

In the matter of an arbitration
under Annex VII of the United Nations
Convention on the Law of the Sea

PCA Case No. 2015-28

Permanent Court of Arbitration
Peace Palace
The Hague
The Netherlands

Day 1

Wednesday, 30th March 2016

Hearing on Request for
Provisional Measures

Before:

H.E. JUDGE VLADIMIR GOLITSYN (President)
H.E. JUDGE JIN-HYUN PAIK
H.E. JUDGE PATRICK ROBINSON
PROFESSOR FRANCESCO FRANCONI
H.E. JUDGE PATIBANDLA CHANDRASEKHARA RAO

BETWEEN:

THE ITALIAN REPUBLIC
(APPLICANT)

-and-

THE REPUBLIC OF INDIA
(RESPONDENT)

-concerning-

THE "ENRICA LEXIE" INCIDENT

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Anurag Tankha, Inspector-General, National Investigation Agency

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FOR THE PERMANENT COURT OF ARBITRATION

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Dirk Pulkowski, Registrar

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Diem Huong Ho, Assistant Legal Counsel

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(Participants may not have been present for the entire hearing.)

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Wednesday, 30th March 2016

(9.30 am)

THE PRESIDENT: Good morning, ladies and gentlemen. This is a hearing of PCA case 2015-28, concerning the "Enrica Lexie" incident, instituted by the Italian Republic against the Republic of India, under Annex VII to the 1982 United Nations Convention on the Law of the Sea.

The Arbitral Tribunal is meeting today and tomorrow to hear the observations of the parties in respect of a request for provisional measures submitted by the Italian Republic in this case under Article 290 of UNCLOS. On behalf of the Arbitral Tribunal, I welcome the Agents, Co-Agents, counsel and advocates of Italy and India to this hearing, and express our gratitude to the parties for their co-operation in the conduct of these proceedings.

This is a public sitting. Therefore, I would like to welcome the distinguished members of the diplomatic corps in the Netherlands, the press and the interested members of the public who are following the hearing live in a separate room of the Peace Palace, the Small Hall of Justice, through closed circuit television. Please note, however, that portions of the hearing may proceed in camera if the Arbitral Tribunal considers

1 so necessary for the smooth conduct of the proceedings
2 or for the protection of confidential information. In
3 such cases, the live transmission will be interrupted
4 for the duration of the confidential discussion. Once
5 the confidential discussion has concluded, the live
6 transmission will resume.

7 For the orderly conduct of this hearing, allow me
8 to remind the representatives of the press of the
9 ground rules for photography, filming and interviews
10 that the Registry has communicated prior to this
11 hearing. I shall not repeat these here, save to
12 recall that press photographers will be asked to
13 return to the Small Hall of Justice once the parties
14 have begun the presentations.

15 Before turning it over to the parties, I would
16 like to ask the Registrar briefly to summarise the
17 proceedings up to this date, and to read out the
18 parties' formal submissions in respect of provisional
19 measures, as formulated in their written briefs.

20 **MR PULKOWSKI:** Thank you, Mr President. On 26th June
21 2015, the Italian Republic instituted arbitral
22 proceedings against the Republic of India by serving
23 on India a "notification under Article 287 and
24 Annex VII, Article 1 of UNCLOS and Statement of Claim
25 and Grounds on Which it is Based".

26 Following the constitution of the Arbitral

1 Tribunal on 11th December 2015, Italy submitted
2 a "Request for the Prescription of Provisional
3 Measures under Article 290, paragraph 1, of the
4 United Nations Convention on the Law of the Sea".

5 On 18th January 2016, the Arbitral Tribunal held
6 a first procedural meeting with the parties at the
7 Peace Palace in The Hague, and on 19th January 2016,
8 having regard to consultations with the parties at the
9 first procedural meeting, the Arbitral Tribunal
10 adopted its rules of procedure and issued Procedural
11 Order No. 1, fixing the date for the submission by
12 India of a response to Italy's Request for the
13 Prescription of Provisional Measures. In the same
14 order, the Arbitral Tribunal fixed 30th and 31st March
15 2016 as the dates for the hearing on provisional
16 measures.

17 On 26th February 2016, India submitted its written
18 observations on Italy's Request for the Prescription
19 of Provisional Measures. In its Request for the
20 Prescription of Provisional Measures, Italy requested
21 the Arbitral Tribunal to prescribe the following
22 provisional measures:

23 "India shall take such measures as are necessary
24 to relax the bail conditions on Sergeant Girone in
25 order to enable him to return to Italy, under the
26 responsibility of the Italian authorities, pending the

1 final determination of the Annex VII Tribunal."

2 In its written observations on Italy's Request for
3 the Prescription of Provisional Measures, India
4 requested the Tribunal:

5 "To reject the submission made by the Italian
6 Republic in its Request for the Prescription of
7 Provisional Measures and to refuse to prescribe any
8 new provisional measures in the present case."

9 Mr President.

10 **THE PRESIDENT:** Thank you, Mr Registrar. Before we
11 continue, may I now ask the photographers to join the
12 general public in the Small Hall of Justice. The
13 staff of the PCA will guide you out of the hearing
14 room and into the Small Hall.

15 Thank you. Now I would like kindly to ask parties
16 to introduce their delegations. Let me first turn the
17 floor over to the Agent of Italy, Ambassador Francesco
18 Azzarello, to introduce the delegation of Italy.

19 **AMBASSADOR AZZARELLO:** Mr President, members of the
20 Tribunal, Agent, Co-Agent and members of the
21 delegation of the Republic of India, Registrar of the
22 PCA, I have already provided you with a list of the
23 members of the Italian delegation. Our submissions
24 today will be presented by the following counsel: Sir
25 Daniel Bethlehem, Mr Sudhanshu Swaroop, Sir Michael
26 Wood, Professor Mauro Politi, Professor Guglielmo

1 Verdirame.

2 Mr President, following the presentation of the
3 Indian legal team by the Indian Agent, at your
4 invitation, I will return to make some opening
5 submissions on behalf of Italy. I thank you,
6 Mr President.

7 **THE PRESIDENT:** Thank you, Ambassador. I now turn to the
8 Agent of India, Dr Neeru Chadha, to introduce the
9 delegation of India.

10 **DR CHADHA:** Thank you, Mr President. With me I have our
11 Co-Agent, Ambassador JS Mukul, our counsel and
12 advocates are Professor Alain Pellet, and Mr Rodman
13 Bundy. Then we have Dr Vishnu Dutt Sharma as our
14 Deputy Agent, Benjamin Samson and Laura Zielinski are
15 junior counsel, Mr Anurag Tankha and Mr Chhikara and
16 Dr Kajal Bhat are India's advisers. Thank you,
17 Mr President.

18 **THE PRESIDENT:** Thank you, Dr Chadha. You are all
19 familiar with the schedule that the Tribunal has fixed
20 for the hearing. According to the schedule, each
21 party will present a first round of oral arguments
22 today. The Tribunal has allotted a maximum of three
23 hours to each party in the first round. Now I give
24 the floor to the Agent of Italy, Ambassador Azzarello,
25 to begin Italy's presentations.

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ITALY'S FIRST ROUND OF ORAL ARGUMENT

OPENING STATEMENT BY THE AGENT

AMBASSADOR AZZARELLO: Thank you. Mr President, members of the Tribunal, Italy's right to make a request for provisional measures before this Tribunal with respect to the situation of Sergeant Girone cannot be called into question. It is a right clearly set out by Article 290 of the UNCLOS Convention. It is a right that was already recognised by the ITLOS order of 24th August 2015. Italy firmly rejects attempts to characterise this request for provisional measures as unwarranted, or even abusive, as India does.

Indeed, even only a brief overview of the facts of this dispute is on its face sufficient to show that not only is this request for provisional measures entirely legitimate, but that, respectfully, the Tribunal should uphold it.

Mr President, members of the Tribunal, Sergeant Girone is an Italian Marine. He was at the time of the incident, and remains, a State official and an organ of the Italian State. He was arrested more than four years ago by Indian authorities while he was exercising a sovereign and official mandate, an antipiracy mandate, on behalf of the Italian State and

1 indeed in the interest of the international community
2 at large. He has been detained in India, subject to
3 the bail conditions of the Indian Supreme Court, ever
4 since.

5 He is obliged to live thousands of kilometres away
6 from his country and family, with two children still
7 in a tender age, in a situation of deprivation of his
8 liberty and of his rights. The harm to his rights
9 directly engages the rights of Italy, which is
10 suffering serious and irreversible prejudice from the
11 continued detention of, and exercise of jurisdiction
12 over, an Italian State official and organ.

13 Indeed, the exercise of jurisdiction over the
14 Marine by India engages various levels of illegality.
15 Italy retains exclusive jurisdiction over the "Enrica
16 Lexie" incident. The Marine enjoys State immunity and
17 immunity *ratione materiae* from the jurisdiction of
18 foreign courts. Even the most basic due process
19 requirement of formulating charges against one who is
20 accused of a crime, or else set them free, has not
21 been respected by India.

22 However, Mr President, members of the Tribunal,
23 there is no need to venture into the merits of the
24 case to decide this request for provisional measures.
25 Because, in reality, it is apparent even from India's
26 submissions to this Tribunal that the only reason why

1 Sergeant Girone is not allowed to leave India is so
2 that he can act as a de facto guarantee of Italy's
3 obligation to return him to India for trial, if this
4 Tribunal were to so decide in due course.

5 In its order of 24th August 2015, the ITLOS
6 ordered both parties to suspend all court proceedings
7 and to refrain from initiating new ones, and both
8 parties did so. There are no proceedings in India at
9 present. Italy has given, and I now re-affirm before
10 this Tribunal in the most solemn terms, an undertaking
11 that it will abide by any order of this Tribunal and
12 that it will return Sergeant Girone to India if so
13 required by an order of this Tribunal.

14 Given this solemn undertaking of Italy, a human
15 being cannot be used as a guarantee for the conduct of
16 a State, and especially in circumstances in which
17 these arbitral proceedings are expected to last
18 between three and four years. This would mean
19 a situation of detention in Delhi, without any formal
20 charges, for a period of about seven to eight years!
21 In this situation, and given the serious violation of
22 human rights that this would determine, it should
23 simply flow from the ITLOS Order of 24th August that
24 Sergeant Girone should be allowed to come home until
25 the final determination of rights by this Tribunal.

26 Mr President, members of the Tribunal, India is

1 right in saying that provisional measures must
2 preserve the rights of both parties, but its position
3 must be read against the framework that I have just
4 addressed. India is therefore wrong in contending
5 that it would suffer prejudice from a positive
6 decision of Italy's Request by this Tribunal. On the
7 contrary, it is the preservation of the status quo
8 that determines unilateral prejudice to Italy.

9 A correct and fair framework of legality therefore
10 needs to be restored. Mr President, members of the
11 Tribunal, for all these reasons Italy respectfully
12 requests that the Tribunal prescribe the following
13 provisional measure: "that India shall take such
14 measures as are necessary to relax the bail conditions
15 on Sergeant Girone in order to enable him to return to
16 Italy, under the responsibility of the Italian
17 authorities, pending the final determination of the
18 Annex VII Tribunal."

19 I thank you, Mr President and members of the
20 Tribunal, and would ask you to call Sir Daniel
21 Bethlehem to the podium. Thank you.

22 **THE PRESIDENT:** Thank you, Ambassador Azzarello. I now
23 give the floor to Sir Daniel Bethlehem.

24 **SPEECH BY SIR DANIEL BETHLEHEM**

25 **SIR DANIEL BETHLEHEM:** Mr President, members of the

1 Tribunal, it is an honour to appear before you today
2 representing Italy in these proceedings.

3 You will all be familiar with the underlying facts
4 of the dispute of which you are seised and I don't
5 therefore propose to spend too much time setting the
6 scene for our submissions on the request for
7 provisional measures that is the subject of this
8 hearing. Some brief background and context to the
9 present request will, however, be useful to ensure
10 that there is a common frame of reference for our
11 submissions to come.

12 Mr President, I anticipate that I will be on my
13 feet for about 45 minutes or so. My submissions will
14 proceed under the following headings. I will begin
15 with some brief scene-setting observations to provide
16 a frame of reference for our submissions, and also to
17 bring developments up to date. I will thereafter make
18 some preliminary observations on the present
19 proceedings. Following this, I will address the ITLOS
20 Provisional Measures Order of 24th August last year
21 and its consequences for the present request.
22 Finally, I will address some aspects of Italy's
23 Request in anticipation of the submissions to follow
24 by my colleagues.

25 I will be followed by Mr Sudhanshu Swaroop. He
26 will address various issues arising out of the

1 proceedings before the Indian courts to this point
2 that are relevant to the provisional measures request.
3 He will be followed by Sir Michael Wood, who will
4 address the law relevant to your assessment of this
5 request. Sir Michael will be followed by
6 Professor Politi, and he in turn by
7 Professor Guglielmo Verdirame, both of whom will
8 address the issue of why the prescription of the
9 requested provisional measure is warranted and
10 appropriate in the circumstances of this case.

11 Professor Politi will set out relevant principles
12 of international law concerning due process.
13 Professor Verdirame will apply those principles to the
14 facts of this case.

15 Mr President, members of the Tribunal, you have
16 been provided with a slim judges' bundle of documents
17 to which it may be useful to refer during the course
18 of our submissions. I hope you have those available.
19 We have kept the documents to a minimum. I will leave
20 my colleagues to introduce in due course the documents
21 to which they propose to refer. As regards the
22 documents to which I will make reference, the only one
23 that you will not have seen before is Order No 3 of
24 the Annex VII Tribunal in *The MOX Plant Case (Ireland*
25 *v United Kingdom)* of 24th June 2003, which is at
26 tab 6. I will take you to that a little bit later,

1 I don't ask you to turn that up now. The ITLOS
2 Provisional Measures Order in this case of 24th August
3 last year is at tab 2.

4 At tab 1, simply for purposes of convenience, you
5 will find a consolidated index of all of Italy's
6 annexes to the Notification instituting proceedings
7 and the present request for provisional measures.

8 And then finally in terms of the documents to
9 which I will make reference, I would also like to draw
10 your attention to the document at tab 5,¹ which is an
11 Affidavit that Italy submitted to the Indian Supreme
12 Court on 7th December last year. This updates the
13 Indian Supreme Court on developments in the
14 international arbitral proceedings and also addresses
15 some salient matters to which it may be useful to make
16 reference in the course of these proceedings. That
17 Affidavit is at Italy's annex no 43 in the main
18 bundle, we have included it in the judges' folders for
19 ease of reference.

20 Mr President, members of the Tribunal, with this
21 introduction, I turn to some brief background and
22 contextual observations with a view to providing
23 a frame of reference for our submissions to come. The
24 parties are far apart on key issues of fact and law
25 arising from the incident that took place off the

¹ Annex IT-43

1 Indian coast on 15th February 2012. This said, there
2 are elements of common ground.

3 It is agreed that an incident took place
4 approximately 20.5 nautical miles off the Kerala
5 coast, that is well beyond India's territorial sea, on
6 15th February 2012, involving the Italian-flagged oil
7 tanker, the MV "Enrica Lexie", and its antipiracy
8 Vessel Protection Detachment comprising six Italian
9 Marines on official duties. Two of those Marines were
10 Chief Master Sergeant Massimiliano Latorre and
11 Sergeant Salvatore Girone. The dispute between Italy
12 and India concerns India's arrest, detention and
13 continued exercise of criminal jurisdiction over
14 Sergeants Latorre and Girone.

15 The incident in question concerned the perceived
16 threat of a pirate attack on the "Enrica Lexie". The
17 sketch at appendix 1 to Italy's request for
18 provisional measures, which is on page 35, I don't ask
19 you to turn it up, just to give you the reference,
20 shows the co-ordinates of the "Enrica Lexie" when the
21 Master of the vessel activated the Ship Security Alarm
22 System soon after the pirate attack was perceived.²

23 The activation of this alarm system generated an
24 automated distress message that registered the ship's
25 co-ordinates. There is no dispute therefore about the

² Annex IT-3

1 location of the vessel at the time of the incident or
2 indeed that the Master believed that the vessel was
3 under pirate attack.

4 On the apprehension of the pirate attack, which
5 was caused by a fast approaching boat heading on
6 a collision course with the "Enrica Lexie", and this
7 is a common *modus operandi* for pirate attacks, the
8 Marines on board the "Enrica Lexie" took steps to warn
9 off the approaching boat. Amongst the other measures
10 that they took was the firing of warning shots into
11 the sea, after which the approaching boat altered
12 course. The "Enrica Lexie" thereafter continued on
13 its way to join a merchant fleet convoy to be escorted
14 by naval vessels en route to Djibouti. There was
15 another reported pirate attack off the Kerala coast
16 that same day.³

17 Mr President, members of the Tribunal, the very
18 brief description of the events that I have just given
19 should be uncontroversial. It is certainly
20 objectively provable, as we will show when it comes to
21 the merits. Virtually everything that follows from
22 this point, however, is a matter of dispute between
23 the parties, although the dispute is not so much about
24 whether the developments in question took place, but
25 rather about the interpretation to be placed on them.

³ Annex IT-4

1 Having continued on its way after the incident,
2 the "Enrica Lexie" was subsequently contacted by the
3 Indian Coast Guard authorities and was thereafter
4 intercepted by a coastguard aircraft and by armed
5 coastguard vessels and required to alter course to
6 Kochi.⁴ On arrival in Kochi, the ship was detained,
7 the Master, crew and Marines were questioned, and
8 documents and other items were seized by the Kerala
9 police.⁵

10 Italy maintains, with evidence to support this
11 contention, that the "Enrica Lexie" was the subject
12 both of ruse and coercion by the Indian authorities
13 while in international waters, some 36 nautical miles
14 off the Kerala coast, which caused the Master to alter
15 course towards Kochi.

16 The sketch at appendix 2 to Italy's request for
17 provisional measures in this case, which is at
18 page 36, shows the point at which the "Enrica Lexie"
19 was intercepted by the Indian Coast Guard aircraft.
20 The co-ordinates on the sketch are taken from the
21 report of the Indian Coast Guard pilot who intercepted
22 the vessel.⁶

23 At some point on 15th or 16th February, the Master

⁴ Annexes IT-6 and IT-9

⁵ Annex IT-9

⁶ Annex IT-7

1 of the vessel was informed by the Kerala authorities
2 that two Indian fishermen, Valentine Jelastine and
3 Ajeesh Pink, on board a fishing boat, the "St Antony",
4 had been killed by shots fired from a passing ship.
5 It became apparent that the Indian authorities had
6 concluded that the shots that killed the Indian
7 fishermen had been fired by the Marines on board the
8 "Enrica Lexie".

