The case concerned the interpretation of
37 section 273 of the Indian Code of Criminal Procedure, which addresses evidence in
38 inquiries and trials. The section is headed "Evidence to be taken in the presence of
39 accused". Here we have the language of "presence". If I may ask you to turn to page
40 603 of the judgment, which is the headnote or summary of the judgment. You will
41 see part-way down the page the question that is framed, and it is stated to be
42 "whether in a criminal trial, evidence can be recorded by video-conferencing". The
43 answer is: "Section 273 contemplates constructive presence". This shows that actual
44 physical presence is not a must. This indicates that the term "presence", as used in
45 this section, is not used in the sense of actual physical presence." It goes on:
46 "Further evidence can be both oral and documentary and electronic records can be
47 produced as evidence. This means that evidence, even in criminal matters, can also

² ITLOS/PV.15/C24/2, 10 August 2015, p. 27 (Bundy); p. 39 (Pellet).

1 be given by way of electronic records. This would include video-conferencing.” The
2 relevant passages in the full judgment are at paragraphs 12 and 19.

3
4 Mr President, Members of the Tribunal, with the greatest of respect to Counsel for
5 India, they are making it up as they go along. Italy fully acquitted its assurance to
6 India to ensure the presence of the four marines for interview. Italy’s senior Indian
7 Counsel at the time that all this occurred was Mr Mukul Rohatgi, now the Attorney
8 General of India. He would not have countenanced anything else.

9
10 Mr President, Members of the Tribunal, let me turn to yet another allegation made by
11 India’s Counsel yesterday that has no basis whatever. Counsel for India sought to
12 characterize what they described as Italy’s “litigation strategy” as capricious and
13 inconsistent and merely a matter of convenience, with the filing of the Notification
14 initiating Annex VII arbitration as simply the latest twist. You were told, for example,
15 by both the Additional Solicitor General and Mr Bundy that in April 2012 Italy filed a
16 petition before the Indian Supreme Court in which Italy asked the Indian Supreme
17 Court to take custody of the two marines – this at the time when the marines were
18 still being held in Kerala. You were referred to a two-page extract of Writ Petition
19 No.135 at tab 15 of India’s Judges’ folder and directed to a paragraph in which Italy
20 argued that “at the very least” the Union of India was under an obligation to take
21 custody of the marines pending a final decision being reached on jurisdiction.

22
23 The whole document was annexed to Italy’s Request for provisional measures as
24 Annex A/16. A review of the whole document gives a rather different picture. An
25 accurate appreciation of what Italy was asking for is seen in the Prayer for Relief that
26 sets out the formal requests being made. This is at tab 35 of your Judges’ folder.
27 You will see on the front cover the petitioners, no.1 being the Italian Republic, no.2 is
28 Sergeant Latorre and no.3 is Salvatore Girone, and then you have the respondents,
29 the Union of India and others. If you turn over the page you will see the Prayer for
30 Relief, and it says:

31
32 In view of the facts and circumstances stated hereinabove, it is most
33 respectfully prayed that this Honourable Court may be graciously be pleased
34 to:-

35
36 Declare that any action by Respondent in relation to the alleged incident
37 referred to in Para 6 and 7 above, under the Criminal Procedure Code or any
38 other Indian law, would be illegal and *ultra vires* and violative of Articles 14
39 and 21 of the Constitution of India; and

40
41 Declare that the continued detention of Petitioners 2 and 3 – Sergeants
42 Latorre and Girone – by the State of Kerala is illegal and *ultra vires* being
43 violative of the principles of sovereign immunity and also violative of Art. 14
44 and 21 of the Constitution of India; and

45
46 Issue writ of Mandamus and/or any other suitable writ, order or direction
47 under Article 32 directing that the Union of India take all steps as may be
48 necessary to secure custody of Petitioners 2 and 3 and make over their
49 custody to Petitioner No. 1

50
51 In other words, to hand them over to Italy.
52

1 Far from supporting India's contention of Italian inconsistency and capriciousness,
2 this illustrates that Italy was saying then to the Indian Supreme Court what it has
3 been saying throughout, and what it has been saying to you in these proceedings,
4 namely, that India's assertion of jurisdiction over the *Enrica Lexie* incident is
5 unlawful, that the continued detention of the marines is illegal, and that they should
6 be delivered into Italian custody.

7
8 Mr President, Members of the Tribunal, once again, with the greatest of respect to
9 Counsel for India, they are making it up as they go along. Italy was saying then what
10 it is saying now.

11
12 Mr President, Members of the Tribunal, let me take you to another example of India's
13 creative lawyering. We heard yesterday from India's Counsel that the Indian
14 Supreme Court judgment of 18 January 2013 left open the possibility for Italy to
15 "re-agitate"³ all issues of jurisdiction. They were clear about this yesterday. This
16 argument was variously part of India's allegations against Italy of abuse of process,
17 of exhaustion of local remedies, of *electa una via*, of equity. It is at the core of India's
18 argument not simply that Italy must stick to the path that it has chosen but that every
19 avenue remains open to Italy in the Indian domestic proceedings.

20
21 Mr President, Members of the Tribunal, what India said in oral argument yesterday
22 does not comport with what it said in its Written Observations. In its Written
23 Observations, at paragraph 1.19, India says: "... in spite of a clear ruling by the Supreme
24 Court in its judgment of 18 January 2013 ... Italy has disregarded the principle of *res judicata*
25 and repeatedly approached the court on jurisdictional issues ...". Further, and even more
26 tellingly, in the affidavit submitted by the Indian Ministry of Home Affairs to the Indian
27 Supreme Court in the Article 32 Writ Petition proceedings, which seeks to re-visit the
28 issues of jurisdiction and immunity, the Indian Government objects to the entire
29 petition on the grounds that it seeks to "re-agitate issues which have already been
30 raised by the Petitioners before this Hon'ble Court and which have been decided by
31 this Hon'able Court," including as regards both jurisdiction and immunity.

32
33 Mr President, Members of the Tribunal, what India is saying to you in these
34 proceedings is the diametric opposite of what it is saying to its own Supreme Court.
35 I hesitate to use the phrase again that India is making it up as it goes along. It is
36 more than that. It is rather more pernicious.

37
38 Mr President, Members of the Tribunal, Counsel for India also sought to persuade
39 you that the delay in the Indian proceedings is all to be laid at the doorstep of Italy
40 and that, but for Italy's machinations, a charge sheet would have been issued years
41 ago, due process would have been served, and all this would be behind us.

42
43 This is so far from reality as almost to amount to fiction. In the 16 months since the
44 Article 32 Writ Petition was filed, the Indian Government has missed filing deadline
45 after filing deadline. Affidavits from Indian ministries and agencies are still
46 outstanding today. In order after order, in four separate hearings, the Registrar of the
47 Indian Supreme Court required various Indian Government ministries to submit

³ ITLOS/PV.15/C24/2, 10 August 2015, p. 7, line 6 (Pellet).

1 affidavits required of them. Submissions are still outstanding. The delay in the Article
2 32 Writ Petition is due completely and utterly to delays by India.

3
4 This brings me to the affidavit that was due to be filed by the Indian Government
5 yesterday in the Article 32 Writ Petition deferment proceedings in respect of which a
6 hearing is scheduled to take place on 26 August. The Indian Government did not
7 submit that affidavit. Not only is this but the latest example of missed filing deadlines
8 by India, but it also calls into question the viability of the 26 August hearing date. In
9 the light of what we heard from India yesterday, we also anticipate that it signals that
10 India will in due course submit an affidavit opposing the deferment application, which
11 would trigger exactly the kind of precipitous aggravation of the dispute that we are
12 concerned about.

13
14 India has, in these proceedings, been clear that it wishes to press ahead with the
15 criminal trial of the marines, notwithstanding the Annex VII proceedings that have
16 now been commenced. The more we hear from India, the more we are alarmed by
17 what they intend. It injects a new urgency into the Request for provisional measures
18 that we have made to you.

19
20 Mr President, Members of the Tribunal, let me conclude on urgency. Counsel for
21 India, although, we note, not the Indian Agent, questioned whether what Italy had
22 said yesterday about the impasse in the political process was reliable. In my
23 submissions yesterday morning I outlined the political process that Italy had pursued,
24 an open process, through correspondence to the Ministry of External Affairs, and a
25 private process through the most senior advisers of Prime Minister Renzi and Prime
26 Minister Modi.

27
28 On 31 May this year, India's Minister of External Affairs, Sushma Swaraj, gave a
29 wide-ranging media briefing to mark one year in government. In the course of this
30 briefing she was asked a general question about Indian relations with the European
31 Union. Her reply, which is at tab 36 of your Judges' folder, included the following:

32
33 So far as the marines issue is concerned, we have repeatedly conveyed to
34 Italy, you please join us in judicial process. The matter is *sub judice*. So far,
35 they have not even joined the judicial process. If they join our judicial
36 process, things can move forward.

37
38 Some days after this statement, Italy was informed on the private channel of
39 engagement between the senior Prime Ministerial advisers that the statement by
40 Minister Swaraj reflected the position of the Government. There was no scope for the
41 Indian Government to engage in further discussions about a political settlement. This
42 is the reason why Italy instituted Annex VII proceedings on 26 June. There was no
43 longer any prospect of a negotiated solution.

44
45 The situation has changed fundamentally in recent weeks. There is no prospect of a
46 political settlement. The unavoidable consequence is that India intends to press
47 ahead with the criminal trial of the marines. Notwithstanding the dispute over
48 jurisdiction that will now go to the Annex VII tribunal, India has indicated that it
49 intends to continue to exercise jurisdiction over the marines. It intends to require
50 Sergeant Latorre to re-apply for leave to remain in Italy on humanitarian grounds,

1 again and again, without regard for the Annex VII proceedings that will now address
2 the question of whether India has jurisdiction over the marines.

3
4 India has not contested in any way the humanitarian evidence that has been put
5 before you concerning Sergeant Girone, yet it has made it clear in these proceedings
6 that it will have no regard to these circumstances whatsoever, and will keep
7 Sergeant Girone in Delhi. Counsel for India, while characterizing Italy's description of
8 Sergeant Girone as a hostage as "odious", nonetheless went on to say: "What is
9 true, however, is that the presence of Mr Girone on Indian soil provides the
10 guarantee that he will be able to be tried once that time comes." This sounds like a
11 hostage to us, and this is the language that has been used to Italy by Indian officials
12 to describe Sergeant Girone.

13
14 Mr President, Members of the Tribunal, there is an imminent risk of a serious
15 aggravation of this dispute. There is evidence before you, uncontroverted, of acute
16 humanitarian circumstances. You have India before you, in this Chamber, saying
17 openly that they will press ahead with their domestic proceedings, notwithstanding
18 that an Annex VII proceeding has been seised with a dispute over India's jurisdiction.
19 We do not know what step India will take next. We are on the cusp of a precarious
20 moment.

21
22 Mr President, Members of the Tribunal, that concludes my submissions this morning.
23 Mr President, may I invite you to call Sir Michael Wood to the podium.

24
25 **THE PRESIDENT:** Thank you, Sir Daniel. I now give the floor to Sir Michael Wood.

26
27 **SIR MICHAEL WOOD:** Mr President, Members of the Tribunal, I shall make just four
28 points in response to what we heard from India yesterday. These concern a curious
29 question of terminology; the local remedies issue; the supposed time limit on
30 provisional measures; and India's assertion that the measures requested would
31 prejudice the final award.

32
33 India has not yet responded to what I said yesterday, all of which I stand by but need
34 not repeat.