9 Mr President, members of the Tribunal, as an
10 evidential matter, this conclusion by the Indian
11 authorities is disputed by Sergeants Latorre and
12 Girone, there being doubt about (amongst other things)
13 whether the fishing boat that has approached the
14 "Enrica Lexie" was in fact the "St Antony", and also
15 whether the Marines had fired the shots that killed
16 the unfortunate Mr Jelastine and Mr Pink.

17 Sergeant Girone and Sergeant Latorre were
18 nonetheless arrested by the Indian authorities in
19 Kerala on 19th February 2012 and have been subject to
20 the criminal jurisdiction of the Indian authorities
21 and courts ever since.

22 Immediately upon learning of the deaths of the two
23 Indian fishermen, on 16th February 2012, the
24 Prosecution Office of the Military Tribunal in Rome
25 opened a criminal investigation into the incident for
26 the crime of murder, in other words within 24 hours of

1 the incident and three days before Sergeants Latorre
2 and Girone were arrested by the Kerala Police on
3 19th February 2012.⁷

4 Italy, by Notes Verbale to India on 16th and
5 17th February 2012, informed India of Italy's
6 exclusive jurisdiction over the Italian Marines and
7 about the investigation by the Italian judicial
8 authorities.⁸ The Kerala police, who sought to
9 question the Master, crew and Marines, were likewise
10 informed of the Italian investigation and its *sub*
11 *judice* implications on 16th February 2012.⁹

12 Mr President, members of the Tribunal, this is
13 a very highly compressed summary of the incident that
14 took place on 15th February 2012, and the events in
15 its immediate aftermath. I set out a fuller record of
16 events in my opening submissions in the provisional
17 measures hearing before ITLOS. That record is part of
18 the documentary record submitted with our present
19 Request to this Tribunal.¹⁰ Insofar as any of that
20 description may be relevant for purposes of the
21 present proceedings, which we do not anticipate will
22 be the case, we stand by and adopt those earlier
23 submissions.

⁷ Annex IT-9, para. 9; Annexes IT-11 and IT-13

⁸ Annexes IT-10 and IT-12

⁹ IT-9, para. 9

¹⁰ IT-34(a), pp.7 – 12

1 Mr President, members of the Tribunal, as I have
2 already noted, Sergeants Latorre and Girone have been
3 subject, forcibly and under protest from Italy, to the
4 criminal jurisdiction of the Indian investigating
5 authorities and courts ever since their arrest on
6 19th February 2012. Italy maintained, from the very
7 first moment, that it had exclusive jurisdiction over
8 the incident of 15th February, and over the Italian
9 Marines who, as serving State officials, carrying out
10 official duties on behalf of the Italian State, were
11 immune from the jurisdiction of the Indian
12 authorities.

13 Mr President, members of the Tribunal, as you will
14 know, Sergeant Latorre is currently in Italy, with the
15 leave of the Indian Supreme Court, having suffered
16 a brain stroke in September 2014. As we understand
17 it, as a matter of Indian law, he remains subject to
18 the jurisdiction of the Indian Supreme Court, with the
19 Supreme Court having extended his leave to remain in
20 Italy until 30th April this year, in a month's time,
21 with a hearing scheduled on this matter on 27th April.

22 On 7th December 2015, three and a half months ago,
23 affirming our respect for the Indian Supreme Court,
24 Italy submitted an Affidavit to the Supreme Court to
25 draw to its attention in a timely and transparent
26 manner the developments in the international arbitral

1 proceedings.

2 In fact, there were two further subsequent
3 additional Affidavits as well. That first Affidavit
4 of 7th December 2015 is at tab 5 of your judges'
5 bundles, and I will refer to it in just a moment.
6 I do not ask you to turn it up at this point, but I do
7 commend it to your attention, not only because it
8 addresses the situation of Sergeant Latorre, who is
9 not the subject of the present application for
10 provisional measures, but also because it sets out, at
11 paragraphs 12 to 17 of the Affidavit, Italy's
12 appreciation of the effect of the ITLOS Provisional
13 Measures Order on the different circumstances of
14 Sergeant Latorre and Sergeant Girone.

15 In a spirit of accommodation, which was part of
16 the motivation for filing the affidavit in a timely
17 and transparent manner, there having been no
18 requirement on Italy to do so, Italy invited India to
19 agree with its statement of the effect of the ITLOS
20 Provisional Measures Order.¹¹ The Government of India
21 has had an opportunity to respond to Italy's
22 affidavit, it has not yet done so.

23 Mr President, members of the Tribunal, against
24 this very brief factual background, I turn now to make
25 some preliminary observations on the present request

¹¹ IT-43, at p.28, fourth paragraph. [Judges' Bundle, Tab 5]

1 for provisional measures.

2 These proceedings concern the position of Sergeant
3 Girone alone. He has been detained in India since
4 19th February 2012, that is for more than four years.
5 He is in Delhi now. He is not now, and he has not
6 ever been, subject to any lawful charge by the Indian
7 authorities. He is detained in India, subject to bail
8 conditions imposed by the Indian Supreme Court that
9 confine him to Delhi and require him to report weekly
10 to the Delhi police. His family, including his wife
11 and two young children, remain in Italy.

12 Given the pleading timetable in the Tribunal's
13 Rules of Procedure, and the possible scenarios that
14 may unfold were India minded to raise objections to
15 jurisdiction and admissibility in this case, but for
16 the provisional measures request that is now before
17 you, it is possible that Sergeant Girone could remain
18 detained in India for another four years still to
19 come. Even the shortest and most optimistic scenario
20 from India's perspective would see Sergeant Girone
21 detained in India for around another two years, and
22 such a scenario would require a confluence of factors
23 that are on any assessment unlikely.

24 More conceivable, at the shorter end of the
25 spectrum are proceedings that are likely to last for
26 another two and a half to three years before the

1 Tribunal renders a final award, that is a hearing in
2 early to mid 2018, with an award of the Tribunal in
3 late 2018 or early 2019.

4 So, but for this provisional measures request,
5 Sergeant Girone will remain detained in India for
6 between two and a half to four years still to come,
7 without any lawful charge having been preferred. That
8 would be a total of six and a half to eight years of
9 detention in India, in circumstances in which the
10 outcome of these proceedings could -- and I put it no
11 more highly than this for present purposes -- be to
12 uphold Italy's case on the merits, in other words
13 a finding that India has not had jurisdiction to
14 detain Sergeant Girone from the outset.

15 Mr President, members of the Tribunal, there would
16 be manifest irreparable prejudice to Italy's rights in
17 the form of its interests in its serving officials in
18 these circumstances. There are compelling reasons for
19 the Tribunal to grant Italy's Request, as we will
20 show, subject to clear and appropriate safeguards,
21 willingly accepted by Italy, to ensure India's rights,
22 if the Tribunal finds against Italy in due course, and
23 requires Sergeant Girone to return to India.

24 Mr President, members of the Tribunal, this
25 request for provisional measures in respect of
26 Sergeant Girone is about the future. It is not about

1 the past. It is about Sergeant Girone's detention in
2 India for the next four years, absent a Provisional
3 Measures Order from you. It is not about his
4 detention in India for the past four years.

5 While you will hear shortly from my colleagues
6 about India's failure to prefer charges against
7 Sergeant Girone and Sergeant Latorre over the past
8 four years, about the law on pre-trial detention,
9 about considerations of due process, these submissions
10 provide the foundation for our request that you
11 prescribe a provisional measure that requires
12 a relaxation of the bail conditions on Sergeant Girone
13 to enable him to return to Italy under the
14 responsibility of the Italian authorities, pending
15 your final determination of the dispute between Italy
16 and India in this case.

17 As the Agent for Italy has said in opening just
18 a few moments ago, Italy affirms its solemn
19 undertaking to return Sergeant Girone to India if this
20 is required by a decision of this Tribunal.
21 Professor Verdirame will address this issue further in
22 due course. For the moment, I would simply like to
23 underline that our request goes to Sergeant Girone's
24 continued detention in India while this arbitration
25 progresses, not to the lawfulness of his detention in
26 the past, which is a matter for the merits stage.

1 Mr President, members of the Tribunal, Italy has
2 said in its written observations that Italy's Request
3 is tendentious and that it constitutes an abuse of
4 process.¹² In support of this assertion, India says
5 that Italy's Request amounts to appeal from the ITLOS
6 refusal to grant a similar request in its Provisional
7 Measures Order of 24th August last year and that there
8 are no new facts that risk creating irreparable
9 prejudice to Italy's rights, and that Italy's Request
10 is an unreasonable extension of the right to request
11 provisional measures.¹³

12 This theme runs throughout India's written
13 observations, with India saying in opening that
14 nothing has changed since the ITLOS Provisional
15 Measures Order except that the duration of the
16 proceedings is now known after the adoption of the
17 Tribunal's rules of procedure on 18th January 2016.¹⁴

18 Mr President, members of the Tribunal, as it did
19 before ITLOS, India glosses over both the law and the
20 facts. On the law, in its Order No 3 of 24th June
21 2003 in *The MOX Plant Case (Ireland v United Kingdom)*
22 which is at tab 6 of your folders, that eminent
23 Annex VII Tribunal -- which was presided over by

¹² Written Observations, para. 4.1

¹³ Written Observations, paras. 4.3–4.5

¹⁴ Written Observations, para. 1.9

1 another President of ITLOS, Thomas Mensah, and had
2 James Crawford, Yves Fortier, Gerhard Hafner and
3 Arthur Watts alongside -- was faced with a similar
4 situation to that now before you, namely a second
5 provisional measures request by Ireland following an
6 earlier Provisional Measures Order by ITLOS that had
7 required the parties to take certain action while
8 denying other aspects of the original Irish
9 provisional measures request.

10 With similar overtones to the present case, the
11 arbitral proceedings in that case, in the *MOX* case,
12 had been suspended pending a ruling on certain issues
13 by the European Court of Justice.

14 The Annex VII Tribunal then, as now, was faced by
15 an argument that there were no new circumstances
16 warranting the prescription of provisional measures.
17 The Tribunal would have none of it. In the interests
18 of time, I do not ask you to turn up *The MOX Plant*
19 order, which is at tab 5, but I do draw to your
20 attention what the Tribunal said at paragraphs 39 and
21 40 of that Order.¹⁵ It said as follows; paragraph 39:

22 "Although a provisional measure was prescribed by
23 ITLOS, Ireland's request for additional provisional

¹⁵ *The MOX Plant Case (Ireland v. United Kingdom)*, Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures, Order No. 3, 24 June 2003, at paras. 39–40 [Judges' Bundle, Tab 6], available on <http://pcacases.com/web/sendAttach/867>

1 measures is the first such request to this Tribunal.
2 Hence, the Tribunal's competence to prescribe
3 provisional measures is contained in article 290,
4 paragraph 1, of the Convention, and is subject to the
5 provisions of paragraphs 2 to 4 of that article."

6 Paragraph 40 of that Order then continues:

7 "To the extent that this may be relevant, the
8 Tribunal considers that there has been a change in the
9 circumstances in which ITLOS prescribed its
10 provisional measure. First, this Tribunal has now
11 been constituted. Furthermore, following the
12 suspension of the proceedings, the time that will
13 elapse before the Tribunal can reach a decision on the
14 merits is likely to be greater than was to be expected
15 when ITLOS made its Order. In the view of the
16 Tribunal, the longer delay in reaching a final
17 decision on the merits of the dispute constitutes
18 a change in the circumstances that would, if
19 necessary, warrant modification of the provisional
20 measures prescribed by ITLOS in accordance with
21 article 290, paragraph 5, of the Convention."

22 Mr President, members of the Tribunal, as in that
23 case, so also in this case. Sir Michael Wood will
24 address this aspect further in his submissions
25 shortly.

26 Mr President, members of the Tribunal, India has

1 been equally economical on the facts in respect of its
2 contention that there has been no change of
3 circumstances warranting the present provisional
4 measures request and that is even assuming that there
5 is a requirement to show a change of circumstances,
6 which Italy contends is not the case, as Sir Michael
7 Wood will address shortly.

8 But assuming *arguendo* that there is such
9 a requirement, there has manifestly been a change of
10 circumstances. It is not simply that the duration of
11 these arbitral proceedings is now known with greater
12 clarity, following the adoption of the Tribunal's
13 Rules of Procedure. It is not simply that this
14 Annex VII Tribunal, the Tribunal that has jurisdiction
15 over the merits of the case, has now been constituted,
16 and is seised of a request for provisional measures.
17 It is also that the jurisdiction of ITLOS to prescribe
18 provisional measures was materially different to the
19 jurisdiction of this Tribunal to do so, notably
20 because ITLOS only had jurisdiction pending the
21 constitution of this Tribunal. It is also that ITLOS,
22 in its Order of last August, stated explicitly that it
23 would not address the situation of the Marines as that
24 was a matter to be addressed by this Tribunal, once
25 constituted. It is also that the difference in the
26 temporal jurisdiction of ITLOS and of this Tribunal is

1 highly material for purposes of an appreciation of the
2 risk of irreparable prejudice to Italy's rights
3 pending the final decision of this Tribunal.

4 Beyond this is also the consideration that it is
5 this Tribunal that will have both the competence and
6 the authority to ensure compliance with any
7 provisional measures that it prescribes. This
8 Tribunal is also properly competent to address the
9 consequences of the suspension of the Indian
10 proceedings ordered by ITLOS and the implications that
11 this has for the detention in India of Sergeant Girone
12 without charge for potentially another four years.

13 Mr President, members of the Tribunal, all of
14 these developments manifestly amount to a change in
15 the circumstances that were considered by ITLOS in
16 August last year. This request for provisional
17 measures, without doubt, both in fact and in law,
18 meets the conditions set out in Article 290,
19 paragraph 1 of UNCLOS. The prescription of
20 a provisional measure in the terms requested by Italy
21 is appropriate, is warranted and indeed is necessary
22 in the circumstances of this case to preserve the
23 respective rights of the parties pending the final
24 decision of this Tribunal. My colleagues will develop
25 these submissions further shortly.

26 One further preliminary observation is required.

1 Although the parties are far apart on the matters in
2 dispute on the merits, and although we are here
3 opposed on this request for provisional measures,
4 there is an important area of intersection in our
5 positions that points to the way forward in these
6 proceedings and on which I hope we may be able to
7 capitalise to common advantage.

8 In paragraph 3.32 of its Written Observations,
9 India says that it is not opposed to a request for the
10 relaxation of Sergeant Girone's bail conditions if the
11 circumstances so demand. India goes on to add, in
12 paragraph 3.67 of its Written Observations, that its
13 "concern relates to securing [Sergeant Girone's]
14 presence in India during trial. It would be necessary
15 for India to be assured that in case the Tribunal
16 finds that India has jurisdiction, the presence of
17 Sergeant Girone in India would be ensured."

18 Mr President, members of the Tribunal, Italy
19 agrees with India that provisional measures are about
20 the preservation of the rights of both parties. Italy
21 has in the past provided solemn undertakings to the
22 Indian Supreme Court to return the Marines. Italy has
23 complied with those undertakings. Italy's
24 undertakings in respect of Sergeant Latorre, who
25 remains unwell in Italy, as the documents annexed to
26 the Affidavit submitted to the Indian Supreme Court on

1 7th December 2015 indicate,¹⁶ have been accepted by
2 India's Supreme Court. The form of those undertakings
3 have met the Indian Supreme Court's requirements.

4 India cannot now, before this Tribunal, in respect of
5 Sergeant Girone, claim as insufficient what its
6 Supreme Court has readily been prepared to accept in
7 respect of Sergeant Latorre.

8 As you heard from Italy's Agent in opening, as
9 a formal and solemn matter, Italy repeats and affirms
10 to you, the Tribunal that Italy has seised of this
11 dispute, the undertaking that if this is required by
12 your decision in due course, Italy will take all steps
13 as are necessary and required to ensure that Sergeant
14 Girone is returned to India. There is no basis to
15 doubt that Italy would honour its commitment, both to
16 India and to this Tribunal. Professor Verdirame will
17 address certain legal considerations relevant to this
18 matter.

19 Mr President, members of the Tribunal, the
20 continuing and irreversible prejudice to Italy's
21 rights from Sergeant Girone's continued detention in
22 India for the duration of these arbitral proceedings
23 is unarguable. Leaving him in Delhi for potentially
24 four more years on the ground only that India
25 considers that "there is a risk that he would not be

¹⁶ Annex IT-43, at pp. 31-52. [Judges' Bundle, Tab 5]

1 returned to India in the event that India is found to
2 have jurisdiction over the incident"¹⁷ in due course
3 would be unconscionable.

4 Mr President, members of the Tribunal, I turn now
5 to address the ITLOS Provisional Measures Order of
6 24th August last year. You will all be very familiar
7 with it. What I would like to do though is to take
8 you back to the text, what the Order says, and indeed
9 what it does not say, and the consequences that flow
10 necessarily from it. I propose to do so, indeed it is
11 necessary for me to do so, as India, invoking Latin
12 against Italy, in the form of the principles of *res*
13 *judicata* and *ne bis in idem*, contends that Italy's
14 present request is an abuse of process, in that the
15 ITLOS Order effectively shut the door to it. As
16 I will show, ITLOS did no such thing. Quite to the
17 contrary, ITLOS expressly left the issue that is now
18 before you open for your consideration on the ground
19 that it was for this Tribunal to address.

20 If I may, Mr President, members of the Tribunal,
21 I would like to ask you to have in front of you the
22 ITLOS Order, it is at tab 2 of the folders.

23 I would like to start very briefly simply at
24 paragraph 29 of the Order, just to place everything in
25 its proper context. Paragraph 29 is at page 7. As

¹⁷ Written Observations, para. 3.50

1 paragraph 29 reminds us, Italy before ITLOS had
2 requested two provisional measures. You will see them
3 set out there. The first provisional measure was that
4 India refrain from taking or enforcing any measures
5 against Sergeant Latorre and Sergeant Girone, in other
6 words a stay of all action by India; and the second
7 request, which is more relevant for purposes of these
8 proceedings, was that India lift the restrictions, and
9 the language here is important:

10 "That India lift the restrictions imposed on
11 Sergeant Girone [for these purposes] to enable him to
12 travel to and remain in Italy and that Sergeant
13 Latorre remain in Italy throughout the duration of the
14 Annex VII proceedings."

15 I would like, if I may, to ask you now please to
16 turn to paragraph 115, which is on page 22. The
17 intervening paragraphs of the Order address
18 preliminary matters, the arguments of the parties and
19 so forth. Paragraph 115 picks up the point of Italy's
20 second request, which I have just highlighted for you.
21 As India notes in its Written Observations in this
22 case, as regards Sergeant Girone, the second request
23 before ITLOS overlaps to some extent with the request
24 that Italy makes in these proceedings, but the key
25 issue for these proceedings is: how did ITLOS address
26 the second request, and why did it do so in the terms

1 that it did?

2 Paragraph 115 summarises Italy's arguments in
3 support of the second request, including that the
4 second request, for the immediate lifting of all
5 restrictions on Sergeant Girone, was justified as
6 a consequence of the first measure, of the stay, and
7 also by due process considerations. The third ground
8 that is referred to in paragraph 115 is not relevant
9 to these proceedings.

10 If we then go to paragraph 117 of the Order, you
11 will see there, by reference to a quotation, that the
12 Order records Italy's argument that a freezing order
13 in respect of the criminal proceedings would not be
14 enough, as Italy's rights could not adequately be
15 preserved by the maintenance of the status quo.
16 Mr President, members of the Tribunal, I highlight
17 this paragraph as the provisional measure that ITLOS
18 went on to prescribe very carefully and very
19 intentionally maintained the status quo, as the
20 *dispositif* in paragraph 141(1) makes clear, in other
21 words all court proceedings were to be suspended and
22 the parties were to refrain from initiating any new
23 proceedings that might aggravate or extend the
24 dispute, or jeopardise or prejudice the carrying out
25 of any decision that the Annex VII Tribunal may
26 render.

1 Once again, the key issue with respect to Italy's
2 second request is how ITLOS addressed the second
3 request and why it did so in the terms that it did.

4 The answer to this question is to be found in
5 paragraphs 125 and following of the ITLOS Order and
6 notably in paragraphs 125, 126, 131 and 132. I would
7 like to take you through these paragraphs if I may
8 briefly.

9 Paragraph 125, and I am quoting:

10 "Considering that the Order must protect the
11 rights of both parties and must not prejudice any
12 decision of the Arbitral Tribunal to be constituted
13 under Annex VII."

14 I emphasise the words here "must not prejudice any
15 decision of the Arbitral Tribunal to be constituted
16 under Annex VII".

17 We then turn to paragraph 126, and it says:

18 "Considering that the first and the second
19 submissions by Italy, if accepted, will not equally
20 preserve the respective rights of both Parties until
21 the constitution of the Annex VII Tribunal as required
22 by Article 290, paragraphs 1 and 5, of the
23 Convention."

24 Again, I emphasise the words "until the
25 constitution of the Annex VII Tribunal".

26 Mr President, members of the Tribunal, I highlight

1 in these paragraphs the repetition of the
2 consideration that ITLOS should not prescribe any
3 measure that may prejudice any decision of the
4 Annex VII Tribunal. This makes it quite clear that
5 ITLOS, in framing its order, was acutely aware that
6 the Annex VII Tribunal would have competence over
7 provisional measures once it was constituted. Indeed,
8 this is set out in this Tribunal's Rules of Procedure.

9 This is evident from the express language of
10 paragraph 132 of the ITLOS Order, to which we will
11 come in just a moment, in respect of the situation of
12 the two Marines.

13 Paragraph 131 of the ITLOS Order addresses the
14 provisional measures that ITLOS then went on to
15 prescribe, and I read it briefly:

16 "Considering that it is appropriate for the
17 Tribunal to prescribe that both Italy and India
18 suspend all court proceedings and refrain from
19 initiating new ones which might aggregate or extend
20 the dispute submitted to the Annex VII arbitral
21 tribunal or might jeopardise or prejudice the carrying
22 out of any decision which the arbitral tribunal may
23 render."

24 This is the maintenance of the status quo order
25 that ITLOS prescribed in its dispositif in
26 paragraph 141(1). We then have in the ITLOS Order

1 paragraph 132, which is critically important for
2 purposes of these proceedings. Paragraph 132 says as
3 follows:

4 "Considering that, since it will be for the
5 Annex VII arbitral tribunal to adjudicate the merits
6 of the case, the Tribunal does not consider it
7 appropriate to prescribe provisional measures in
8 respect of the situation of the two Marines because
9 that touches upon issues related to the merits of the
10 case."

11 Mr President, members of the Tribunal, here we
12 have it. ITLOS did not reject Italy's second request
13 in respect of the situation of the two Marines with
14 prejudice. It did so without prejudice, saying
15 expressly that since it would be for the Annex VII
16 Tribunal to adjudicate on the merits, it (ITLOS) did
17 not consider it appropriate to prescribe provisional
18 measures in respect of the situation of the two
19 Marines. It was Italy's request before ITLOS for the
20 immediate lifting of the restrictions imposed on the
21 liberty of the Marines,¹⁸ ie by ITLOS, rather than by
22 the Annex VII Tribunal, that led ITLOS to conclude
23 that it should not accede to Italy's second request.

24 There is no implication that ITLOS considered that
25 the request that Italy now makes in respect of

¹⁸ ITLOS Order, Declaration of Judge Paik, para. 9

1 Sergeant Girone to this Tribunal would be
2 inappropriate. Quite to the contrary. And here we
3 are. There is no question of *res judicata*. There is
4 no question of *ne bis in idem*. Latin does not avail
5 India here.

6 Mr President, members of the Tribunal, there is
7 one other matter that I should touch upon very briefly
8 in passing as regards the ITLOS Order, the binding
9 force of which both parties accept, and the fact of
10 which has brought a measure of calm to the dispute
11 between the parties and indeed some welcome
12 equilibrium to their wider relations.

13 The issue is that of the interpretation and
14 application of the provisional measures that ITLOS did
15 prescribe. Italy addresses this in the Affidavit that
16 it submitted to the Indian Supreme Court on
17 7th December last year, to which I have already
18 referred.¹⁹

19 Our understanding of the ITLOS Order is summarised
20 in paragraphs 16 and 17 of the Affidavit. In the
21 interests of time, I do not invite you to turn up the
22 Affidavit now, but simply commend these paragraphs to
23 your attention.

24 Mr President, members of the Tribunal, the present
25 Request concerns Sergeant Girone alone. It does not

¹⁹ Annex IT-43. [Judges' Bundle, Tab 5]

1 address the situation of Sergeant Latorre. With
2 a view of avoiding any extension or aggravation of the
3 dispute, Italy, some three and a half months ago, set
4 out its understanding of the effect of the ITLOS Order
5 on the situation of Sergeant Latorre and expressed the
6 hope that India would share its view.

7 India has yet to express itself on the matter.
8 The situation of Sergeant Latorre is scheduled to be
9 heard by the Indian Supreme Court in a month's time.
10 I draw this to your attention so that you are aware
11 that your Provisional Measures Order on the present
12 requests concerning Sergeant Girone, insofar as it
13 addresses, as may indeed be unavoidable, the
14 interpretation and application of the ITLOS
15 Provisional Measures Order, may have wider
16 ramifications of very great importance beyond Sergeant
17 Girone.

18 Mr President, members of the Tribunal, I turn
19 finally and very briefly to the detail of Italy's
20 provisional measures request. As this will be
21 addressed by my colleagues, I will confine myself
22 simply to some overarching observations.

23 The provisional measure that Italy requests the
24 Tribunal to prescribe in this case is that -- and the
25 language here, if I just may interpolate, is
26 critically important. The provisional measure is:

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

6 India says in its Written Observations that this
7 request is the same as Italy's second request before
8 ITLOS. Mr President, members of the Tribunal, it is
9 similar, but it is not the same, and the differences
10 are important. In the second request before ITLOS
11 last August, Italy asked that ITLOS prescribe that
12 "India shall take all measures necessary to ensure the
13 restrictions on the liberty and security and movement
14 of the Marines be immediately lifted".

15 In addition to these different formulations of the
16 two requests, as I have just read them out, there was
17 also no reference in the ITLOS Request to "the
18 responsibility of the Italian authorities". The ITLOS
19 Request language of the "immediate lifting of all
20 restrictions" is not the same language of the present
21 Request, which seeks the relaxation of the bail
22 conditions of Sergeant Girone and Sergeant Girone's
23 return to Italy under the responsibility of the
24 Italian authorities.

25 India will perhaps argue that the object and
26 outcome that is sought is the same, insofar as what is

1 in contemplation is allowing Sergeant Girone to return
2 to Italy until a final decision of this Tribunal.
3 But, Mr President, members of the Tribunal, the nuance
4 is important, as Italy, as I have already said,
5 recognises the need for the assurance that India
6 seeks. The language of the relaxation of the bail
7 conditions was and is an attempt to signal that Italy
8 acknowledges that India continues to have an interest
9 in securing Sergeant Girone's presence in India during
10 any trial, if India's jurisdiction is upheld by this
11 Tribunal in due course.

12 The language of the relaxation of bail conditions,
13 as well as that referring to the responsibility of the
14 Italian authorities, was also shorthand for saying
15 that Italy acknowledges that the Tribunal may consider
16 it appropriate to impose certain conditions on
17 Sergeant Girone's return to Italy. Such conditions
18 might include that Sergeant Girone is required to
19 surrender his travel documents to the Italian
20 authorities, and that he does not travel outside Italy
21 without express permission, and that he report
22 periodically to designated authorities in Italy
23 throughout the period in question. Such conditions
24 would operate alongside the undertaking already given
25 in Italy's name by the Italian Agent in these
26 proceedings.

1 Mr President, members of the Tribunal, overly
2 lengthy restrictions on the liberty and movement of an
3 individual should be a concern for the Tribunal. The
4 importance of such considerations has been underscored
5 by ITLOS over and again. Considerations of due
6 process of law must be applied in all circumstances.²⁰
7 This imperative should be all the more pressing in
8 circumstances in which the individual concerned has
9 not been subject to any lawful charge over four years
10 of detention, and may conceivably be detained for
11 a further four years still to come.

12 As ITLOS noted in its Provisional Measures Order
13 in this case, considerations of humanity must apply in
14 the law of the sea as they do in other areas of
15 international law.²¹ It is in these circumstances
16 that Italy comes before you with the present request,
17 a request in which Italy has sought to accommodate
18 India's concerns by seeking the prescription of
19 a provisional measure that would have the effect of
20 preserving the respective rights of both parties
21 pending a final determination by the Tribunal.

22 Mr President, members of the Tribunal, this
23 concludes my submissions this morning, I thank you for
24 your attention. Mr President, may I invite you to ask

²⁰ Cf. ITLOS Order, Declaration of Judge Paik, para. 8

²¹ ITLOS Order, para. 133

1 Mr Swaroop to the podium, please?

2 **THE PRESIDENT:** Thank you, Sir Daniel Bethlehem. I now
3 give the floor to Mr Sudhanshu Swaroop.

4 **SPEECH BY MR SWAROOP QC**

5 **MR SWAROOP:** Mr President, members of the Tribunal, it is
6 an honour to appear before you today on behalf of
7 Italy. I shall deal with events subsequent to the
8 arrest of the Marines in February 2012. I will focus
9 on the issue of delay in the Indian proceedings.
10 I will show that the delay in these proceedings has
11 been caused by India rather than by Italy or the
12 Marines. I will do so in order to correct India's
13 misleading portrayal of this situation, and in order
14 to provide context for the submissions that will come
15 from Professors Verdirame and Politi on the question
16 of "appropriateness".

17 Four years have passed since the arrest of
18 Sergeant Girone. India continues to exercise
19 jurisdiction over him, and no lawful charges have been
20 filed or framed against him. That much is understood
21 to be common ground.²²

22 India blames this situation on Italy and the
23 Marines. India uses strong language. It says that
24 Italy and the Marines have "thwarted the proceedings

²² WO, para. 2.6, 2.22, 3.57; WO page 21

1 in India repeatedly".²³ It says that "at each stage
2 of the case it was Italy's actions that prevented
3 India's efforts to proceed with the case
4 expeditiously."²⁴

5 Thus India rests its case on the surprising
6 proposition that the failure by the Indian authorities
7 for four years to bring lawful charges against the
8 Marines was in no way the fault of the Indian
9 authorities, and was at all times the fault of others.
10 An objective analysis of the facts shows that indeed
11 the cause of the delays was the actions of the Indian
12 authorities.

13 The Tribunal should recall the context of the
14 Indian proceedings.

15 Italy's position, right from the outset, in
16 February 2012, has been that Italy has exclusive
17 jurisdiction and that in any event the Marines are
18 immune from India's jurisdiction.

19 Furthermore, India was obliged under international
20 law to address the issue of immunity *in limine litis*,
21 in other words promptly at the start of the
22 proceedings, as Italy has explained in its Request
23 ²⁵and as India apparently does not dispute.

²³ WO, para. 2.33

²⁴ WO, para. 2.24

²⁵ Request, para. 78

1 It is convenient to analyse the Indian proceedings
2 in three stages. The detail of that analysis is set
3 out in our Request.²⁶ I will now outline the key
4 points.

5 Stage 1 lasted for just under one year, from
6 February 2012 until the Indian Supreme Court judgment
7 in January 2013. On 22nd February 2012, just after
8 the arrest of the Marines, immunity and jurisdiction
9 objections were raised in the Kerala High Court.²⁷
10 The Indian courts should have proceeded to determine
11 those objections swiftly.

12 Instead, what happened was this: in April 2012,
13 the Marines filed a further application directly in
14 the Indian Supreme Court because, as the Marines
15 complained in terms, the Kerala proceedings had
16 "failed to provide an expeditious remedy".²⁸

17 At the end of May of that year, the Kerala High
18 Court gave its judgment, dismissing the jurisdiction
19 and immunity objections.²⁹

20 In August of that year, the Supreme Court heard an
21 appeal from the Kerala High Court, together with the
22 earlier application which I just mentioned, which the

²⁶ Request, Appendices 3 and 4

²⁷ Writ Petition No. 4542 of 2012, 22 February 2012 (Annex IT-15)

²⁸ Writ Petition No.135 of 2012, 19 April 2012 (Annex IT-16)

²⁹ Judgment of Kerala High Court (Annex IT-17)

1 Marines had filed directly in the Supreme Court. On
2 18th January 2013, the Supreme Court gave its
3 judgment.

4 The judgment found that under international and
5 Indian law, the State of Kerala did not have
6 jurisdiction to investigate or try the matter, so that
7 the investigation conducted by the Kerala authorities
8 and the charge sheet filed by them was invalid.³⁰

9 However, the Supreme Court failed to determine the
10 question of India's jurisdiction, instead reserving
11 the matter, or some aspect of it, to a "Special Court"
12 which was to be established and making that
13 reservation in terms that were far from clear.
14 Fundamentally and remarkably, the Supreme Court
15 overlooked the entire issue of immunity.³¹

16 Thus, during this first stage, it was India that,
17 to use India's language, "thwarted" the proceedings.
18 The Kerala authorities had wasted the best part of
19 a year with an investigation that was admittedly
20 invalid, so that the whole investigation and charging
21 process would now have to be started from scratch at
22 the national level, and fundamentally, the Supreme

³⁰ *Republic of Italy & Ors v. Union of India & Ors*, Supreme Court of India Judgment of 18 January 2013, paras. 84 to 86 (Annex IT-19); WO, page 21

³¹ *Republic of Italy & Ors v. Union of India & Ors*, Supreme Court of India Judgment of 18 January 2013, paras. 100 to 103 (Annex IT-19)

1 Court, after a year-long wait, had failed to resolve
2 the jurisdiction and immunity objections.

3 Stage 2 lasted for just over one year, from that
4 January 2013 judgment until March 2014. That judgment
5 had expressly required that the Indian authorities
6 establish a "Special Court" and they dispose of the
7 proceedings "expeditiously".³² That did not happen.

8 Instead, what happened was this. Initially, the
9 Indian authorities failed to establish any Special
10 Court, attracting criticism from the Supreme Court at
11 a hearing in February 2013.³³

12 India only identified a Special Court and
13 appointed an investigating authority, the National
14 Investigation Agency or NIA, in April 2013.³⁴

15 Thereafter, on 13th January 2014, in the absence
16 of any ostensible progress, the Marines made an
17 application in the Supreme Court complaining about
18 "gross non-compliance" and "inordinate delay" by India
19 in its implementation of the January 2013 judgment.³⁵

20 Specifically, the Marines complained that they had

³² *Republic of Italy & Ors v. Union of India & Ors*, Supreme Court of India Judgment of 18 January 2013, p. 83, para. 101 (Annex IT-19)

³³ Order of the Supreme Court of India, 22 February 2013, para. 15 (Annex IT-48)

"The learned ASG is unable to tell us today as to whether the procedure for constitution of the Special Court directed to be set up by the Central Government, in consultation with the Chief Justice of India, has been initiated or not. In the event steps have been taken to constitute the Special Court, as directed, the Central Government is directed to do so, without any further delay."

³⁴ Notification of the Ministry of Home Affairs of India of 15 April 2013 (Annex IT-44)

³⁵ Interim Application, 13 January 2014, p. 20 (Annex IT-51)

1 been "detained in India for the last two years without
2 any criminal case against them being started" and they
3 complained that India had "failed to present" any
4 charges "for almost a year" despite the January 2013
5 directions of the Supreme Court "to try and dispose of
6 the case on a fast track basis".³⁶

7 Throughout this period, India was not being
8 "thwarted" by Italy or the Marines, India was being
9 thwarted by its own delays.

10 Stage 3 runs from March 2014 until the ITLOS Order
11 in August 2015. On 6th March 2014, the Marines filed
12 a Writ Petition under Article 32 of the Indian
13 Constitution. They filed it in the Indian Supreme
14 Court. That Writ Petition sought a determination of
15 the immunity objection, the fundamental point which
16 the Supreme Court had overlooked in its earlier
17 January 2013 judgment. ³⁷The petition also pursued
18 general challenges to the jurisdiction of India and
19 a specific challenge to the jurisdiction of the
20 National Investigation Agency.

21 At a hearing on 28th March 2014, the Indian
22 Supreme Court, to use India's own language, "allowed
23 the petition"³⁸, and ordered the Special Court to stay

³⁶ Interim Application, 13 January 2014, p. 2 (Annex IT-51)

³⁷ Article 32 Writ Petition, 6 March 2014 (Annex IT-56)

³⁸ WO, para. 2.31

1 its proceedings.

2 Again, this petition should have been determined
3 swiftly. Instead, it, and as a result the Special
4 Court proceedings, were brought to a complete halt.
5 That was due to the inaction of the Indian
6 authorities, in repeated breach of the Supreme Court
7 directions.