35
36 I begin by noting that our friends opposite constantly refer to the "inadmissibility" of
37 Italy's requests for provisional measures.¹ Inadmissibility is not a term normally
38 associated with a provisional measures phase. India uses the term in a way that
39 seems designed to sow confusion, to conflate provisional measures proceedings and
40 a possible preliminary objections phase going to jurisdiction and admissibility. By
41 using this novel terminology, they apparently seek to extend the requirements for the
42 prescription of provisional measures beyond those that I set out yesterday and to
43 turn the present phase into one concerning jurisdiction and admissibility.

44
45 A good example of this deliberate confusion is India's approach to local remedies.
46 Professor Pellet devoted much of his first speech yesterday to article 295 of

¹ See ITLOS/PV.15/C24/2, 10 August 2015, p. 4, lines 17, 20, 22 (Agent); p. 21, line 31 (Bundy); p. 36, line 31 (Bundy).

1 UNCLOS.² He failed, however, to respond in any way to what I had said in the
2 morning.³

3
4 The main point is that it is inappropriate to address the application of article 295 in
5 the course of a provisional measures phase. Exhaustion of local remedies is not an
6 issue going to the *prima facie* jurisdiction of the Annex VII tribunal. Rather, it is an
7 issue concerning the admissibility of a case. The question of exhaustion of local
8 remedies requires a detailed examination of the facts relating to the merits, and is
9 not appropriate to the urgent and expedited nature of provisional measures
10 proceedings. If India wishes to raise a point about exhaustion of local remedies that
11 will be considered by the Annex VII tribunal.

12
13 The jurisprudence of this Tribunal expressly confirms this. In the *M/V “Louisa” Case*,
14 this Tribunal expressly stated that it was inappropriate to consider the issue of
15 exhaustion of local remedies at the provisional measures phase and that it should
16 instead be “examined at a future stage of the proceedings”.⁴

17
18 I shall not therefore go into the application of the local remedies rule at this stage
19 beyond what I said yesterday, except to say this. Article 295 provides that local
20 remedies are to be exhausted “where this is required by international law”, namely in
21 the context of diplomatic protection. This is not a case of diplomatic protection.
22 Yesterday, in this context, Professor Pellet studiously avoided referring to the
23 marines as State officials, or acknowledging that the acts alleged were performed in
24 the exercise of their official functions. As members of a Vessel Protection
25 Detachment, they exercised official functions connected to the rights that States
26 have under the law of the sea. As I explained yesterday, Italy is asserting a *direct*
27 injury to its own rights as a result of the wrongful acts of India. The question whether
28 an injury is direct or indirect, or mixed, may sometimes be a difficult issue,⁵ though
29 not in this case. I have already addressed you on the injury to Italy’s rights under a
30 whole series of provisions of UNCLOS. Suffice to say, these are Italy’s rights under
31 UNCLOS; they are not the rights of the marines. This was the point that Avvocato
32 Busco was making yesterday when he referred to “Italy’s rights” being at issue,⁶ not
33 as Mr Bundy suggested Italy’s rights in contradistinction to India’s rights.⁷

34
35 The marines are not “private persons” to whom diplomatic protection applies.
36 Exhaustion of local remedies is only relevant where a State espouses the claim of a
37 “private citizen” (*ressortissant*). It does not apply where the individual was engaged
38 in official business on behalf of his or her State. This is confirmed by the
39 commentaries of the International Law Commission to the Draft Articles on
40 Diplomatic Protection and the Articles on State Responsibility.⁸ On the facts before

² ITLOS/PV.15/C24/2, 10 August 2015, p. 17, line 18-p. 19, line 35 (Pellet).

³ ITLOS/PV.15/C24/1, 10 August 2015, p. 26, lines 22-34 (Wood).

⁴ *M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain), Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010*, p. 58, at p. 69, para. 68.

⁵ Commentary to article 14 of the ILC Draft articles on Diplomatic Protection, *ILC Yearbook*, 2006, Vol. II(2), pp. 45-46, paras. (10)-(12).

⁶ ITLOS/PV.15/C24/1, 10 August 2015, p. 28, line 3 (Busco).

⁷ ITLOS/PV.15/C24/2, 10 August 2015, p. 24, lines 16-17 (Bundy).

⁸ Commentary to article 1 of the ILC Draft articles on Diplomatic Protection, *ILC Yearbook*, 2006, Vol. II(2), p. 28, para. (13): “Diplomatic protection mainly covers protection of nationals not engaged in official international business on behalf of the State.” [“*La protection diplomatique s’entend surtout de la*

1 us, the marines are not private individuals by any definition, nor were they acting in a
2 private capacity. They are State officials of the Italian Navy. At the time of the
3 incident in February 2012, they were deployed by the Italian Navy and exercising
4 official functions on board the *Enrica Lexie*. The local remedies rule has no
5 application in this situation.
6

7 I turn to my third point. Yesterday Mr Bundy claimed that Italy was oblivious to the
8 point that “there is a temporal limitation to the duration of any provisional measures
9 that may be prescribed by this Tribunal”,⁹ and he asserted that this Tribunal “is not
10 called on to consider any provisional measures that will remain in force throughout
11 the duration of the Annex VII arbitration.”¹⁰ I already answered that point yesterday,
12 since it was also made in India’s Written Observations.¹¹ It is simply wrong. That is
13 clear from the practice of this Tribunal. Provisional measures prescribed by the Law
14 of the Sea Tribunal under article 290, paragraph 5, do not have express temporal
15 limits (whether extending beyond the constitution of the Annex VII tribunal or
16 otherwise).¹² I refer you to two recent examples: the provisional measures prescribed
17 in the *ARA Libertad* and *Arctic Sunrise* cases. Of course, under article 290,
18 paragraph 5, this Tribunal may only prescribe provisional measures if they need to
19 be prescribed before the Annex VII tribunal is able to do so, but that does not mean
20 that the measures then prescribed may only last until the arbitral tribunal is itself in a
21 position to act. Article 290, paragraph 5, refers to the arbitral tribunal modifying,
22 revoking or affirming (as the *MOX Plant* tribunal did) the measures prescribed by this
23 Tribunal; that would make no sense if Mr Bundy was right. So it is entirely proper for
24 Italy to request provisional measures extending to the final award of the arbitral
25 tribunal.
26

27 My next point is this: India has made much in its Written Observations, and
28 yesterday, to the effect that the provisional measures requested by Italy should not
29 be prescribed because to do so would prejudice the final result before the Annex VII
30 tribunal. That is not and cannot be the case. To adopt the language of the Tribunal in
31 *Ghana/Côte d’Ivoire*, relied upon by our friends opposite, a provisional measures
32 order “in no way prejudices the question of the jurisdiction of [the Annex VII tribunal]
33 relating to the merits of the case or to deal with the merits themselves.”¹³
34

35 India asserts that the implementation of the final decision would be made “impossible
36 or more difficult” if either of the provisional measures which Italy seeks were
37 prescribed. But they give no serious reasons for this assertion. In fact, most of the

protection des nationaux qui ne se livrent pas à des activités internationales officielles pour le compte de l’État.”]