8 In summary, what happened was this: there were
9 four procedural hearings in front of the Supreme Court
10 Registrar in relation to this Article 32 Writ
11 Petition. Those hearings took place in July³⁹,
12 September⁴⁰ and December 2014⁴¹, and in March 2015⁴².

13 The Ministry of Law and Justice and the National
14 Investigation Agency, who were two of the respondents,
15 failed to appear at any hearing or to file any
16 response to this petition. The Ministry of Home
17 Affairs, the third respondent, only filed an affidavit
18 in September 2014. The Ministry of External Affairs,
19 the fourth respondent, failed to appear at the first
20 three hearings, and only in March 2015 stated that it
21 adopted the affidavit filed by the Ministry of Home
22 Affairs.

³⁹ Order of the Supreme Court Registrar, 18 July 2014 (Annex IT-59)

⁴⁰ Order of the Supreme Court Registrar, 25 September 2014 (Annex IT-60)

⁴¹ Order of the Supreme Court Registrar, 16 December 2014 (Annex IT-61)

⁴² Order of the Supreme Court Registrar, 10 March 2015 (Annex IT-62)

1 In April 2015, over one year since the original
2 petition was filed, pleadings had still not been
3 completed, and accordingly, the Indian Supreme Court,
4 on its own motion, put off the substantive hearing
5 until some indeterminate date "after the summer
6 vacations".⁴³

7 Once again, attempts by the Marines to pursue
8 their objections were blocked by the actions and
9 inactions of the Indian authorities.

10 Events were then superseded by the August 2015
11 ITLOS Order and the resulting general stay of Indian
12 proceedings.

13 I shall now respond to India's Written
14 Observations. India makes five main criticisms of the
15 actions of Italy and the Marines.

16 First, India complains that "the formal
17 commencement of the trial was stopped at the instance
18 of Italy and the Marines ... before the Kerala courts
19 in 2012 ..." ⁴⁴ That argument is misleading. As
20 I have explained, the commencement of a trial in
21 Kerala was stopped by the Supreme Court of India,
22 accepting the arguments of the Marines that the State
23 of Kerala did not have jurisdiction under
24 international or Indian law.

⁴³ Order of the Supreme Court of India, 28 April 2015 (Annex IT-63)

⁴⁴ WO, para. 2.32

1 Secondly, India complains that Italy and the
2 Marines stopped the trial "... a second time" by
3 filing the March 2014 Writ Petition, which I have just
4 mentioned, even though, as India argues, the Supreme
5 Court had given "full liberty" to argue "the issues of
6 jurisdiction" in the Special Court.⁴⁵ That criticism
7 is also without any foundation.

8 The real cause of the delay from March 2014, as
9 I have just described, was the repeated failure of the
10 Indian authorities to comply with the directions of
11 their own Supreme Court.

12 Furthermore, India's current position before this
13 Tribunal contradicts what India has said to its own
14 Supreme Court. India's affidavit responding to the
15 March 2014 Writ Petition argues that the questions of
16 India's jurisdiction and of immunity are, in the words
17 of that document, *res judicata*, having already been
18 determined, India claims, in the January 2013
19 judgment.⁴⁶

20 India's current position also contradicts what it
21 said at one point in its Written Observations in front
22 of ITLOS, where again it argued that by reason of the
23 January 2013 judgment, jurisdictional issues were *res*

⁴⁵ WO, para. 2.32

⁴⁶ Verbatim Record ITLOS/PV.15/C24/3 (uncorrected), p. 6, lines 36 - 49 (Bethlehem) (Annex IT-34 (c))

1 *judicata* in the Indian courts⁴⁷. India is speaking
2 with two voices on this issue.

3 In any event, as India accepts in its current
4 Written Observations, on 28th March 2014, the Indian
5 Supreme Court, in India's own words, "allowed this
6 petition", it allowed it to proceed, and accordingly
7 granted a stay of the Special Court proceedings.⁴⁸ No
8 doubt if that petition had been misconceived then the
9 Supreme Court would simply have said so.

10 Thirdly, India claims that: "On 20th April 2014
11 the Marines filed another Writ Petition challenging
12 the jurisdiction of India ..."⁴⁹ That is
13 a straightforward factual error in India's Written
14 Observations. There was no further written document
15 or Writ Petition on 20th April 2014.

16 Fourthly, India relies on Italy's alleged failure
17 to make certain witnesses available, namely four
18 Marines on board the "Enrica Lexie" vessel other than
19 Sergeants Latorre and Girone, and India said this
20 failure "further added to the delay".⁵⁰

21 The dispute about the questioning of the Marines

⁴⁷ ITLOS, India's WO, para. 1.19: "... in spite of a clear ruling by the Supreme Court in its judgment of 18 January 2013 ... Italy has disregarded the principle of *res judicata* and repeatedly approached the court on jurisdictional issues ..."

⁴⁸ WO, paras. 2.31 and 2.32

⁴⁹ WO, para. 2.32

⁵⁰ WO, para 2.30

1 was not causative of delay. The four Marines were
2 interviewed on 11th November 2013, that is India's own
3 date. However, on the chronology as I have just set
4 it out, India still failed thereafter to file any
5 charges. They failed to file any charges by their
6 13th January 2014 Delay Petition that I have
7 mentioned, and then they failed still to file any
8 charges by the March 2014 Article 32 Writ Petition.

9 Furthermore, as explained by Sir Daniel Bethlehem
10 at the ITLOS hearing, as explained at length,
11 ⁵¹indeed, Italy acted in compliance with Indian law at
12 all times in relation to these four witnesses.

13 Fifthly and finally, India says that the January
14 2014 petition by the Marines, in India's words,
15 "effectively blocked" the filing of charges by the
16 National Investigation Agency.⁵² That makes no sense
17 whatsoever. As I said earlier, the January 2014
18 Petition was a petition complaining about the
19 "inordinate delay" in filing charges. India's
20 argument appears to be that its own delay in filing
21 charges was caused by a petition complaining about
22 that delay.

23 In conclusion, Mr President, an objective
24 assessment of the facts shows that India, not Italy or

⁵¹ Verbatim Record ITLOS/PV.15/C24/3 (uncorrected), p. 3, line 46- p.5, line 15 (Bethlehem) (Annex IT-34 (c))

⁵² WO, para. 3.42

1 the Marines, has caused the delay in the Indian
2 proceedings.

3 May I now ask you, Mr President, to call
4 Sir Michael Wood to the podium.

5 **THE PRESIDENT:** Thank you, Mr Swaroop. We have just ten
6 minutes left before break. Would you like,
7 Sir Michael Wood, to start before the break, right
8 now, and then we will have a break and you will
9 continue? You have the floor.

10 **SPEECH BY SIR MICHAEL WOOD**

11 **SIR MICHAEL WOOD:** Thank you, Mr President, members of
12 the Tribunal. With your permission, I will indicate
13 a convenient moment for the break at around 11.00.

14 It is a great honour to appear before you and to
15 do so on behalf of Italy.

16 My task is to recall the requirements for
17 provisional measures as set out in Article 290 of
18 UNCLOS and the case law. I shall address this
19 Tribunal's prima facie jurisdiction; the rights
20 claimed by Italy and the link between those rights and
21 the provisional measure sought; and the
22 appropriateness of the measure under the present
23 circumstances to preserve the respective rights of the
24 parties.

25 Mr President, India has said very little in its

1 Written Observations and has failed to address most of
2 the points in Italy's request for provisional
3 measures. Instead, as Sir Daniel has just noted,
4 India invokes the principles of *res judicata* and *ne*
5 *bis in idem*⁵³, principles that frankly are irrelevant
6 to the present case.

7 Shabtai Rosenne in his work on provisional
8 measures, after describing ITLOS's Order in *Land*
9 *Reclamation*⁵⁴, rightly says that it:

10 "... lacks all the characteristics of a *res*
11 *judicata* and can be amended by the Annex VII arbitral
12 tribunal at any time ..."⁵⁵

13 In our case, India argues that Italy's Request is,
14 as it continues to put it, "inadmissible"⁵⁶. Its
15 basic point is that Italy's request "is in reality
16 a request to modify ITLOS's earlier Order"⁵⁷ and that
17 "there has been no change of circumstances justifying
18 the modification of the decision of ITLOS"⁵⁸.

19 Mr President, India's point is without merit. It
20 does, however, require us to look closely at various

⁵³ WO, para. 3.42

⁵⁴ *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p. 10

⁵⁵ S. Rosenne, *Provisional Measures in International Law. The International Court of Justice and the International Tribunal for the Law of the Sea* (OUP, 2005), p. 218.

⁵⁶ Verbatim Record ITLOS/PV.15/C24/3 (uncorrected), p. 9, lines 1-8 (Wood) (Annex IT-34 (c))

⁵⁷ WO, para. 3.30

⁵⁸ WO, para. 3.12. See also WO, paras. 1.3-1.8, 4.3-4.4

1 paragraphs of Article 290 of UNCLOS, a "rather complex
2 provision", as the Virginia Commentary remarks⁵⁹.

3 I can summarise Italy's response to India in two
4 short propositions. First, there is no requirement,
5 for the prescription of provisional measures under
6 Article 290, paragraph 1, of "new facts" or of
7 a change of circumstances. Second, even if there
8 were, this Annex VII Tribunal is in a quite different
9 situation from ITLOS: the two procedures, the special
10 procedure under the first sentence of paragraph 5 and
11 the regular procedure under paragraph 1, are quite
12 different.

13 One of the best analyses of the differences
14 between paragraph 5 and paragraph 1 is to be found in
15 Judge Mensah's Separate Opinion attached to the ITLOS
16 Order in the *MOX Plant* case⁶⁰. We have included this
17 opinion at tab 9 in the folders, and I will not read
18 all the relevant passages but I would commend to the
19 members of the Tribunal in particular the second,
20 fourth, fifth and sixth paragraphs.

21 In the fourth paragraph, which is at the bottom of
22 the first page of the tab, Judge Mensah points out
23 that:

⁵⁹ *United Nations Convention on the Law of the Sea 1982. A Commentary* (Virginia Commentary), vol. V, pp. 52-59, at p. 58

⁶⁰ *MOX Plant (Ireland v. United Kingdom), Order of 13 November 2001, Separate Opinion of Judge Mensah, ITLOS Reports 2001*, p. 118

1 "... the situations dealt with under the two
2 paragraphs [paragraphs 1 and 5] are different from
3 each other in two important respects."

4 He then describes the differences at some length.
5 For example, at the end of the fourth paragraph, he
6 says that the:

7 "... difference in the temporal dimension of the
8 competence of the tribunal imposes a measure of
9 constraint on a court or tribunal dealing with
10 a request for provisional measures under Article 290,
11 paragraph 5 ..."

12 As members of the Tribunal will know, Judge Mensah
13 has also written interestingly on this subject.⁶¹

14 India avoids taking you to ITLOS's own explanation
15 of why it did not prescribe a provisional measure
16 concerning the Marines. It did not do so because it
17 considered that any such measure was a matter for this
18 Tribunal. Sir Daniel has drawn attention to
19 paragraph 132 of the Order, which could hardly be
20 clearer.⁶²

21 India has not begun to explain how it can be said
22 that Italy now seeks a modification of the measure
23 prescribed in August last year. Instead, India relies

⁶¹ Thomas A. Mensah, "Provisional Measures in the International Tribunal for the Law of the Sea (ITLOS)", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 62 (2002), pp. 46-47

⁶² ITLOS Order, paras. 132 (Annex IT-35)

1 on selective passages from the ITLOS Order⁶³. It
2 refers to the statement that Italy's submission, "if
3 accepted, will not equally preserve the rights of both
4 parties", though it conveniently omits the following
5 words:

6 "... until the constitution of the Annex VII
7 arbitral tribunal."

8 It then refers to the statement that "the Tribunal
9 does not consider the two submissions of Italy to be
10 appropriate" but again omits crucial preceding words,
11 "due to the above", which is a reference back to
12 paragraph 132.

13 As Sir Daniel has pointed out, India fails to
14 refer to the only other Annex VII arbitral tribunal
15 that has been requested to prescribe provisional
16 measures under paragraph 1, following an ITLOS
17 prescription. As Sir Daniel mentioned, the *MOX Plant*
18 arbitral tribunal dealt carefully, after extensive
19 oral argument in this very room, with the issues now
20 raised by India: the relationship between paragraphs 1
21 and 5, and the question whether new circumstances had
22 to be shown.

23 The arbitral tribunal did so at paragraphs 39 and
24 40, which Sir Daniel has read out⁶⁴. It noted that

⁶³ ITLOS Order, paras. 126-127 (Annex IT-35)

⁶⁴ Order No. 3, 24 June 2003

1 Ireland's request was the first such request it had
2 received and hence its competence to prescribe
3 provisional measures was contained in Article 290,
4 paragraph 1. It went on to say that, "to the extent
5 it might be relevant", in other words the Tribunal did
6 not need to decide whether a change of circumstances
7 was required, the Tribunal considered that there has
8 been a change of circumstance, among other things
9 because of the fact that the arbitral tribunal itself
10 had now been constituted.

11 Mr President, it is 11.00 and that might be
12 a convenient moment to break.

13 **THE PRESIDENT:** Thank you. We will now break for 30
14 minutes, until 11.30, and so you will resume your
15 presentation at 11.30. The meeting is adjourned.

16 **(11.00 am)**

17 **(A short break)**

18 **(11.30 am)**

19 **THE PRESIDENT:** Sir Michael, I invite you to continue
20 your presentation.

21 **SIR MICHAEL WOOD:** Mr President, members of the Tribunal,
22 just before the break I had been recalling the *MOX*
23 *Plant* Order number 3 which India had signally failed
24 to mention. Instead of referring you to that case,
25 the only case directly on point, India seeks to rely
26 on the limited case law of the ICJ on the modification

1 of provisional measures. In our submission such
2 reliance is misplaced. In none of the cases was the
3 ICJ acting under Article 290, paragraph 1, following
4 a prescription of provisional measures under the
5 special procedure of paragraph 5.

6 An Annex VII Tribunal faced with provisional
7 measures prescribed by ITLOS under its "special
8 jurisdiction"⁶⁵, under the first sentence of
9 paragraph 5, is in a very different position from the
10 ICJ when it considers a request to modify its own
11 earlier provisional measures.

12 India relies upon the particular wording of a
13 passage from the second Provisional Measures Order in
14 the *Bosnia v Serbia* case⁶⁶. In doing so, it overlooks
15 the wholly exceptional nature of the second request in
16 that case, and the fact that the Court did there find
17 that the circumstances had changed.

18 Similarly, nothing relevant to this particular
19 point is to be learnt from the *Costa Rica v*
20 *Nicaragua*⁶⁷ or *Timor-Leste v Australia*⁶⁸ cases that

⁶⁵ *United Nations Convention on the Law of the Sea 1982. A Commentary* (Virginia Commentary), vol. V, pp. 52-59, at p. 59

⁶⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993, p. 325*

⁶⁷ *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 16 July 2013, I.C.J. Reports 2013, p. 230*

⁶⁸ *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia), Provisional Measures, Order of 22 April 2015*

1 India refers to in a footnote. In both cases, the
2 parties expressly asked for a modification of the
3 existing measures, and the court applied the specific
4 wording of its rules. India's citation without
5 context of a few words from *Costa Rica v Nicaragua*⁶⁹
6 is equally misplaced. All that the Court was saying
7 there was that Nicaragua's request for modification
8 did not have any bearing on the situation addressed in
9 an earlier order, and thus could not be based on any
10 change in that situation.

11 The second answer to India's argument is this: as
12 Sir Daniel has explained, the ITLOS Order of August
13 2015 was made under very different circumstances from
14 those before you today.

15 First, as it made clear, ITLOS was determining
16 what would be appropriate as a provisional measure in
17 the relatively short period, a matter of a few months,
18 pending the constitution of the present tribunal⁷⁰.
19 Unlike the present tribunal, it was not called upon to
20 consider what was needed pending the final award on
21 the merits. India's representatives insisted on this
22 point during the hearing in August.⁷¹

23 Second, the present Tribunal, which has

⁶⁹ WO, para. 3.19

⁷⁰ ITLOS Order, paras. 126, 132 (Annex IT-35)

⁷¹ Verbatim Record ITLOS/PV.15/C24/2 (uncorrected), 10 August 2015, p. 25, lines 3-4 (Bundy) (Annex IT-34 (b))

1 jurisdiction to decide upon the merits, is
2 particularly well placed to decide on the
3 appropriateness of the provisional measure now sought;
4 under the special procedure of paragraph 5 of
5 Article 290, ITLOS was inevitably operating in
6 something of a vacuum. That was acknowledged by ITLOS
7 itself.⁷²

8 Third, yet further time has elapsed, a further
9 seven months, since Sergeant Salvatore Girone was
10 first detained. And it is now clear, as it was not
11 when ITLOS heard the argument, that it will be years
12 before, in the event that they ever are, charges are
13 laid against him.

14 Fourth, India seems to conclude that the only "new
15 fact" raised by Italy is the suspension of proceedings
16 following the Order of August 2015, and argues that
17 this cannot be a new fact, because the decision of
18 ITLOS must have been based on the facts at that time.

19 India goes so far as to say that "the Order of
20 24th August does not change the situation"⁷³. That is
21 a startling conclusion. India seeks to dismiss as
22 irrelevant the essential fact that both parties have
23 taken steps, following the Order of August last year,

⁷² ITLOS Order, para. 132 (Annex IT-35)

⁷³ WO, para. 3.31

1 to suspend all criminal proceedings⁷⁴. On India's
2 side, the action taken includes an Order of the
3 Special Designated Court⁷⁵ and various Orders of the
4 Supreme Court of India⁷⁶. It is now clear, as it was
5 not in August 2015, that charges will not be laid, if
6 ever, for another three or four years.

7 Mr President, in summary on this point, Italy's
8 Request is a request under paragraph 1 of Article 290
9 for the prescription of a provisional measure
10 concerning Sergeant Girone. Italy is not asking this
11 Tribunal to "modify, revoke or affirm" the provisional
12 measure prescribed by ITLOS in August 2015, which
13 concerned the suspension of proceedings. Instead,
14 Italy requests this Tribunal to prescribe
15 a provisional measure under paragraph 1 of
16 Article 290.

17 What Italy has to do is to persuade this Tribunal
18 that the measure requested in respect of Sergeant
19 Salvatore Girone is appropriate in today's
20 circumstances. Indeed, as we explain, the measure
21 sought is not only appropriate, it is necessary.

22 Mr President, I now turn to the requirements for

⁷⁴ Report of the Republic of India pursuant to paragraph 141(2) of the ITLOS Order and Article 95(1) of the Rules of the Tribunal, 18 September 2015 (Annex IT-36); Report of the Italian Republic pursuant to paragraph 141(2) of the ITLOS Order and Article 95(1) of the Rules of the Tribunal, 23 September 2015 (Annex IT-37(a))

⁷⁵ Order of the Special Designated Court of 25 August 2015 (Annex IT-37 (b))

⁷⁶ Orders of the Supreme Court of India of 26 August 2015 and 3 September 2015 (Annexes IT-37 (c) and (d))

1 the prescription of provisional measures under
2 Article 290, paragraph 1. These are, first, the
3 Arbitral Tribunal may only prescribe provisional
4 measures if it considers that prima facie it has
5 jurisdiction under Part XV.

6 Second, the Tribunal needs to satisfy itself that
7 the rights claimed are "at least plausible"⁷⁷, and
8 that there is a link between the rights claimed and
9 the provisional measure sought.

10 Third, the measures must be ones that the Tribunal
11 "considers appropriate under the circumstances to
12 preserve the respective rights of the parties to the
13 dispute".

14 These requirements differ in at least one
15 important respect from those under the first sentence
16 of paragraph 5 of Article 290. That sentence confers
17 a special jurisdiction upon ITLOS, a jurisdiction
18 unique to UNCLOS. Pending the constitution of an
19 arbitral tribunal to which a dispute is being
20 submitted, ITLOS is empowered to prescribe provisional
21 measures under two express conditions: first, that it
22 considers prima facie that the tribunal which is to be
23 constituted would have jurisdiction, and second "that
24 the urgency of the situation so requires". The first,
25 prima facie jurisdiction, corresponds to what we find

⁷⁷ ITLOS Order, para. 84 (Annex IT-35)

1 in paragraph 1, but the second, the urgency of the
2 situation, is mentioned only in paragraph 5.

3 What had to be shown before ITLOS last August was
4 that the "urgency of the situation" required the
5 prescription of provisional measures by ITLOS prior to
6 the time when the present arbitral tribunal had been
7 constituted and was itself in a position to act on
8 a provisional measures request⁷⁸.

9 I now turn to the three requirements under
10 paragraph 1. The first is prima facie jurisdiction.
11 In contrast to the position it took before ITLOS,⁷⁹ in
12 its Written Observations, India does not appear to
13 contest prima facie jurisdiction. The Tribunal will
14 nevertheless wish to satisfy itself that it does
15 indeed have prima facie jurisdiction. We have dealt
16 with this in detail in our Request⁸⁰, so I can be very
17 brief.

18 There is clearly a dispute between the parties,
19 indeed ITLOS held in its order that "both parties
20 agree that there is a dispute between them on matters
21 of fact and law relating to the 'Enrica Lexie'
22 incident"⁸¹.

⁷⁸ ITLOS Order, para. 87 (Annex IT-35)

⁷⁹ ITLOS Order, para. 45 (Annex IT-35)

⁸⁰ Request, paras. 60-62

⁸¹ ITLOS Order, para. 51 (Annex IT-35)

1 It is equally clear that the dispute concerns the
2 interpretation or application of UNCLOS. India and
3 Italy disagree on the effect of many specific
4 provisions of UNCLOS in relation to the incident.⁸²

5 I do not think I need dwell at this stage on
6 Article 283, exchange of views⁸³, or Article 295,
7 exhaustion of local remedies, both of which were dealt
8 with by ITLOS⁸⁴, and neither of which have been raised
9 by India in its Written Observations.

10 So I now turn to the rights claimed by Italy,
11 which are set out in paragraph 29 of our Notification
12 instituting proceedings. For convenience, you will
13 find paragraph 29 at tab 10 of the folders.

14 Paragraph 29 begins by indicating that the parts
15 of UNCLOS that, in Italy's submission, India has and
16 is violating, are, in particular, Part II, on the
17 territorial sea and contiguous zone; Part V, on the
18 Exclusive Economic Zone; and Part VII, on the high
19 seas. India has and is violating Articles 2(3), 27,
20 33, 56, 58, 87, 89, 92, 94, 97, 100 and 300 of UNCLOS.
21 Sub-paragraphs (a) to (h) of paragraph 29 set out, in
22 a non-exhaustive manner, the ways in which India has
23 breached these various provisions. This is reflected

⁸² ITLOS Order, paras. 45-54 (Annex IT-35)

⁸³ Request, para. 60 (c)

⁸⁴ ITLOS Order, paras. 60 and 67 (Annex IT-35)

1 in the relief sought at paragraphs 33 and 34 of the
2 Notification.

3 The breaches include, in particular, the
4 proceedings against the two Marines, in violation of
5 various provisions of UNCLOS, including articles 27,
6 56(2), 92 and 97, you will find that at sub-paragraphs
7 (a) and (e) of paragraph 29.⁸⁵

8 In addition, by flagrantly ignoring the immunity
9 to which Italy is entitled in respect of its state
10 officials, its military personnel, India has violated
11 and continues to violate articles 2(3), 56(2) and
12 58(2) of UNCLOS as well as customary international
13 law, and you will find that at subparagraph (g) of
14 paragraph 29.⁸⁶

15 It is, of course, in relation to these continuing
16 breaches that we seek the present provisional measure
17 in respect of Sergeant Girone, as summarised at
18 paragraphs 63 to 66 of our Request for Provisional
19 Measures, and again for convenience, we have placed
20 these paragraphs at tab 11.

21 Paragraph 63 lists, at sub-paragraphs (a) to (g),
22 the rights of Italy that are particularly relevant to
23 the present Request. We show there, among other

⁸⁵ Notification, paras. 29 (a) and (e); 33(a), (c) and (d), and 34

⁸⁶ Notification, para. 29 (g); 33 (d); 34

1 things, how Italy's rights under the provisions of
2 UNCLOS there listed, and other relevant rules of
3 international law, include the right to the immunity
4 of Sergeant Girone and other officials, and its right
5 that they be treated in accordance with due process.

6 Then, at paragraphs 65 and 66, we summarise the
7 rights of Italy, relevant for the present request for
8 provisional measures, in two general propositions
9 which you have before you but which I do not think
10 I need read out.⁸⁷

11 Mr President, members of the Tribunal, I pause
12 here to note that during the ITLOS proceedings, India
13 contested some of these rights. For example, in its
14 Written Observations of 6th August 2015, it argued
15 that "there was ... no 'incident of navigation', nor
16 any collision", pursuant to Article 97 of UNCLOS⁸⁸;
17 and that therefore, "this case is not covered by
18 Article 97".⁸⁹

19 India also "denied that Italy can invoke the
20 benefit of any immunities recognised by the UNCLOS in
21 favour of the two Marines".⁹⁰ India repeats some of

⁸⁷ "First, Italy has the right to exercise jurisdiction over the Enrica Lexie Incident and Sergeant Girone, and that India not do so." "Second, Sergeant Girone's immunity from Indian jurisdiction, as an Italian State official, is Italy's right of immunity of its officials and agents. Sergeant Girone is an official of the Italian State who was arrested for acts committed in the performance of official duties, under Italy's Law No. 130 of 2 August 2011, leaving Italy as the only State entitled to exercise any jurisdiction."

⁸⁸ India's ITLOS Written Observations, para. 1.8 (Annex IT-33)

⁸⁹ India's ITLOS Written Observations, para. 1.11 (Annex IT-33)

⁹⁰ India's ITLOS Written Observations, para. 3.5 (Annex IT-33)

1 these points in its Written Observations at this
2 stage.

3 I would make three points in relation to these
4 arguments.

5 First, it is plain, as India itself acknowledges,
6 for example as regards the question of the Marines'
7 immunity from foreign criminal jurisdiction⁹¹, that
8 these are arguments for the merits. They are not to
9 be determined at the present stage of the proceedings.

10 Second, insofar as India is attempting to point to
11 a lack of "subject-matter" jurisdiction, it
12 misconstrues the prima facie jurisdiction requirement
13 under Article 290. That test is satisfied as long as
14 the provisions invoked by Italy appear prima facie to
15 afford a basis on which the jurisdiction of the
16 Annex VII Tribunal might be founded⁹². This is
17 manifestly so; for example, India's arguments as to
18 the applicability of Article 97 and denial of Italy's
19 rights of immunity under UNCLOS shows that there is
20 a dispute between Italy and India on the
21 interpretation and application of the Convention.

22 To say this is not to downplay the seriousness of
23 the breach of international law represented by India's

⁹¹ WO, paras. 3.38; Chapter 3 section II D (*Italy Assumes Immunity, which is a Merits Question*)

⁹² See also "*ARA Libertad*" (*Argentina v. Ghana*), *Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012*, p. 332, at p. 343, para. 60

1 purported assumption of criminal jurisdiction over the
2 two Italian naval personnel in respect of their
3 official acts. The ability of States to deploy
4 military personnel to carry out official acts,
5 including at sea, without fear of arrest or
6 prosecution by foreign states, is crucially important
7 in today's world. I would recall the words of the
8 International Court of Justice in the *Tehran Hostages*
9 case⁹³, when it spoke about the crucial importance of
10 immunities in that situation.

11 Third, insofar as India is attempting to disprove
12 the existence of the rights claimed by Italy, I would
13 draw the Tribunal's attention to the established case
14 law, to the effect that, at a provisional measures
15 stage, it is not for the Tribunal to determine the
16 definitive existence or non-existence of those rights
17 by reference to each isolated allegation. The
18 Tribunal need only satisfy itself of the plausibility
19 of rights claimed by the applicant after an assessment
20 of the evidence and arguments of the parties as
21 a whole.

22 Mr President, this takes me back to my core
23 submission. Each of these rights of Italy that I have
24 mentioned meets the plausibility test laid down in the
25 case law most recently by the Special Chamber of ITLOS

⁹³ *United States Diplomatic and Consular Staff in Tehran, Judgment, ICJ. Reports 1980*, p. 3 at p. 43, para. 92

1 in *Ghana/Côte d'Ivoire*⁹⁴. There is ample material in
2 our Notification and Statement of Claim which will, of
3 course, be developed in our memorial to show that the
4 rights claimed by Italy are plausible. Sir Daniel has
5 already recorded the basic facts.

6 The incident took place approximately 20.5
7 nautical miles from India's baselines, that is to say
8 well beyond India's territorial sea. Sergeant Girone
9 was on board the Italian flagged vessel, and was
10 acting in exercise of his official duties as laid down
11 by Italian law. Italy exercised its jurisdiction over
12 the case without hesitation or delay, and informed the
13 Indian authorities of this before Sergeant Girone was
14 arrested by India.

15 Notwithstanding, India has exercised and continues
16 to exercise jurisdiction over the incident and over
17 Sergeant Girone, who is an Italian official, in
18 flagrant violation of numerous provisions of UNCLOS.
19 Based on these facts, it is clear beyond doubt that
20 the violations of UNCLOS are at least plausible;
21 indeed, they are in our submission manifest.

22 Mr President, I now turn to the link between the
23 rights claimed by Italy and the provisional measure we

⁹⁴ *Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015*, para. 57 ("a court called upon to rule on a request for provisional measures does not need, at this stage of the proceedings, to settle the parties' claims in respect of the rights and obligations in dispute and is not called upon to determine definitively whether the rights which they each wish to see protected exist")

1 seek. The measure sought is set out in paragraph 112
2 of the Request, we have placed it at tab 12 in your
3 folders, both the registrar and the Agent read it out
4 this morning so I won't repeat it.

5 The link between these measures and the rights
6 claimed by Italy is obvious from a comparison of the
7 measures sought in the request and the relief sought
8 in the Notification. The request that India take such
9 measures as are necessary to relax the bail conditions
10 on Sergeant Girone in order to enable him to return to
11 Italy pending the final determination of this Tribunal
12 is directly linked to the claim in the Notification
13 that India must cease to exercise jurisdiction over
14 Sergeant Girone⁹⁵, and that India's exercise of
15 jurisdiction is in violation of the immunity to which
16 Italy is entitled⁹⁶. It is likewise directly linked
17 to our claims that Italy has exclusive jurisdiction⁹⁷,
18 and that India must cease to exercise any measure of
19 jurisdiction, including any measures of restraint⁹⁸.

20 Mr President, members of the Tribunal, I now turn
21 to the requirement that the provisional measures
22 should be "appropriate in the circumstances to

⁹⁵ Notification, para. 33 (a)

⁹⁶ Notification, para. 33 (b)

⁹⁷ Notification, para. 33 (c)

⁹⁸ Notification, para. 33 (d)

1 preserve the respective rights of the parties to the
2 dispute". We have set out our position at some length
3 in our Request⁹⁹. Professors Politi and Verdirame
4 will deal with the matter in a few minutes. I shall
5 confine myself therefore to two general comments.

6 First, India constantly refers to the requirement
7 of "urgency"¹⁰⁰. But in the context of the
8 prescription of a measure by the court or tribunal
9 with jurisdiction to hear the main case, "urgency",
10 while often referred to, does not really add anything
11 to the requirement that the measure sought should be
12 appropriate in the circumstances to preserve the
13 respective rights of the parties, in particular that
14 there is a real and imminent risk to the rights in
15 dispute before the Tribunal gives its final decision.

16 The requirement of urgency is expressly mentioned
17 in Article 290 only in the first sentence of
18 paragraph 5, and I dealt with this at the outset.
19 There it refers to the need for measures to be
20 prescribed before the arbitral tribunal to be
21 constituted will itself be in a position to prescribe
22 measures.

23 Throughout its Written Observations, India
24 conflates the requirement of urgency under the first

⁹⁹ Request, paras. 67-111

¹⁰⁰ WO, paras. 3.29-3.31

1 sentence of paragraph 5 with the requirement of a real
2 and imminent risk of irreparable prejudice prior to
3 a final decision of the arbitral tribunal and that, we
4 submit, is a basic flaw in its reasoning¹⁰¹.

5 The second point is this: India argues at some
6 length that the provisional measure sought by Italy
7 would prejudice the final decision¹⁰².

8 Professor Verdirame will deal with this. But it is
9 clearly not the case. In light of Italy's solemn and
10 binding undertaking to the effect that it will comply
11 with any award of this Tribunal requiring the return
12 of Sergeant Girone to India, in light of that, there
13 is no basis whatsoever for India's concerns. It is
14 clear that international tribunals must reason on the
15 basis that States before them will comply with such
16 undertakings. In the words of the ICJ in the
17 *Timor-Leste v Australia* case:

18 "Once a State has made such a commitment
19 concerning its conduct, its good faith in complying
20 with that commitment is to be presumed."¹⁰³

21 Mr President, members of the Tribunal, India's
22 case reflects a bias in favour of the status quo.

23 There are some cases in which the status quo may be

¹⁰¹ See, for example, WO, para. 3.34

¹⁰² WO, paras. 3.58-3.69

¹⁰³ *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014, p. 147, at p. 158, para. 44*

1 entitled to protection, but this is not one of them.

2 Sergeant Girone is only in India as a result of
3 conduct by India which Italy alleges to have been
4 unlawful. The Tribunal has yet to determine if it was
5 unlawful. But until it does, it cannot grant any
6 preference to a status quo so created. The Tribunal
7 may only ask whether the rights invoked by Italy are
8 plausible, and if they are, then the Tribunal has to
9 determine the most appropriate place for Sergeant
10 Girone to be for the duration of the arbitration,
11 having regard to all the relevant circumstances.

12 Where Sergeant Girone is today is not
13 a circumstance entitled to any weight in this
14 balancing exercise, because he is there only because
15 of the breach of Italy's rights which it now asserts.
16 The Tribunal must determine what is most appropriate
17 pending its final decision, not defer to a status quo
18 the lawfulness of which is the essence of the dispute
19 before the Tribunal.

20 A decision on the merits will determine which
21 state has jurisdiction over the "Enrica Lexie"
22 incident and over the Marines. A decision to return
23 Sergeant Girone to Italy pending that would say
24 nothing about that matter. It would neither determine
25 the question of jurisdiction over the incident, nor
26 the status of the Marines. Like any other provisional

1 measure, it would "in no way prejudice ... the
2 jurisdiction of the ... arbitral tribunal to deal with
3 the merits of the case or relating to the merits
4 themselves, and leaves unaffected the rights of Italy
5 and India respectively, to submit arguments in respect
6 of these questions."¹⁰⁴ That is a quote from the ITLOS
7 Order in this case.

8 If, however, the Tribunal allows India to keep
9 Sergeant Girone in India for the coming years, and
10 then the Tribunal decides against India on the merits,
11 there will be no way to remedy the prejudice that
12 Italy will have suffered in the meantime.

13 If, on the other hand, the Tribunal orders that
14 Sergeant Girone be allowed to return to Italy for the
15 duration of its proceedings, he can be sent back to
16 India, if that is required by the final decision of
17 the Tribunal. Neither State will have suffered any
18 prejudice in the meantime, because the measure already
19 prescribed by ITLOS precludes any proceedings in
20 either place.

21 Perhaps, Mr President, this is the right moment to
22 mention ITLOS' use of the word "equally" in
23 paragraph 126 of its Order. As you will recall, ITLOS
24 said that Italy's submissions "will not equally
25 preserve the respective rights of both parties".

¹⁰⁴ ITLOS Order, para. 137 (Annex IT-35)

1 ITLOS's purpose in using that word is, with respect,
2 not self-evident. So far as we can tell, it did not
3 appear in earlier case law, and it is not obvious what
4 it adds to the language of Article 290 "appropriate
5 ... to preserve the respective rights of the parties".
6 It is not obvious that "equally" is meaningful in the
7 context of provisional measures, and you can see that
8 by reading the ICJ's Order in the *Tehran Hostages*
9 case¹⁰⁵, at paragraph 29.

10 Mr President, we have summarised our position in
11 our Request to this Tribunal for provisional measures
12 in the following terms:

13 "Sergeant Girone's continuing deprivation of
14 liberty, which is in breach of minimum guarantees of
15 due process under international law, causes
16 irreversible prejudice to Italy's rights of
17 jurisdiction over and immunity for its officials."¹⁰⁶

18 Professor Mauro Politi and Professor Guglielmo
19 Verdirame will deal with the appropriateness
20 requirement in more detail. In particular, they will
21 set out the important due process considerations
22 relevant to this case. Those due process
23 considerations arise in relation to India's unlawful

¹⁰⁵ *United States Diplomatic and Consular Staff in Tehran, Provisional Measures, ICJ. Reports 1979*, p. 4 at pp. 16-17, para. 29

¹⁰⁶ Notification, p. 1, Summary fourth para

1 exercise of jurisdiction under UNCLOS, specifically an
2 exercise of jurisdiction over an Italian military
3 official, Sergeant Girone, in respect of his exercise
4 of official functions on behalf of Italy.