⁹ ITLOS/PV.15/C24/2, 10 August 2015, p. 23, lines 40-41 (Bundy).

¹⁰ ITLOS/PV.15/C24/2, 10 August 2015, p. 24, lines 4-5 (Bundy).

¹¹ ITLOS/PV.15/C24/1, 10 August 2015, p. 23, lines 17-30 (Wood). See *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, p.10, at p. 22, para. 67.

¹² See, for recent examples, the provisional measures prescribed in “*Arctic Sunrise*” (*Kingdom of the Netherlands v. Russian Federation*), Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013, p. 230; and in “*ARA Libertad*” (*Argentina v. Ghana*), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012, p. 332.

¹³ *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d’Ivoire)*, Provisional Measures, Order of 25 April 2015, para. 104.

1 long section in India's Written Observations entitled *A request for "pre-judgment"*¹⁴ is
2 simply irrelevant to the question of pre-judgment. It is mostly an excuse for India to
3 paint a distorted and self-serving picture of the facts.
4

5 As regards our first request for provisional measures, all India had to say in its
6 Written Observations was that to grant it would prejudge the merits "by implying that
7 the investigation and judicial proceedings conducted with rigorous fairness by India
8 to date were somehow inappropriate".¹⁵ Of course, it would do nothing of the kind; it
9 would merely hold the ring pending final determination of the issues to be decided by
10 the Annex VII tribunal.
11

12 As regards Italy's second request, India hardly says any more. They claim that "lifting
13 all restrictions on the liberty and movement of Mr Latorre and Mr Girone, would
14 mean that the Tribunal accepts that these restrictions ... are illegitimate and
15 unlawful"¹⁶ and that "what Italy tries to obtain ... is a recognition by the ITLOS that
16 the accused individuals are entitled to claim immunities from the jurisdiction of Indian
17 courts."¹⁷ Merely to read these out shows how far-fetched these claims are. They
18 show that India has simply not understood, or perhaps does not wish to understand,
19 the nature of provisional measures. India conveniently overlooks the fact that the
20 measures we seek, like all provisional measures, would remain in force until
21 modified or, at the latest, until a final decision on the merits.
22

23 Yesterday, Professor Pellet argued that if Sergeants Latorre and Girone were in Italy
24 when the award was given, and if the Annex VII tribunal found that both States had
25 jurisdiction in terms of UNCLOS, that would prejudge the matter in Italy's favour.¹⁸
26 That, with respect, is pure speculation. First, concurrent jurisdiction is not what either
27 party is seeking. Second, we cannot know in what terms the arbitral tribunal would
28 make any such finding. Third, any such finding would need to take account of the
29 immunity of the two State officials in respect of acts performed in an official capacity,
30 acts performed, moreover, in international waters. In any event, on India's reasoning
31 Italy's rights would be equally prejudged by a decision that left the marines in India.
32

33 Mr President, Members of the Tribunal, that concludes what I have to say. I thank
34 you for your attention, and would request that you invite Professor Verdirame to the
35 podium.
36

37 **THE PRESIDENT:** Thank you, Sir Michael. I will give the floor to Mr Guglielmo
38 Verdirame.
39

40 **MR VERDIRAME:** Mr President, Members of the Tribunal, I will reply to a number of
41 submissions made by India yesterday. I will begin by addressing India's contradictory
42 position on the role of UNCLOS. I will then reply to India's more specific assertions
43 on the issue of irreparable prejudice and on the question of urgency.
44

¹⁴ Written Observations of India, paras. 3.48-3.75.

¹⁵ Written Observations of India, para. 3.54.

¹⁶ Written Observations of India, para. 3.65.

¹⁷ Written Observations of India, para. 3.66.

¹⁸ ITLOS/PV.15/C24/2, 10 August 2015, p. 42, lines 12-16 (Pellet).

1 At the beginning let me recall a point, which Professor Pellet describes as a “key
2 element”,¹ namely that the question of India’s jurisdiction is still to be determined by
3 the Special Court.

4
5 Sir Daniel has shown that India has been speaking with two voices on this issue:
6 saying in an affidavit to the Indian Supreme Court that the question has been settled
7 and contending before this Tribunal that the question is still effectively pending
8 before its courts.

9
10 Mr President, Members of the Tribunal, three and half years after the incident, India
11 has not apparently yet decided if it has jurisdiction over this matter. Professor Pellet
12 is right in describing this as a “key element”, but it is a key element in Italy’s favour.

13
14 India wants to continue to exercise jurisdiction. It wants to continue to detain an
15 official of the Italian State, and to be at liberty to place under detention another
16 official of the Italian State, but it has not even decided if it has jurisdiction over the
17 event.

18
19 Quite extraordinarily, Mr President, India maintains that Italy must remain committed
20 exclusively to the Indian domestic proceedings – proceedings to which Italy objected
21 promptly. India says that it is even an abuse of process for Italy to have started
22 international arbitral proceedings. It is Italy’s right to start proceedings under
23 UNCLOS in connection to a dispute which India’s own Supreme Court accurately
24 characterizes as concerning the interpretation UNCLOS provisions. As for the idea
25 that there was some kind of “fork in the road” here and that Italy opted for the
26 domestic process, this is so completely unfounded that it barely warrants attention.
27 Italy did not opt for domestic proceedings. Its marines were subjected to them; and,
28 in any event, there is no basis or precedent for the notion of “fork in the road” in the
29 context of inter-State proceedings.