5 These considerations are intimately and
6 inextricably linked to Italy's rights at issue in
7 these proceedings. The *SAIGA (No 2)* judgment quoted
8 in our Request¹⁰⁷ is exactly on point, though in fact
9 the link between Italy and Sergeant Girone is much
10 stronger and more direct than that between St Vincent
11 and the crew in the *SAIGA* case.¹⁰⁸

12 Mr President, members of the Tribunal, before
13 closing, let me recall, as Sir Daniel also did, that
14 in its Written Observations, India summarised its
15 concern in the following way:

16 "India's concern relates to securing [Sergeant
17 Girone's] presence in India during trial. It would be
18 necessary for India to be assured that in case the
19 Tribunal finds that India has jurisdiction, the
20 presence of Sergeant Girone in India would be
21 ensured."¹⁰⁹

22 It is our submission that India may indeed be
23 assured that, if the award of this Tribunal requires

¹⁰⁷ Request, para. 68

¹⁰⁸ Notification, paras. 67-70

¹⁰⁹ WO, para. 3.67

1 the return of Sergeant Girone to India, the presence
2 of Sergeant Girone in India will indeed be ensured.
3 That being so, there is no obstacle to the
4 prescription of the provisional measure now sought by
5 Italy.

6 In conclusion, Mr President, members of the
7 Tribunal, I can summarise what I have said very
8 briefly. India's appeal to the principle of *res*
9 *judicata* is without merit. Italy is not inviting you
10 to modify the provisional measures prescribed by ITLOS
11 in its Order of 24th August 2015. The rights claimed
12 by Italy in the main proceedings are at least
13 plausible and the provisional measure that we now seek
14 is linked to those rights. And, as we have explained
15 in our Request¹¹⁰, and as the following speakers will
16 also show, the prescription of that measure is
17 appropriate, indeed it is necessary.

18 Mr President, the next speaker will be
19 Professor Politi and I would request that you invite
20 him to the podium. I thank you for your attention.

21 **THE PRESIDENT:** Thank you, Sir Michael. I would now like
22 to give the floor to Professor Politi.

23 **SPEECH BY PROFESSOR MAURO POLITI**

24 **PROFESSOR POLITI:** Thank you, Mr President.

¹¹⁰ Request, paras. 67-111

1 Mr President, members of the Tribunal, it is an honour
2 and a privilege for me to appear before you
3 representing Italy, my country, in these proceedings.

4 Together with Professor Verdirame, I intend to
5 address the question of "appropriateness" of the
6 requested measure under the circumstances pursuant to
7 Article 290, paragraph 1 of UNCLOS. I will focus on
8 the effects of the suspension of the proceedings
9 ordered by ITLOS on the position of Sergeant Girone,
10 and on the guarantees of due process resulting from
11 international norms accepted by both Italy and
12 India.¹¹¹

13 What I wish to underline is that the suspension of
14 domestic proceedings should result in the granting of
15 Italy's request for provisional measure. If this does
16 not happen, the violation by India of fundamental
17 principles of due process will be unreasonably
18 perpetuated. In fact, Sergeant Girone will continue
19 to be detained in India for the next two to four
20 years, as explained by Sir Daniel.

21 These due process considerations are fully
22 relevant in the application of UNCLOS. It is
23 therefore surprising that India paid so little
24 attention to them.

¹¹¹ E.g. the International Covenant on Civil and Political Rights (ICCPR) of 1966. Italy ratified the ICCPR on 15 September 1968 while India acceded on 10 April 1979

1 First, and crucially, as emphasised by Sir Michael
2 earlier, these considerations are intimately and
3 inextricably linked to Italy's rights in the dispute,
4 as they concern an official of the Italian Republic
5 who is being subjected to measures in breach of due
6 process as a direct consequence of the official
7 functions he was exercising on behalf of Italy.

8 Secondly, considerations of due process of law
9 apply in all circumstances, as affirmed by ITLOS on
10 many different occasions¹¹².

11 Thirdly, in assessing the appropriateness in the
12 circumstances of a request under Article 290,
13 paragraph 1, a wider range of factors are to be
14 considered by a tribunal. In the present
15 circumstances, due process is a manifestly relevant
16 and important factor.

17 Mr President, I will address more specifically the
18 following points: the effects of the suspension; the
19 nature and scope of fundamental principles of due
20 process; the obligation to formulate charges; and the
21 exceptional character of pre-trial detention.

22 The result of the suspension of the proceedings

¹¹² See “*Juno Trader*” (*Saint Vincent and Grenadines v. Guinea-Bissau*), *Prompt Release, Judgment, ITLOS Reports 2004*, p. 17, at pp. 38-39, para. 77; “*Tomimaru*” (*Japan v. Russian Federation*), *Prompt Release, Judgment, ITLOS Reports 2005-2007*, p. 74, at p. 96, para. 76; *M/V “Louisa”* (*Saint Vincent and Grenadines v. Spain*), *Merits, Judgment, ITLOS Reports 2013*, p. 4, at p. 46, para. 155; and Declaration of Judge Paik, para. 8, appended to the Order of 24 August 2015 in *The “Enrica Lexie” Incident (Italy v. India)*, Request for the Prescription of Provisional Measures

1 ordered by ITLOS is that India continues to exercise
2 jurisdiction in substance notwithstanding the stay.
3 In criminal proceedings, there is nothing more
4 "assertive" than depriving an individual of his or her
5 freedom. Every day that Sergeant Girone is detained
6 in Delhi, Italy suffers irreversible prejudice.
7 Sergeant Girone is required to remain in Delhi as
8 a guarantee he will be available for a possible
9 criminal trial there. However, it is a fact that no
10 criminal trial can be held until this Tribunal gives
11 its final award.

12 The Order issued by ITLOS on an emergency basis
13 pending constitution of this Tribunal leaves for this
14 Tribunal the task of determining whether it is
15 appropriate to detain an Italian Marine in India for
16 the coming years where he cannot be tried and, as
17 I will further explain, is not subject to any charge.

18 International jurisprudence supports the
19 conclusion that with proceedings stayed, it would not
20 be appropriate for India to continue to detain him.
21 This is based also on the assumption that a procedural
22 suspension, especially if due to last for a long
23 period of time, requires an immediate and thorough
24 review of the reasons for any continuing deprivation
25 of liberty.

26 I refer, in particular, to the decisions of the

1 International Criminal Court in the *Lubanga* case
2 concerning suspension of the proceedings and release
3 of the accused. Both in 2008¹¹³ and 2010, the trial
4 chamber ordered a stay of the proceedings¹¹⁴ and the
5 release of the accused due to the absence of
6 guarantees of a fair trial, the uncertainty of
7 a future trial, and the length of Lubanga's
8 detention¹¹⁵.

9 The Appeals Chamber then reversed the stay of
10 proceedings, but it also said that the necessity of
11 continued detention should have been assessed
12 carefully by the Trial Chamber, on the basis of the
13 criteria under the Rome Statute¹¹⁶, and considering
14 that any detention should not be "for an unreasonably
15 long period of time, in breach of internationally
16 recognised human rights"¹¹⁷. Which means that the
17 Appeals Chamber found that, given the stay of the

¹¹³ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Decision on the release of Thomas Lubanga Dyilo, ICC-01/04-01/06-1418, 2 July 2008, paras. 30 and 34, available at <https://www.icc-cpi.int/iccdocs/doc/doc522804.PDF#search=ICC%2D01%2F04%2D01%2F06%2D1418>

¹¹⁴ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Redacted Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, ICC-01/04-01/06-2517-Red, 8 July 2010, para. 31, available at <https://www.icc-cpi.int/iccdocs/doc/doc906146.pdf>

¹¹⁵ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Oral Decision of Trial Chamber I of 15 July 2010 to release Thomas Lubanga Dyilo, ICC-01/04-01/06-T-314-ENG., p. 20, lines 7-25, available at <https://www.icc-cpi.int/iccdocs/doc/doc1438370.pdf>

¹¹⁶ Article 58, paragraph 1

¹¹⁷ ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the release of Thomas Lubanga Dyilo", ICC-01/04-01/06-1487, 21 October 2008, para. 37, available at <https://www.icc-cpi.int/iccdocs/doc/doc578365.pdf>

1 proceedings, prolonging the custody of the accused
2 should have been considered with the greatest care and
3 in strict compliance with the criteria that justify
4 detention under international law.

5 The criteria to which the Appeals Chamber referred
6 are well-known: the risk of repetition of the conduct,
7 the possibility of the suspect or accused tampering
8 with the evidence, and the risk that he flees from
9 justice. As the Human Rights Committee has recently
10 established in its General Comment No 35 on "Liberty
11 and Security of Persons":¹¹⁸

12 "Detention pending trial must be based on an
13 individualised determination that is reasonable and
14 necessary taking into account all the circumstances,
15 for such purposes as to prevent flight, interference
16 with evidence or the recurrence of the crime."¹¹⁹

17 None of the above criteria is met in the case of
18 Sergeant Girone. His continuing detention does not
19 serve any of the above purposes. The suspension of
20 domestic proceedings is, and must continue to be, in
21 place.

22 Against this background, India's allegation that

¹¹⁸ Para. 38

¹¹⁹ Human Rights Committee, General Comment No. 35 (2014), CCPR/C/GC/35, para. 38, available at <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsrdB0H115979OVGGB%2bWPAXjdnG1mwFFfPYGIInfb%2f6T%2fqwtc77%2fKU9JkoeDcTWWPIgDgGLtUi69eXTdCtFxOwwX0kHI764R7WYYohkOgOK1n>

1 Italy would not comply with the undertakings given on
2 the return of Sergeant Girone becomes even less
3 credible. Since the criteria for continuing detention
4 during the suspension must be applied in a rigorous
5 manner, the risk of fleeing justice must also be
6 assessed only on the basis of concrete elements and
7 circumstances. It cannot be implied, as India appears
8 to suggest, from mere speculations about the
9 intentions of one of the parties to the proceedings.

10 Mr President, members of the Tribunal,
11 internationally recognised principles of due process
12 make Italy's requested measure entirely appropriate.
13 Nowadays, respect for these standards and principles
14 is not an option. It constitutes a firm obligation
15 and a fundamental tenet of the contemporary
16 international legal order.

17 In particular, there is no *a priori* level of
18 "gravity" of the offence that may justify
19 non-compliance with protecting fundamental rights that
20 impact on the liberty and security of persons. Even
21 when the gravest crimes of international concern are
22 involved, guarantees of respect for the rights of the
23 accused are key elements of the legal framework for
24 their prosecution and punishment.

25 In fact, the rights of the accused are fully
26 protected in the main instruments of international

1 criminal justice, from the statutes of the ad hoc
2 tribunals to those of the Special Court for
3 Sierra Leone¹²⁰ and of the Special Tribunal for
4 Lebanon¹²¹, to the ICC Statute, especially, but not
5 only, Article 67. And precisely in the Rome Statute,
6 Article 21, paragraph 3 says that the application and
7 interpretation of the law by the Court, including then
8 the Statute itself, must be consistent with
9 "internationally recognised human rights".

10 There is clear and sound jurisprudence on this
11 point. For example, the ICTY Decision of 9th October
12 2002 in *Prosecutor v Dragan Nikolić*:

13 "The Trial Chamber observes first that it attaches
14 great importance to respect for the human rights of
15 the accused and to proceedings that fully respect due
16 process of law ... This Tribunal has a responsibility
17 to fully respect 'internationally recognised standards
18 regarding the rights of the accused at all stages of
19 its proceedings'. Such standards 'are, in particular,
20 contained in Article 14 of the International Covenant
21 on Civil and Political Rights'."¹²²

¹²⁰ Art. 17

¹²¹ Art. 16. See also article 28 of the Statute of the Special Tribunal for Lebanon which refers to "the highest standards of international criminal procedure" as guidance for the adoption of the Rules of Procedure and Evidence

¹²² ICTY, *Prosecutor v. Dragan Nikolić*, Trial Chamber II, Decision on defence motion challenging the exercise of jurisdiction by the Tribunal, Case No. IT-94-2-PT, 9 October 2002, para. 110, available at http://www.icty.org/x/cases/dragan_nikolic/tdec/en/10131553.htm

1 I can also quote the ICTR Appeals Chamber's
2 decision in *Prosecutor v JB Barayagwiza* that released
3 the appellant by saying that while the crimes
4 allegedly committed were "very serious", "the
5 fundamental rights of the appellants were repeatedly
6 violated". In the same decision, the Appeals Chamber
7 stated that:

8 "The International Covenant on Civil and Political
9 Rights is part of general international law and is
10 applied on that basis."¹²³

11 Crucially, in its August 2015 Order in this case,
12 ITLOS re-affirmed its views that "considerations of
13 humanity must apply in the law of the sea as they do
14 in other areas of international law".¹²⁴ And a number
15 of judges underscored the principle that due process
16 must be applied in all circumstances.¹²⁵ And this
17 passage has been already quoted by my colleagues.

18 Any decision on Italy's request will need then to
19 address the issue of the conformity of the continuing
20 detention of Sergeant Girone with principles of due
21 process. The first of these principles is the
22 obligation to formulate charges promptly and in

¹²³ ICTR, *Prosecutor v. Jean Bosco Barayagwiza*, Appeals Chamber, Decision, Case No. ICTR-97-19-AR72, 3 November 1999, paras. 40 and 106, available at <http://ictrcaselaw.org/docs/doc5006.PDF>

¹²⁴ ITLOS Order, para. 133 (Annex IT-35). See also the Declarations of Judge Paik (para. 8) and Judge *ad hoc* Francioni (para. 23) appended to the Order

¹²⁵ International Court of Justice, *Corfu Channel (United Kingdom v. Albania)*, *Merits, Judgment*, I.C.J. Reports 1949, p. 4, at p. 22. For ITLOS case-law, see *supra*, footnote 112

1 detail, both at the time of the arrest and during the
2 exercise of criminal jurisdiction. There can be no
3 more fundamental norm of due process, since it is
4 strictly connected with *nullum crimen sine lege*.

5 This obligation is contained in article 9,
6 paragraph 2 and article 14, paragraph 3(a) of the
7 ICCPR, the International Covenant on Civil and
8 Political Rights, an instrument to which both Italy
9 and India are parties.

10 Under Article 9, paragraph 2:

11 "Anyone who is arrested shall be informed, at the
12 time of arrest, of the reasons for his arrest and
13 shall be promptly informed of any charges against
14 him."

15 And Article 14, paragraph 3(a) states that:

16 "In the determination of any criminal charge
17 against him, everyone shall be entitled to the
18 following minimum guarantees, in full equality: (a) To
19 be informed promptly and in detail in a language which
20 he understands of the nature and cause of the charge
21 against him ..."

22 According to General Comment No 35 of the Human
23 Rights Committee:

24 "Paragraph 2 of Article 9 imposes two requirements
25 for the benefit of persons who are deprived of
26 liberty. First, they shall be informed, at the time

1 of arrest, of the reasons for the arrest. Second,
2 they shall be promptly informed of any charges against
3 them."¹²⁶

4 The obligation to formulate charges promptly
5 requires that States Parties to the ICCPR not only
6 make sure that the accused has a factual knowledge of
7 the matters alleged against him¹²⁷, but also that
8 charges are formally notified to the accused¹²⁸. For
9 India to say that in any event "Italy and the Marines
10 were fully aware of the charges" wholly ignores the
11 fundamental requirement that the accused must be duly
12 informed of the details of the charges against him¹²⁹.

13 In *Grant v Jamaica*, the Human Rights Committee
14 stated:

15 "With regard to the author's allegations
16 concerning a violation of Article 9, the Committee
17 observes that the State Party is not absolved from its
18 obligation under Article 9, paragraph 2, of the
19 Covenant to inform a person of the reasons of his

¹²⁶ UN Human Rights Committee, General Comment No. 35 (2014), CCPR/C/GC/35, para. 24, available at <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsrdB0H115979OVGGB%2bWPAXjdnG1mwFFfPYGIInfb%2f6T%2fqwtc77%2fKU9JkoeDcTWWPIgDgGLtUi69eXTdCtFxOwwX0kHI764R7WYYohkOgOK1n>

¹²⁷ See, for example, UN Human Rights Committee, Communication No. 1955/2010, *Al Gertani v. Bosnia and Herzegovina*, *General Assembly Official Records, Sixty-ninth session, Supplement No. 40 (A/69/40)*, Vol. II, p. 369, at p. 381, para. 10.5; UN Human Rights Committee, Communication No. 2094/2011, *F.K.A.G. et al. v Australia*, *ibid.*, p. 433, at pp. 449-450, para. 9.5

¹²⁸ UN Human Rights Committee, Communication No. 1890/2009, *Baruani v. DRC*, *ibid.*, p. 259, at p. 264, para. 6.6

¹²⁹ India's Written Observations, para. 3.57

1 arrest and of the charges against him, because of the
2 arresting officer's opinion that the arrested person
3 is aware of them."¹³⁰

4 This obligation is recognised also in the ICC
5 Statute¹³¹, and in the Statutes of the ad hoc
6 tribunals¹³². ICTY jurisprudence has elaborated on
7 this aspect, by establishing that: the indictment must
8 plead with sufficient detail the essential elements of
9 the alleged criminal conduct; if the prosecution fails
10 to comply with this requirement, it will suffer from
11 a material defect; the prosecution cannot make vague
12 allegations on the basis that they might be clarified
13 at a later stage¹³³.

14 Crucially, all these provisions require, as
15 I said, a formal act of charging a given individual
16 with specified criminal conduct. Sergeant Girone is
17 detained in India without being subject to any lawful
18 criminal charge¹³⁴. And it is of no importance to
19 raise the point, repeatedly made by India, that it was
20 impossible to "frame" the charges against the Marines

¹³⁰ Communication No. 597/1994, *General Assembly Official Records, Fifty-first session, Supplement No. 40 (A/51/40)*, Vol. II, p. 206, at p. 212, para. 8.1

¹³¹ Article 67, para. 1(a)

¹³² Article 21, para. 4(a) of the ICTY Statute, and article 20, para. 4(a) of the Statute of ICTR

¹³³ See in particular ICTY, *Prosecutor v. Zoran Kupreskic et al.*, Appeals Chamber, Appeal Judgement, Case No. IT-95-16-A, 23 October 2001, paras. 88, 114, available at <http://www.icty.org/x/cases/kupreskic/acjug/en/kup-aj011023e.pdf>

¹³⁴ India's Written Observations, para. 2.6

1 due to the delays caused by the applications filed by
2 Italy and the Marines during the Indian proceedings.
3 The legitimate exercise of the right of defence cannot
4 be pleaded by India to justify the delay in complying
5 with the duty properly to inform the accused of the
6 charges against him.

7 Again, the relevant case law is clear. In *Eckle v*
8 *Germany*, the European Court of Human Rights stated
9 that no blame could be laid on an accused "for having
10 made full use of the remedies available under the
11 domestic law"¹³⁵. Moreover, in *Corigliano v Italy*, the
12 same European Court concluded that Article 6 of the
13 European Convention on Human Rights on fair trial does
14 not require "the person concerned actively to
15 co-operate with the judicial authorities".¹³⁶

16 Also in *Guerreiro v Portugal*, the court stated
17 that the accused cannot be criticised for having used
18 all the defences provided by the domestic law¹³⁷.

19 We can then conclude that Sergeant Girone is
20 facing and will continue to face, if Italy's Request
21 is not granted, a totally unlawful pre-charge
22 deprivation of liberty.

¹³⁵ European Court of Human Rights, *Case of Eckle v. Germany*, 15 July 1982, Series A, No. 51, Application No. 8130/78, para. 82, available at [http://hudoc.echr.coe.int/eng#{"itemid":\["001-57476"\]}](http://hudoc.echr.coe.int/eng#{)

¹³⁶ European Court of Human Rights, *Case of Corigliano v. Italy*, 10 December 1982, Series A, No. 57, Application No. 8304/78, para. 42, available at [http://hudoc.echr.coe.int/eng#{"itemid":\["001-57463"\]}](http://hudoc.echr.coe.int/eng#{)

¹³⁷ European Court of Human Rights, *Case of Guerreiro v. Portugal*, 31 January 2002, Application No. 45560/99, para. 34, available only in French at [http://hudoc.echr.coe.int/eng#{"itemid":\["001-64581"\]}](http://hudoc.echr.coe.int/eng#{)

1 I now turn to the second principle concerning due
2 process, which is that pre-trial detention, let alone
3 pre-charge detention, should be the exception and not
4 the rule in criminal proceedings. Article 9,
5 paragraph 3 of ICCPR, in the second sentence, is quite
6 clear:

7 "It shall not be the general rule that persons
8 awaiting trial shall be detained in custody."

9 In its General Comment No 35, the Human Rights
10 Committee has also stated that the second sentence
11 "applies to persons awaiting trial on criminal
12 charges, that is, after the defendant has been
13 charged, but a similar requirement prior to charging
14 results from the prohibition of arbitrary detention in
15 paragraph 1", which is exactly the situation of
16 Sergeant Girone.

17 Paragraph 37 of the same Comment specifies that:

18 "... extremely prolonged pre-trial detention may
19 also jeopardise the presumption of innocence under
20 Article 14, paragraph 2."

21 These pronouncements are also supported by
22 relevant international jurisprudence. For example,
23 the ICC in the *Gbabgo* case refers to the "fundamental
24 principle that deprivation of liberty [pending trial]

1 should be an exception and not the rule".¹³⁸

2 Furthermore, the Inter-American Court of Human Rights
3 stated that prolonged pre-trial detention would
4 violate the presumption of innocence if such detention
5 is not strictly necessary to ensure that the detained
6 person will not impede the efficient development of an
7 investigation and that he will not evade justice¹³⁹.

8 India seems to justify the length of Girone's
9 pre-trial detention solely on the basis of the
10 "seriousness" of the crime allegedly committed by
11 him¹⁴⁰. But we already said that based on the constant
12 case law, the gravity of the alleged offence does not
13 justify disregarding the rights of the accused.

14 Furthermore, the point remains that pre-trial
15 detention cannot have the purpose of punishing the
16 accused before a judgment is handed down by a court of
17 law.

18 Rather, as a precautionary measure, it can be
19 applied only under the strict conditions and within
20 the temporal limits set out precisely by the rules of
21 due process.

22 Mr President, members of the Tribunal, what we are

¹³⁸ ICC, *Prosecutor v. Laurent Gbagbo*, Pre-Trial Chamber I, Third Decision on the Review of Laurent Gbagbo's Detention Pursuant to Art 60(3) of the Rome Statute, ICC-02/11-01/11-454, 11 July 2013, para. 55, available at <https://www.icc-cpi.int/iccdocs/doc/doc1618385.pdf>

¹³⁹ IACHR, *Suárez Rosero v. Ecuador*, Merits, Judgement, 12 November 1997, Series C No. 35, paras. 77 and 78, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_35_ing.pdf

¹⁴⁰ See, in particular, India's Written Observation, para. 3.52

1 witnessing, in the case of Sergeant Girone, an Italian
2 military officer, is a dramatic sequence of violations
3 of his fundamental right to liberty and security. The
4 Universal Declaration of Human Rights provides that:

5 "No one shall be subjected to arbitrary arrest,
6 detention or exile."¹⁴¹

7 In the present case, the continued deprivation of
8 liberty imposed on Sergeant Girone would be both
9 unlawful and arbitrary. Unlawful and arbitrary
10 because inconsistent with the suspension of domestic
11 proceedings ordered by ITLOS. Unlawful and arbitrary
12 because of lack of any lawful charge brought against
13 Girone. Unlawful and arbitrary, as
14 Professor Verdirame will further demonstrate, because
15 unnecessary, disproportionate and unreasonable under
16 the present circumstances, especially due to the
17 prospect of being prolonged for years pending the
18 final decision of the Arbitral Tribunal.

19 This will be regarded as a leading case from many
20 viewpoints, and the Tribunal is facing an important
21 choice, a choice that will have wide repercussions on
22 the existing level of international protection against
23 violations of due process.

24 On the one hand, the Tribunal could allow a member
25 of the armed forces of a State to spend four more

¹⁴¹ Article 9

1 years unlawfully detained in another State. Or it
2 could allow him to return to his country pending the
3 Tribunal's final decision; and this on the basis of
4 Italy's undertaking to return him, should this be
5 required by that decision.

6 In our view, if the Tribunal were to choose the
7 first option, the disregard of fundamental principles
8 of due process would be self-evident.

9 To grant Italy's requested measure would lead
10 instead to a fair and reasonable outcome with no
11 prejudice inflicted on either party to the dispute.
12 And, not less importantly, with full respect for those
13 individual rights and principles of due process that
14 are recognised by today's international community as
15 embodying the very concept of "rule of law".

16 This concludes my presentation today. I thank
17 you, Mr President, members of the Tribunal, for your
18 attention. May I now ask you, Mr President, to call
19 Professor Verdirame to the podium?

20 **THE PRESIDENT:** Thank you, Professor Politi. And

21 I invite now Professor Verdirame to take the floor.

22 **SPEECH BY PROFESSOR GUGLIELMO VERDIRAME**

23 **PROFESSOR VERDIRAME:** Thank you, Mr President.

24 Mr President, members of the Tribunal, it is an honour
25 and a privilege to appear before you on behalf of the

1 Italian Republic. My task today is to bring the
2 various factual and legal assessments which you heard
3 from those who spoke before me together, and show
4 Italy's request to be entirely appropriate, and indeed
5 necessary, under the circumstances to preserve the
6 respective rights of the parties to this dispute.

7 Mr President, I will present my submissions in two
8 parts. In the first part, I will concentrate on the
9 detention of Sergeant Girone in Delhi and explain why,
10 in light of the applicable principles set out by
11 Professor Politi, his continuing detention for
12 a further period of between two to four years would be
13 wholly unwarranted.

14 In the second part of my submissions, I will
15 address the question of the preservation of rights.
16 Contrary to India's submissions, Italy's Request does
17 not in any way prejudice the merits and it is most
18 emphatically not the case that this Request would be
19 prejudicial to India's rights.

20 But before I proceed, Mr President, let me briefly
21 return to an overarching consideration that others
22 have developed before me, and of which we should not
23 lose sight. While it is the situation of one
24 individual that concerns us today, the central object
25 of this request is the preservation of Italy's rights.
26 The position of Sergeant Girone is an inseparable part

1 of Italy's rights to be preserved. The harm that he
2 suffers, and would continue to suffer in the absence
3 of the requested provisional measure, is a direct
4 consequence of India's continuing exercise of
5 jurisdiction over him.

6 As you heard from Sir Michael and
7 Professor Politi, the principle that due process of
8 law, including considerations of humanity, must apply
9 in all circumstances, is also enshrined in the
10 jurisprudence under UNCLOS. Due process
11 considerations are even more intensely engaged in this
12 case, Mr President, members of the Tribunal, as they
13 arise in close connection to the very exercise of
14 jurisdiction which is the object of the dispute that
15 has been submitted to you.

16 Mr President, members of the Tribunal, let me now
17 turn to the first part of my submissions. Our central
18 point is that the continuation of Sergeant Girone's
19 detention in India for the full duration of the
20 Annex VII proceedings is unjustifiable in light of the
21 facts and circumstances of this case, which Sir Daniel
22 and Mr Swaroop discussed, and the applicable legal
23 principles which Sir Michael and Professor Politi set
24 out.

25 Mr President, it is, of course, true that pending
26 the outcome of a criminal trial, States may sometimes

1 restrict the liberty of accused persons or deprive
2 them of it altogether. It is equally true that states
3 must comply with due process obligations when they
4 exercise these jurisdictional powers, and they may
5 have to do so even more scrupulously when the very
6 existence of their jurisdiction is contested.

7 The key principles of due process engaged in this
8 case have already been identified. I will now put in
9 sharper relief three strands of critical
10 considerations that you should have in mind when
11 assessing whether it would be appropriate in the
12 circumstances to relax the bail conditions on Sergeant
13 Girone so as to enable him to return to Italy, under
14 the responsibility of the Italian authorities, pending
15 the final determination by this Tribunal.

16 The first consideration, Mr President, concerns
17 the overall characterisation of the situation before
18 you. The exercise of criminal jurisdiction that
19 results in the continuing detention of Sergeant Girone
20 is extraordinary in several ways. To begin with,
21 Sergeant Girone is not even an accused person, in the
22 sense in which this expression is understood in
23 international law. He was never even formally and
24 lawfully charged.

25 Moreover, all domestic court proceedings are
26 stayed. Crucially, until this Tribunal has decided on

1 the merits, we will not know whether a criminal trial
2 in India would be permissible under international law.

3 This is a unique situation which cannot be
4 disposed of by reference to the general power of
5 states to arrest and detain suspects in criminal
6 proceedings.

7 The second consideration, Mr President, goes to
8 the legal characterisation of Sergeant Girone's
9 detention in India. India has sought to play down the
10 severity of the measures of restraint imposed upon
11 him.

12 The test in international law for deciding whether
13 a particular situation amounts to a deprivation of
14 liberty is settled. The Human Rights Committee has
15 developed a purposive interpretation of that
16 expression "deprivation of liberty" and emphasised
17 throughout that deprivations of liberty do not arise
18 only in cases of imprisonment or house arrest, but
19 also in other less conventional cases including
20 confinement to a specific location¹⁴².

21 Under a test first set out by the European Court
22 of Human Rights, and now widely followed¹⁴³, where

¹⁴² Human Rights Committee, General Comment No. 35 (Article 9: Liberty and security of person), para. 5

¹⁴³ E.g.: Inter-American Court of Human Rights, *Advisory Opinion on the Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, 19 August 2014, paras. 146 and 187, http://www.corteidh.or.cr/docs/opiniones/seriea_21_eng.pdf; UK House of Lords, *Secretary of State for the Home Department v. JJ and others (FC)*, [2007] UKHL 45, para. 15, <http://www.bailii.org/uk/cases/UKHL/2007/45.html>

1 individuals are not physically in prison but forced to
2 reside in a particular location, the classification of
3 the situation as deprivation of liberty will turn on
4 an assessment of the "type, duration, effects and
5 manner of implementation"¹⁴⁴ of the measures of
6 restraint.

7 In particular, the effect of these measures upon
8 private and family life must be taken into account.
9 In a case where it was applying the international
10 standard on deprivation of liberty, the Supreme Court
11 of the United Kingdom emphasised that, where the
12 measure interferes with a person's private and family
13 life, such interference is not merely "a relevant
14 consideration" for the purposes of determining whether
15 the measure amounts to a deprivation of liberty, but
16 it is also "capable of tipping the balance" of that
17 determination¹⁴⁵.

18 What must be considered, the court said, and
19 I quote again from their judgment, is:

20 "... the concrete situation of the particular
21 individual [including] any subjective and/or
22 person-specific factors, such as the particular
23 difficulties of the subject's family in visiting him

¹⁴⁴ *Guzzardi v. Italy*, 6 November 1980, ECHR, Series A No. 39, para. 92

¹⁴⁵ *Secretary of State for the Home Department v. AP*, [2010] UKSC 24, para. 12

1 [and] social isolation."¹⁴⁶

2 And it bears recalling, Mr President, members of
3 the Tribunal, that this was a case decided under
4 anti-terrorism legislation, and involving pressing
5 considerations of national security. But that was the
6 test they adopted.

7 In characterising the measures of restraint to
8 which Sergeant Girone is currently subjected, and to
9 which he would remain subjected in the absence of
10 provisional measures, it is necessary to have regard
11 to his concrete situation, and consider all the
12 specific, and in some crucial respects unique, factors
13 that define it.

14 Mr President, members of the Tribunal, you will by
15 now be familiar with the key aspects of Sergeant
16 Girone's "concrete situation". Sergeant Girone has
17 already been detained in India for well over four
18 years. He has not been the subject of a valid charge
19 during this time, even though three and a half years
20 went by between his arrest and the stay of proceedings
21 put in place pursuant to the ITLOS Order last August.

22 It is true that Sergeant Girone is not in prison,
23 but he is confined to Delhi, in circumstances where
24 his family, including two children, aged 14 and 8, and
25 all other aspects of his life are in Italy.

¹⁴⁶ *Ibid.*, paras. 13-15

1 This is a far harsher position for a person to be
2 in than being subjected to restrictions on liberty and
3 movement within the community in which he lives.

4 Without the requested provisional measure,
5 Sergeant Girone will be forced to remain in a foreign
6 country, with which he has no connection, and where it
7 is impossible for him to maintain his private and
8 family life to an acceptable degree.

9 Taking all these factors into account, it is
10 therefore entirely correct to describe Sergeant
11 Girone's situation as a deprivation of liberty. As
12 such, it must be assessed in the light of the due
13 process requirements specific to the deprivation of
14 liberty in the context of criminal proceedings, which
15 were highlighted by Professor Politi.

16 It must in particular be consistent with the
17 principles that charges must be formulated promptly;
18 that the deprivation of liberty pending trial should
19 be the exception, not the rule; and that it should not
20 go on for an excessively long period of time.

21 Mr President, members of the Tribunal, the third
22 consideration follows from the one I have just
23 addressed. Even if, notwithstanding the preponderance
24 of the evidence, the situation in which Sergeant
25 Girone finds himself were to be regarded as falling
26 short of a deprivation of liberty, it would still

1 amount to a restriction on his liberty and movement.
2 And it would be a restriction at the very high end of
3 the spectrum of severity and intensity of measures of
4 this nature.

5 For to force a man to live in a confined location,
6 in a foreign country, thousands of miles from his home
7 and family, for years and years, cannot be dismissed,
8 as India would like to do, as a "mild" restraint¹⁴⁷.

9 The relevant principles in this case for assessing
10 the continuation of such severe measures of restraint,
11 short of deprivation of liberty, are proportionality
12 and reasonableness.

13 There is ample support for these principles in
14 jurisprudence under UNCLOS¹⁴⁸, as well as in
15 jurisprudence of international criminal courts and
16 tribunals and human rights bodies.

17 Even restrictions on the movement of a person
18 must -- and I quote from the Human Rights Committee:

19 "... conform to the principle of proportionality;
20 they must be appropriate to achieve their protective
21 function; they must be the least intrusive instrument
22 amongst those which might achieve the desired result;
23 and they must be proportionate to the interest to be

¹⁴⁷ India's Written Observations, para. 3.61

¹⁴⁸ *The Arctic Sunrise Arbitration (Netherlands v. Russia)*, Award on the merits, 14 August 2015

1 protected."¹⁴⁹

2 Mr President, members of the Tribunal, even when
3 assessed through the prism of proportionality and
4 reasonableness, rather than on the basis of the
5 specific principles applicable to deprivation of
6 liberty in the context of criminal proceedings, the
7 prospect of Sergeant Girone remaining detained in
8 Delhi must still be viewed as unacceptable.

9 The factors which evidence disproportionality in
10 this case are weighty. They include the following
11 considerations: there are no charges, a fact for which
12 India seeks to blame Italy, but as you heard from
13 Mr Swaroop and Professor Politi, India's argument is
14 untenable as a matter of both law and fact.

15 The measures of restraint have already had
16 a severe impact on Sergeant Girone's liberty, movement
17 and basic enjoyment of private and family life. This
18 impact will continue and worsen as time goes on.

19 Taking into account the nearly four years and two
20 months that have already gone by since his arrest, the
21 addition of the full length of the Annex VII
22 proceedings would mean that Sergeant Girone would be
23 subjected to these harsh restrictions for a total of
24 well over six years, and more likely, close or above

¹⁴⁹ Human Rights Committee, General Comment No. 27, in General Assembly, *Official Records, Forty-sixth session, Supplement No. 40 (A/55/40)*, p. 128, at p. 130, para. 14

1 seven years.

2 On this final point about duration, Mr President,
3 well over six years would be the total time that would
4 have elapsed in the best case scenario for India,
5 namely in the event of a conclusion of the Annex VII
6 proceedings that is both rapid and in favour of India.

7 But even in this case, that would not, of course,
8 be the end of the story. Domestic criminal
9 proceedings in India would resume, and they would take
10 time. Charges would still have to be framed.
11 A criminal trial would need to take place. There may
12 be an appeal phase.

13 Considering that in three and a half years, India
14 failed to lay any lawful charges, it is difficult to
15 see how, even in this best case scenario for India, we
16 would not find ourselves in the 2020s before the final
17 outcome of the criminal process in India. And,
18 Mr President, members of the Tribunal, that criminal
19 process, let us never forget, could well result in an
20 acquittal. For the Marines have always protested
21 their innocence, and their innocence must be presumed.

22 So, in effect, by allowing India to continue to
23 detain Sergeant Girone through the Annex VII
24 arbitration, the Tribunal would be endorsing the
25 principle that a State may impose deprivations of
26 liberty, or extreme severe restrictions thereof, for

1 up to a decade, or, more likely, in excess of
2 a decade, before the conclusion of a trial.