30
31 But Counsel for India goes further, maintaining that the question of jurisdiction under
32 UNCLOS is for India’s Special Court – not the Annex VII tribunal – to determine. At
33 the same time, they say that the Annex VII tribunal and this Tribunal have no
34 jurisdiction under UNCLOS. Professor Pellet went as far as suggesting that this
35 matter “has barely a link with the law of the sea”.²

36
37 India cannot credibly contend that the UNCLOS rights claimed by Italy are not even
38 plausible for provisional measures, in circumstances where its own legal system has
39 not been able to determine the position under UNCLOS in three and half years.

40
41 Mr President, Members of the Tribunal, as Sir Michael has just reiterated, this is
42 about UNCLOS. The Supreme Court of India saw it in those terms too, and
43 discussed various provisions at length. May I ask you to please take a look at the
44 second sentence in paragraph 101 at tab 13 of the Indian judges’ folder, from the
45 judgment of the Indian Supreme Court.

46
47 The Union of India is, therefore, directed, in consultation with the Chief
48 Justice of India, to set up a Special Court to try this case and to dispose of

¹ ITLOS/PV.15/C24/2, 10 August 2015, p. 20, line 16 (Pellet).

² ITLOS/PV.15/C24/2 (unchecked), 10 August 2015, p. 14, line 13 (Pellet).

1 the same in accordance with the provisions of [a number of Indian statutes]
2 and most importantly the provisions of UNCLOS 1982, where there is no
3 conflict between the domestic law and UNCLOS 1982.
4

5 Mr President, Members of the Tribunal, Italy of course does not agree that Indian
6 domestic law should displace UNCLOS. Italy wants its rights determined under
7 UNCLOS – not under UNCLOS insofar as UNCLOS is compatible with Indian law.
8 The best Italy will get at the end of the process to which Counsel for India says Italy
9 should remain committed as a matter of “good faith”³ is a determination of Italy’s
10 rights under UNCLOS “where there is no conflict with Indian law”.

11
12 This comment is found in the key judgment by the Indian Supreme Court on the
13 issues in dispute before the Annex VII tribunal. It takes a view on the hierarchy
14 between international law and domestic law, which is of direct concern to obligations
15 under UNCLOS. In any event, Italy and India have agreed under UNCLOS that
16 disputes over the interpretation and application of the Convention shall be
17 determined by an Annex VII tribunal, not by India’s Special Court. The dispute has
18 now being taken to that Annex VII tribunal.
19

20 This very important consideration aside, the Indian Supreme Court at least saw
21 clearly what has been clear to Italy throughout – that in this matter, which India’s
22 Counsel says “has barely a link with the law of the sea”,⁴ UNCLOS provisions are
23 actually “most important”.

24
25 Mr President, Members of the Tribunal, I would now like to examine where India’s
26 contradictory submissions leave Italy’s two requests, in particular as far as prejudice
27 and urgency are concerned.
28

29 Our first request – it will be recalled – is that India should suspend its domestic
30 jurisdiction during the pendency of the proceedings. The Indian Special Court cannot
31 remain seized of the determination of rights under UNCLOS provisions, while the
32 determination of those rights is simultaneously pending before the Annex VII tribunal.
33

34 It is now is for that tribunal to decide who, between Italy or India, is correct in the
35 competing interpretations of the UNCLOS provisions which are clearly and
36 “importantly” engaged in this case. It is Italy’s right under UNCLOS to have this
37 dispute concerning the interpretation and application of the Convention’s provisions
38 adjudged by the Annex VII tribunal. The exercise of domestic jurisdiction must now
39 await the result of the Annex VII proceedings.
40

41 A principle to which I already referred yesterday is particularly important in this
42 context. States must decide jurisdiction and immunity at the outset – *in limine litis*.⁵
43

44 But the “outset” cannot last three and half years – and beyond. And when it does, the
45 prejudice cannot be said to have faded away. On the contrary, the prejudice to Italy’s

³ ITLOS/PV.15/C24/2, 10 August 2015, p. 21, line 46 (Pellet).

⁴ ITLOS/PV.15/C24/2 (unchecked), 10 August 2015, p. 14, line 13 (Pellet).

⁵ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 62, at p. 88, para. 63 and p. 90, para. 67(2)(b).

1 rights is more acute, given that India – although it has not yet decided if it has
2 jurisdiction – is still exercising it.

3
4 Mr President, Members of the Tribunal, let me now come to the second request. The
5 position of India comes down to this: We cannot let go of Sergeant Girone, whom we
6 have already detained for three and half years. We need him as a *guarantee* – as
7 Professor Pellet said “the presence of Mr Girone on Indian soil provides the
8 guarantee”.⁶ As for Sergeant Latorre, it is for India to decide if and when his
9 detention should resume. By the way, we may well decide we do not have
10 jurisdiction over this matter after all. But he and Sergeant Latorre must remain
11 subject to our jurisdiction. And as to the fact that the marines do not yet know with
12 what offence, and the statute on which the charge is based,⁷ it is all their fault and
13 Italy’s fault.

14
15 Mr President, Members of the Tribunal, this is a simply indefensible line for India to
16 take. Let me make four points in this regard.

17
18 First, the point that no charges have, even until now, been laid against the two
19 marines is a point that both Additional Solicitor General Narasimha and Mr Bundy
20 have conceded.⁸ Mr Narasimha explicitly stated in his address to this Tribunal that
21 the stay of the Special Court proceedings meant that “the charges prepared by the
22 NIA have been kept in abeyance”.⁹

23
24 Mr Bundy admitted that there are no charges, alleging that it was the marines who
25 blocked the receipt by the prosecutor of the investigation report.¹⁰ Mr Narasimha
26 blamed Italy for the failure to issue charges because it is Italy that has “carriage of
27 the proceedings”.¹¹

28
29 Mr President, Members of the Tribunal, this is an exercise of criminal jurisdiction. The
30 idea that the defence has “carriage of the proceedings” is not serious.

31
32 Second, not only has India failed to charge the marines and failed to identify the
33 Statute under which they would have to defend themselves, India has also not
34 decided if, after all, it has jurisdiction under UNCLOS. And it wants to deprive the
35 Annex VII tribunal of its prerogatives in relation to the determination of that issue by
36 saying – contrary to the position taken by its own Supreme Court – that this dispute
37 has nothing to do with the law of the sea.

38
39 Third, delay, as we heard from Sir Daniel, can in no way be put at Italy’s doorstep.
40 India is responsible for its own legal system – not Italy. The contention that the delay
41 in the legal system of a State is the fault of another State – and one State that was
42 objecting to the jurisdiction throughout – is, on its face, absurd. India seeks to make
43 this absurdity good by suggesting that the marines and Italy abused the Indian
44 domestic process. As we heard, there is no basis for this suggestion. Let me

⁶ ITLOS/PV.15/C24/2, 10 August 2015, p. 42, lines 39-40 (Pellet).

⁷ Human Rights Committee, General Comment No. 32 (2007), para. 31.

⁸ ITLOS/PV.15/C24/2, 10 August 2015, pp. 9-10 (Narasimha), pp. 25, 28 (Bundy).

⁹ ITLOS/PV.15/C24/2, 10 August 2015, p. 10, lines 30-31 (Narasimha).

¹⁰ ITLOS/PV.15/C24/2, 10 August 2015, p. 25, lines 22-36; p. 28, lines 27 (Bundy).

¹¹ ITLOS/PV.15/C24/2, 10 August 2015, p. 10, lines 39-40 (Narasimha).

1 emphasize that of this so-called abuse of process in connection to proceedings in
2 India there is not a trace in the record of the Indian proceedings. It has not been
3 alleged by India before its own courts, let alone established by those courts. There is
4 not an order or a judgment that says that Italy or the marines are guilty of some form
5 of abuse of process in the conduct of the litigation.
6

7 In any event, as I mentioned yesterday, even an uncooperative individual is entitled
8 to due process. Wherever in Delhi the blame for this delay might lie, due process
9 should have been respected.
10

11 Fourth, as we said yesterday, every day spent in detention is irreparable. That
12 principle was clearly one of the bases for the Order in *Arctic Sunrise*, with which India
13 has not really engaged. That principle is more acutely relevant here, given that
14 constraints on liberty have gone on for longer, without charges, and with uncertainty
15 over India's jurisdiction in India's own courts hanging over them.
16

17 Mr President, Members of the Tribunal, let me now return to the question of urgency.
18

19 India sought to respond to urgency with a long account of the Indian court
20 proceedings. Again, India seeks to rely on delay produced by its own legal system to
21 somehow argue that there is no urgency. But that misses the point. Liberty is being
22 constrained, with jurisdiction not decided under Indian law or under international law,
23 and, as you decided in *Arctic Sunrise*, constraints on liberty and movement
24 constitute an urgent situation incapable of later being remedied. Delay here injures
25 all those who want the facts around the *Enrica Lexie* incident established. It injures
26 those who lost loved ones and want to know the truth. But it also injures those who
27 have had these allegations, never properly formalized as charges under any law,
28 hanging over their heads and who protest their innocence. And it cannot be seriously
29 suggested that Italy and the marines are to be blamed for this delay because they
30 refused to concede the case on jurisdiction and immunity in the Indian courts.
31

32 Mr Bundy recalled a passage in *Ghana/Côte d'Ivoire* which captures the test on
33 urgency.¹² In that passage urgency is defined by the "need to avert a real and
34 imminent risk that irreparable prejudice may be caused to the rights in issue".¹³ If I
35 may unpack this statement, the test for urgency comprises three elements.
36

37 The first element is that irreparable prejudice to the rights must be shown. Italy has
38 clearly shown irreparable prejudice by reference to each of the two Requests and
39 with ample support from this Tribunal's jurisprudence.
40

41 The second element is imminence. We are dealing here with ongoing exercises of
42 jurisdiction, in relation to both the First and the Second Request. Ongoing prejudice
43 must be assumed to be also imminent, unless there is some very good reason to
44 think that is about to come to an end. Here, India has given you no such good
45 reason.
46

¹² ITLOS/PV.15/C24/2, 10 August 2015, p. 23, lines 5-6 (Bundy).

¹³ *Dispute concerning delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean, Provisional Measures, Order of 25 April 2015*, para. 41.

1 On the contrary, India says – and I am quoting language used yesterday – that “the
2 right to see through this process”¹⁴ is a “fundamental right of India”.¹⁵ If it ever was a
3 fundamental right, it is one that India chose to limit when it became a party to
4 UNCLOS and accepted the principle of binding dispute settlement under the
5 Convention. But, by stating in such clear terms that it will press on with the exercise
6 of jurisdiction, India is dispelling any suggestion that in this case “ongoing” may
7 somehow not mean “imminent”. The requirement of imminence is clearly satisfied.
8

9 Moving on to the third requirement, Mr President and Members of the Tribunal, real
10 risk, that requirement is satisfied here too because the irreparable prejudice to Italy’s
11 rights is not a matter of probable assessment. This is not about hypothetical risks
12 that must be assessed on a “real risk” basis. The irreparable prejudice to Italy’s
13 rights is certain and, again, ongoing. What we have here is not just a real risk of
14 prejudice; we have real irreparable prejudice. We satisfy that element to a higher
15 degree.
16

17 In addition to irreparable prejudice that is real, Mr President and Members of the
18 Tribunals, you must also factor into your assessment the real risk that there will be
19 further and aggravated irreparable prejudice. This aspect must be examined closely
20 in the light of India’s submissions yesterday.
21

22 We know that there is an important hearing on August 26; we do not know what
23 position the Union of India will take there. Different things could happen depending
24 on the stance that the Union of India is due – or rather overdue – to take before
25 India’s courts. We do not need to provide you with a detailed assessment of these
26 different short-term scenarios and the further risks that they pose to Italy because I
27 can simply refer you to the contradictory assessments of the “short-term” scenarios
28 here that you heard yesterday from India’s Counsel.
29

30 Professor Pellet said: “nothing leads one to think that they” – meaning their cases
31 still pending in India – “will not be settled in a reasonably short time”.¹⁶ Mr Bundy
32 however says that “there is no chance” that the proceedings in the Special Court will
33 start “in the near future”.¹⁷ On one assessment coming from India’s Counsel, we are
34 told that we should proceed on the basis that the Indian proceedings will come to an
35 end in a short time. On another assessment, we are told that there is not even a
36 chance in the near future of the Special Court beginning its proceedings.
37

38 At a minimum, for the Indian proceedings to be settled “in a reasonably short time”,¹⁸
39 there must be a very significant risk that in the near future the Special Court will
40 begin the trial. Simply on the basis of the assessments of what might happen in the
41 short term – this is about a short time frame – from India’s Counsel, you have
42 enough to conclude that there is here a risk – and a risk that is at least a real risk –
43 that further irreparable prejudice will soon be inflicted on Italy’s rights through the
44 commencement of the criminal trial.
45

¹⁴ ITLOS/PV.15/C24/2, 10 August 2015, p. 32, line 14 (Bundy).

¹⁵ ITLOS/PV.15/C24/2, 10 August 2015, p. 32, line 14 (Bundy).

¹⁶ ITLOS/PV.15/C24/2, 10 August 2015, p. 20, line 32 (Pellet).

¹⁷ ITLOS/PV.15/C24/2, 10 August 2015, p. 30, line 30 (Bundy).

¹⁸ ITLOS/PV.15/C24/2, 10 August 2015, p. 21, line 41-42 (Pellet).

1 Mr President, Members of the Tribunal, let me look briefly at the consequences of
2 Indian proceedings moving on and even coming to a conclusion before the matter
3 has been adjudged by the Annex VII tribunal.

4
5 India says that, even in that case, Italy's rights would suffer no prejudice because
6 India would comply with the award of the Annex VII tribunal. But how could India's
7 compliance with an award in favour of Italy undo the various consequences of India's
8 exercise of jurisdiction? Those consequences cannot be undone. The criminal trial
9 cannot be undone. The detention cannot be undone. Once Indian proceedings have
10 reached what – you heard it from India's Counsel – is pretty much the foregone
11 conclusion of finding the marines guilty, how could Italy at that point realistically
12 assert any jurisdictional right? Any exercise of jurisdiction by the Italian authorities at
13 that point would be severely undermined, in fact probably completely compromised.
14 A criminal trial would have already taken place, although one vitiated *ab initio* by the
15 lack of jurisdiction. There could also be severe impediments to having a second
16 criminal trial in respect of the same offence: from arguments of *ne bis in idem*, to the
17 fact that a long time in custody would have already been spent. Moreover, the
18 punitive power, which is an essential element of criminal jurisdiction, would have
19 been exercised not by the State which had jurisdiction but by the State which lacked
20 it. This is all irreparable prejudice and the risk of this happening as a result of those
21 assessments about the short-term scenarios is urgent.

22
23 Mr President and Members of the Tribunal, we have real irreparable prejudice that
24 derives from the status quo, which is defined by the continuing exercise of
25 jurisdiction and the ongoing imposition of bail conditions, but we also have a real risk
26 of further and aggravated irreparable prejudice.

27
28 Let me now come to a final point on urgency, and that is the relationship between
29 Italy's case on urgency and the timing of Italy's Request.

30
31 In the "*Camouco*" Case, this Tribunal drew an important distinction. (I am afraid we
32 have not been able to provide you with a Judges' folder on this quotation but you will
33 be familiar with it.) The Tribunal said:

34
35 The Tribunal finds that there is no merit in the arguments of the Respondent
36 regarding delay in the presentation of the Application. In any event,
37 article 292 of the Convention requires prompt release of the vessel or its
38 crew once the Tribunal finds that an allegation made in the Application is
39 well-founded. It does not require the flag State to file an application at any
40 particular time after the detention of a vessel or its crew.¹⁹

41
42 This was in relation to prompt release proceedings. In that context, there may
43 perhaps have been some arguable basis for saying that delay in the filing of an
44 application should cast a negative light on the State request, but even in that context
45 the Tribunal said clearly that this is not the case. The well-foundedness of the
46 application must be assessed without reference to the issue of delay in filing it. The
47 preconditions for seeking the prompt release may have been satisfied before, but
48 failing to act as soon as those preconditions arise does not produce a sort of

¹⁹ "*Camouco*" (*Panama v. France*), *Prompt Release, Judgment*, *ITLOS Reports 2000*, p. 10, at p. 28, para. 54.

1 estoppels, rendering the application inadmissible – again to use language from the
2 other side. There is just no basis for that principle. The well-foundedness of the
3 application is to be assessed when it is brought before the Tribunal.
4

5 That same important analytical distinction applies here, and it applies here *a fortiori*.
6 You have heard about the history of the negotiations and I will not repeat what Sir
7 Daniel said. I will just add that a negotiated solution, once reached, can take effect
8 immediately and settle the dispute permanently, even if it takes a long time to reach
9 and does not involve a consistent trajectory. As Sir Daniel said, there was a
10 sustained effort when two new governments were formed in April 2014 but that
11 clearly came to an end in May 2015. That explains timing here, but, I repeat, this is
12 not the issue when it comes to urgency. This Tribunal has to assess urgency on the
13 circumstances before it now. May 2015 is the point when it became clear to Italy that
14 there was no other way for it to address the severe and increasing concerns other
15 than by resorting to international arbitration under UNCLOS.
16

17 Mr President, Members of the Tribunal, with the further guarantees to address
18 India's concerns, which Sir Daniel explained yesterday and to which Italy's Agent will
19 soon return, we submit that Italy's two Requests are appropriate, necessary and
20 urgent.
21

22 Mr President, I have concluded and I will now ask you to call Italy's Agent.
23

24 **THE PRESIDENT:** Thank you, Mr Verdirame. I now give the floor to the Agent of
25 Italy, Mr Azzarello.
26

27 **MR AZZARELLO:** Mr President, Members of the Tribunal, before I read our final
28 submissions, allow me to say a few words.
29

30 I would like to start with the issue of the death of the two Indian fishermen on
31 15 February 2012. India submits that Italy has disregarded the fact that two Indian
32 citizens lost their lives.
33

34 Mr President, Members of the Tribunal, this is not the case. Italy regrets the death of
35 Valentine Jalestine and Ajeesh Pink and has expressed this view on many
36 occasions. Italy has also provided their families with ex-gratia payments, on a without
37 prejudice basis. It is regrettable that India's Counsel has attempted to portray this fact
38 as an admission of responsibility on the part of the Italian marines.
39

40 Mr President, Members of the Tribunal, India has also suggested that the Tribunal
41 should be careful about trusting Italy to comply with its orders, because Italy has
42 a record of defaulting on its international obligations. Counsel for Italy has already
43 shown how Italy has always honoured the obligations that it has undertaken in the
44 context of this case.
45

46 Reliance on Judgment 238/2014 by the Italian Constitutional Court does not take
47 India's arguments any further: the case is legally and factually distinguishable and of
48 a totally different nature and order of magnitude.
49

1 The case before the Italian Constitutional Court concerned the right to have access to
2 a judicial remedy for the victims of the most egregious war crimes and crimes against
3 humanity committed during the Second World War. It was premised on the necessity
4 to safeguard one specific constitutional bedrock: that of access to justice in the case
5 of gross violations of human rights of a kind that constitute violations of *jus cogens*
6 norms of international law.

7
8 This has to be read by taking into account the unique aggravated circumstances of
9 the case. Germany had already admitted before the International Court of Justice that
10 war crimes and crimes against humanity were committed and that no national judge
11 was available to provide redress to victims of such crimes. In the *Enrica Lexie*
12 incident, the two marines maintain their innocence and the question is which national
13 judicial system has jurisdiction, both being willing to exercise it.

14
15 Mr President, Members of the Tribunal, there should be no doubt in the mind of the
16 Tribunal that Italy will abide by any decision that the Tribunal will render. There
17 should also be no doubt that Italy will abide by the undertaking – that I reaffirm in the
18 context of my final submission – to return Sergeant Latorre and Sergeant Girone to
19 India following the final determination of rights by the Annex VII tribunal, if this is
20 required by the award of the tribunal.

21
22 Lastly, Mr President, Members of the Tribunal, Italy notes India's observations that
23 the two marines are currently subject to bail constraints and its concern that Italy may
24 not be ready to impose any similar form of control over them if the provisional
25 measures requested by Italy are granted. Italy invites the Tribunal to make its order
26 subject to the conditions that it deems appropriate in this regard.

27
28 Thank you, Mr President. That concludes my statement.

29
30 **MR PRESIDENT:** Thank you, Mr Azzarello.

31
32 I understand that this was the last statement made by Italy during this hearing.
33 Article 75, paragraph 2, of the Rules of the Tribunal, provides that, at the conclusion
34 of the last statement made by a Party at the hearing, an Agent, without recapitulation
35 of the arguments, shall read the Party's final submissions. The written text of these
36 submissions, signed by the Agent, shall be communicated to the Tribunal and a copy
37 of it shall be transmitted to the other Party.

38
39 I now invite the Agent of Italy, Mr Azzarello to take the floor again to present the final
40 submissions of Italy.

41
42 **MR AZZARELLO:** Thank you, Mr President. Thank you to the Tribunal.

43
44 Mr President, in accordance with article 75, paragraph 2, of the Rules of the Tribunal,
45 I shall now read Italy's final submissions. They are as follows:

46
47 I will read them in English, then in French.

1 For the reasons given in its Request for the Prescription of Provisional Measures
2 dated 21 July 2015 and in the course of the present hearing, Italy requests that the
3 Tribunal prescribe the following provisional measures:

4
5 a) India shall refrain from taking or enforcing any judicial or administrative
6 measures against Sergeant Massimiliano Latorre and Sergeant Salvatore Girone in
7 connection with the Enrica Lexie Incident, and from exercising any other form of
8 jurisdiction over the Enrica Lexie Incident; and

9
10 b) India shall take all measures necessary to ensure that restrictions on the
11 liberty, security and movement of the marines be immediately lifted to enable
12 Sergeant Girone to travel to and remain in Italy and Sergeant Latorre to remain in
13 Italy throughout the duration of the proceedings before the Annex VII tribunal.

14
15 *(The agent of Italy reads the final submissions in French.)*

16
17 *(Continued in English)* A copy of the written text of Italy's final submissions is now
18 being communicated to the Tribunal and transmitted to the Agent of India.

19
20 Mr President, Members of the Tribunal, before I conclude let me express, on behalf of
21 the Italian Government and on behalf of all the members of the Italian delegation, our
22 profound thanks to you, Mr President, and to the Members of the Tribunal, for the
23 efficient manner in which these proceedings have been prepared and conducted. We
24 are very grateful to all concerned: to the Registrar and his staff, to the interpreters, to
25 the translators and to all those who have worked so hard behind the scenes to make
26 this hearing possible.

27
28 I would also like to thank our colleagues from India.

29
30 I thank you, Mr President.

31
32 **THE PRESIDENT:** Thank you, Mr Azzarello.

33
34 This concludes the oral arguments presented by Italy and this morning's sitting. We
35 will continue the hearing in the afternoon at 4.30 p.m. to hear the second round of
36 oral arguments of India.

37
38 The sitting is now closed.

39 *(Luncheon adjournment)*