3 The status quo which India is asking you to
4 preserve rests on this principle. But it is not
5 a principle which this Tribunal can endorse. Even
6 more so in circumstances where this exercise of
7 criminal jurisdiction by India, exorbitant and
8 arbitrary as it is in terms of due process, would be
9 countenanced at a point where there is a live dispute
10 over its lawfulness between Italy and India.

11 Moreover, this exercise of criminal jurisdiction
12 has affected and will continue to affect an official
13 of the Italian State who has been subject to it as
14 a direct result of his exercising official functions
15 on behalf of the Italian State. India contends that
16 this argument pre-judges immunity, but as you heard
17 before, it does not. We are not asking the Tribunal
18 to determine the jurisdictional immunities in this
19 case at this stage, but we are saying that Italy was
20 entitled to a determination of the question of
21 immunity by India in *limine litis*.

22 States have a clear obligation under international
23 law to address issues of immunity *in limine litis*.
24 The International Court of Justice described this as
25 "a generally recognised principle of procedural

1 law".¹⁵⁰

2 As you heard from Mr Swaroop, however, this
3 generally recognised principle of procedural law was
4 not observed by India, as no determination of the
5 question of immunity *in limine litis* was made. This
6 is a factor that has already crystallised and cannot
7 be credibly in dispute. It is a factor that the
8 Tribunal should take into account in assessing
9 appropriateness to preserve Italy's rights.

10 Mr President, members of the Tribunal, against
11 Italy's assessment of the appropriateness of its
12 requested measure, India advances two arguments.

13 First, India contends that the delay in the Indian
14 proceedings is Italy's fault. But, as you heard from
15 Professor Politi and Mr Swaroop, Italy cannot be
16 blamed for failures of the Indian legal system. Nor
17 can the Marines be blamed for exercising their
18 legitimate right to defend themselves. Delay in the
19 Indian proceedings, including as regards the general
20 principle of procedural law that immunity must be
21 assessed *in limine litis*, renders the prospect of
22 Sergeant Girone's detention in India continuing for
23 years to come more not less disproportionate,
24 unreasonable and ultimately unjustifiable.

¹⁵⁰ *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*

1 The second argument advanced by India concerns the
2 presence of Sergeant Girone for trial in India, if the
3 Tribunal finds that India has jurisdiction.

4 Mr President, this is indeed an important
5 consideration, and the one to which I now turn in the
6 second part of my presentation.

7 In its Written Observations, India argued that the
8 return of Sergeant Girone to Italy would "put in
9 jeopardy the rights of India as well as the execution
10 of the future award by the Annex VII Tribunal"¹⁵¹.

11 A more specific aspect of India's concern about
12 pre-judgment relates to the question of jurisdictional
13 immunities, but that is one that I have already
14 addressed, because the request is not predicated in
15 any way upon a finding of immunity at the provisional
16 stage.

17 There are four key points to make on the question
18 of pre-judgment and prejudice to India's rights.
19 First point: on the relationship between orders on
20 provisional measures and the merits of the dispute.

21 Mr President, members of the Tribunal, as already
22 recalled by Sir Daniel, paragraph 132 of the ITLOS
23 Order is critical in this respect. Dealing with the
24 request in respect of the two Marines, ITLOS
25 considered that "it will be for the Annex VII Tribunal

¹⁵¹ Written Observations, para. 3.59

1 to adjudicate the merits of the case" and also
2 considered, in that same paragraph, "the provisional
3 measures in respect of the situation of the two
4 Marines ... touches upon issues related to the merits
5 of the case".¹⁵²

6 We understand these two considerations to be
7 interdependent. ITLOS's approach to a question that,
8 it considered, touched upon issues related to the
9 merits of the dispute was informed by the fact that it
10 had no role to play on the merits. As already
11 observed by Sir Daniel and Sir Michael, this Tribunal
12 is in a very different position.

13 Mr President, members of the Tribunal, for the
14 purposes of a tribunal vested, as is this one, with
15 responsibility over the dispute in its entirety, the
16 principles that govern the question of pre-judgment
17 are found in the Order on Provisional Measures of the
18 International Court of Justice in the *Tehran Hostages*
19 case¹⁵³. You have the Order at tab 15 of the
20 arbitrators' bundle, and the passage to which I would
21 like to draw your attention is paragraph 28 of the
22 Order.

23 The United States had requested, among other

¹⁵² ITLOS Order, para. 132 (Annex IT-35); Declaration of Judge Paik, para. 9

¹⁵³ *United States Consular and Diplomatic Staff in Tehran, Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979, p. 7*

1 things, the immediate release of all individuals of
2 American nationality detained on the premises of its
3 Embassy in Tehran, including both members of the
4 diplomatic and consular staff who enjoyed immunity and
5 two American citizens not connected to that staff.

6 In that passage in question, paragraph 28, the
7 Court begins by referring to the Iranian argument that
8 the US request for provisional measures -- and the
9 court is quoting from the Iranian argument:

10 "... in fact implies that the Court should have
11 passed judgment on the actual substance of the case
12 submitted to it."

13 Iran had contended that with its request, the
14 United States was trying to obtain, as it put it, an
15 interim judgment in its favour. In rejecting that
16 argument, the Court made two important points, each of
17 which is critical in this context. The first point
18 was, in the words of the Court:

19 "A request for provisional measures must by its
20 very nature relate to the substance of the case since
21 ... their object is to preserve the respective rights
22 of either party."

23 The second point is encapsulated in this quote
24 from that paragraph:

25 "In the present case, the purpose of the
26 United States' request appears to be not to obtain

1 a judgment, interim or final, on the merits of its
2 claims, but to preserve the substance of the rights
3 which it claims *pendente lite*."

4 And the request there included a request for
5 immediate release and return. Mr President, members
6 of the Tribunal, in this case too, Italy is not
7 seeking to obtain any kind of interim judgment on the
8 merits of the claim at this stage. It is only seeking
9 to prevent its rights suffering further irreparable
10 prejudice, should the Tribunal permit India to detain
11 Sergeant Girone for the period between now and the
12 Tribunal's award.

13 Of course, as was true of the request of the
14 United States in *Tehran Hostages*, it is also true of
15 Italy's request, that by its very nature, it relates
16 to the substance of the case. This relationship with
17 the substance of the case may have tipped the balance
18 for ITLOS, but, Mr President and members of the
19 Tribunal, it cannot and should not do so in your case,
20 because of your responsibility over this dispute.

21 Second key point on pre-judgment: while India's
22 concerns about its rights are, of course, important,
23 the proper way of addressing these concerns cannot be
24 one that reduces an individual to a sort of collateral
25 to guarantee performance of a State's obligations.
26 Such an approach would be incompatible with

1 fundamental considerations of humanity, due process
2 and justice, and is not in any way appropriate.

3 Third key point: international courts and
4 tribunals must proceed on the basis that their
5 judgments and orders will be honoured by states. This
6 is a basic principle in the administration of
7 international justice. The International Court of
8 Justice has upheld it on more than one occasion, as
9 you heard before.

10 In its order in the *Documents* case between
11 Timor-Leste and Australia, the court stated, for
12 example, that once a State has made an undertaking as
13 to its conduct, "its good faith in complying ... is to
14 be presumed".¹⁵⁴

15 In the *Navigational Rights* case, the Court said:

16 "... there is no reason to suppose that a State
17 whose act or conduct has been declared wrongful by the
18 Court will repeat that act or conduct in the future,
19 since its good faith must be presumed."¹⁵⁵

20 In other words, Mr President, the presumption of
21 good faith compliance cannot be rebutted even where
22 a party has behaved wrongfully and found by the court
23 to have done so in the context of the same dispute.

¹⁵⁴ See *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, p 158, para. 44

¹⁵⁵ See *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p 213, at p 267, para. 150

1 The conduct of neither party to these proceedings
2 has been found wrongful by this Tribunal. It would be
3 wrong and inappropriate to proceed on any basis other
4 than the Parties' good faith in compliance with this
5 Tribunal's orders and eventual Award.

6 Mr President, members of the Tribunal, the
7 situation that arose in connection to the return of
8 the Marines back in March 2013 may be relied upon by
9 India to justify a departure from these fundamental
10 principles. If anything, it does the opposite. It
11 shows that Italy complied with its undertaking to the
12 Indian Supreme Court in the face of significant
13 pressure from public opinion, that Italy was prepared
14 to endure a significant political cost for that
15 compliance.

16 Italy did this even though there was no order from
17 an international tribunal requiring Italy to return
18 the Marines. Now, there is, of course, an
19 international tribunal, before which the dispute in
20 its entirety has been submitted.

21 One of the possible outcomes of these proceedings
22 is that this Tribunal will find in India's favour and
23 order Italy to return Sergeant Girone to India, but it
24 is a matter of basic legal principle that Italy's
25 compliance in such an event must not and cannot be
26 called into question.

1 Fourth key point on pre-judgment and prejudice to
2 India's rights: in addition to the clear legal
3 presumption that this Tribunal's orders will be
4 complied with, which has not in any way been rebutted
5 in this case, there are specific guarantees and
6 undertakings that have been offered by Italy and
7 placed on record in the solemnity of international
8 proceedings.

9 Therefore, Mr President, members of the Tribunal,
10 India's request that it be, in its words, "assured
11 that in case the Tribunal finds that India has
12 jurisdiction, the presence of Sergeant Girone in India
13 would be ensured"¹⁵⁶, is abundantly met in this case,
14 as a matter of both legal principle and additional
15 specific circumstances.

16 Mr President, members of the Tribunal, to grant
17 this request, you need to satisfy yourselves that the
18 request is appropriate under the circumstances to
19 preserve the respective rights of the parties. Let me
20 say in conclusion that such an assessment inevitably
21 involves also an assessment of the status quo and its
22 appropriateness under the circumstances to preserve
23 rights throughout the duration of the proceedings
24 before you.

25 It is impossible to see how the status quo could

¹⁵⁶ Written Observations, para. 3.67

1 ever be appropriate to preserve the parties' rights in
2 these circumstances, with Italy's rights suffering
3 irreparable and demonstrable prejudice, with due
4 process considerations clearly and acutely engaged,
5 and with severe measures of restraint that affect an
6 organ of the Italian State and that are manifestly
7 disproportionate and unreasonable.

8 The one consideration that could weigh against the
9 manifest inappropriateness of the status quo is if
10 India's rights were found to suffer disproportionate
11 and undue prejudice as a result of the changes to the
12 status quo which the granting of Italy's requested
13 measure would effect.

14 India's concern in this regard is one that, as
15 I indicated, deserves to be taken seriously, but as we
16 have shown, this concern is addressed comprehensively,
17 both in law and in fact.

18 Mr President, members of the Tribunal, Italy's
19 requested measure is appropriate under the
20 circumstances to preserve Italy's rights and would
21 cause no prejudice to India's rights. It is for this
22 reason that we respectfully ask you to grant the
23 request we sought, namely that India shall take such
24 measures as are necessary to relax the bail conditions
25 on Sergeant Girone, in order to enable him to return
26 to Italy under the responsibility of the Italian

1 authorities, pending the final determination of the
2 Annex VII Tribunal.

3 Mr President, members of the Tribunal, I have come
4 to the end of my submissions, and to the end of
5 Italy's first round of oral submissions. I thank you
6 for your kind attention.

7 **THE PRESIDENT:** Thank you, Professor Verdirame. This
8 brings us to the end of the first round of Italy's
9 arguments. We will resume the hearing this afternoon,
10 at 3.00 pm, to hear India's first round of oral
11 arguments. The hearing stands adjourned.

12 **(12.52 pm)**

13 **(Adjourned until 3.00 pm)**

14 **(3.00 pm)**

15 **INDIA'S FIRST ROUND OF ORAL ARGUMENT**

16 **OPENING STATEMENT BY THE AGENT**

17 **THE PRESIDENT:** Good afternoon. The Arbitral Tribunal
18 will now continue the hearing in the arbitration
19 concerning the "Enrica Lexie" incident. This
20 afternoon, we will hear the first round of India's
21 oral arguments. I will now give the floor to the
22 Agent of India, Dr Neeru Chadha, to begin her
23 statement.

24 **DR CHADHA:** Thank you, Mr President. Mr President,
25 distinguished members of the Tribunal, it is an honour

1 for me to be present before this Tribunal as India's
2 Agent.

3 India is before you in response to Italy's Second
4 Request for the Prescription of Provisional Measures
5 dated 11th December 2015 which it labels as Request
6 for an additional Provisional Measure.

7 Mr President, India would have liked the case to
8 advance to the merits rather than repeating arguments
9 that have already been made before the International
10 Tribunal for the Law of the Sea.

11 Be that as it may, this case, which has been
12 brought by Italy against India, concerns the killing
13 of two Indian fishermen who were fishing legitimately
14 in India's Exclusive Economic Zone. On 15th February
15 2012, at about 4.30 pm Indian Standard Time, an Indian
16 boat, "St Antony", engaged in fishing at a distance of
17 about 20.5 nautical miles from the Indian coast, faced
18 a volley of fire originating from two uniformed
19 persons on board an oil tanker, a merchant vessel,
20 which was about 200m from the boat.

21 Valentine Jelastine, who was at the helm of the
22 boat, received a bullet hit on his head, and Ajeesh
23 Pink, who was at the bow, received a bullet hit on his
24 chest. Both died on the spot. In addition to these
25 casualties, the incident also caused serious damage to
26 the boat endangering its safe navigation and the lives

1 of other nine crew members.

2 When the report of the killings reached the Indian
3 authorities, it was entirely reasonable that, as per
4 the law, they would open an investigation. From the
5 vessel movements in the area, it was ascertained that
6 "Enrica Lexie" was a vessel of interest, so it was
7 requested to turn back and join the investigation.

8 There were six Italian Marines on board the
9 "Enrica Lexie". Two Marines were arrested after it
10 was established that they fired the shots that killed
11 the two fishermen. Legal proceedings then commenced
12 in Indian courts under the relevant provisions of
13 Indian law, as the victims were Indian nationals, and
14 they were killed on board an Indian fishing vessel.

15 Italy instituted the present proceedings under
16 Article 287 and Annex VII, Article 1 of UNCLOS some
17 three years and four months later, by means of
18 a written Notification dated 26th June 2015.

19 On 21st July 2015, pending the constitution of the
20 Annex VII Tribunal, Italy filed a request for
21 provisional measures with ITLOS under Article 290,
22 paragraph 5 of UNCLOS.

23 Italy requested for two provisional measures, the
24 first seeking a stay of Indian judicial and
25 administrative proceedings until the Annex VII
26 Arbitral Tribunal had rendered a final determination;

1 the second seeking a relaxation of the bail conditions
2 for Sergeants Latorre and Girone, to enable Sergeant
3 Latorre to remain in Italy and Sergeant Girone to
4 travel to and remain in Italy until the end of the
5 Annex VII arbitration proceedings.

6 Sergeant Latorre was at that time in Italy,
7 pursuant to leave that had been granted by the Supreme
8 Court of India to him to travel to Italy for medical
9 reasons. Sergeant Girone was in India, subject to the
10 relaxed bail conditions that allowed him to reside in
11 New Delhi, at the residence of the Italian Ambassador.

12 ITLOS, in its Order dated 24th August 2015, did
13 not accept either of Italy's two requests. With
14 respect to Italy's first request seeking a stay of
15 Indian judicial and administrative proceedings, ITLOS
16 prescribed a provisional measure directed at both
17 Parties, providing that:

18 "Italy and India shall both suspend all court
19 proceedings and shall refrain from initiating new ones
20 which might aggravate or extend the dispute submitted
21 to the Annex VII Arbitral Tribunal or might jeopardise
22 or prejudice the carrying out of any decision which
23 the Arbitral Tribunal might render."¹⁵⁷

24 As Italy acknowledges, both Parties have taken

¹⁵⁷ ITLOS, Order, 24 August 2015, *The "Enrica Lexie" Incident (Italy v. India), Provisional Measures*, para. 141(1)

1 steps to comply with the suspension of proceedings
2 ordered by ITLOS.

3 As for Italy's second request seeking a relaxation
4 of the Marines' bail conditions, insofar as it
5 concerned Sergeant Girone, he be allowed to travel to
6 and remain in Italy until the end of the Annex VII
7 proceedings, the Tribunal did not accept Italy's
8 submission. The Tribunal observed that "the Order
9 must protect the rights of both Parties and must not
10 prejudice any decision of the arbitral tribunal to be
11 constituted under Annex VII."¹⁵⁸

12 It may be noted that the Tribunal did not
13 prescribe any provisional measure changing the status
14 of either of the Marines. In the meantime, as stated
15 earlier, the Parties have complied with the Order of
16 ITLOS and the Annex VII Arbitral Tribunal has been
17 constituted.

18 Italy now brings a request for a so-called
19 additional measure before this Tribunal. In its
20 submissions, Italy requests the Arbitral Tribunal to
21 prescribe the following provisional measure:

22 "India shall take such measures as are necessary
23 to relax the bail conditions on Sergeant Girone in
24 order to enable him to return to Italy, under the

¹⁵⁸ ITLOS, Order, 24 August 2015, *The "Enrica Lexie" Incident (Italy v. India), Provisional Measures*, para. 125

1 responsibility of the Italian authorities, pending the
2 final determination of the Annex VII Tribunal."¹⁵⁹

3 Italy makes no request with respect to Sergeant
4 Latorre.

5 Italy casts its submissions as a request to
6 prescribe what it terms an "additional provisional
7 measure" under Article 290, paragraph 1 of UNCLOS,
8 presumably since the ITLOS has previously issued an
9 Order prescribing provisional measures on 24th August
10 2015.

11 The present request is therefore described as
12 being "additional" in order to convey the impression
13 that it is something new, or over and above what ITLOS
14 has already prescribed. However, the request does not
15 reflect this.

16 India understands that there is no bar preventing
17 Italy from approaching the Annex VII Tribunal for
18 prescribing provisional measures. However, while
19 doing so, it has to fulfil the conditions laid down in
20 Article 290 of UNCLOS. In Annex VII cases,
21 Article 290 does not allow a state that has used the
22 urgent provisional measures jurisdiction of ITLOS
23 an avenue for appeal to the Annex VII Tribunal against
24 the order of ITLOS once it has been set up.

25 In fact, what it provides is an opportunity to

¹⁵⁹ IR, p. 3, para. 6

1 a party to the dispute to seek an affirmation,
2 revocation or modification of the order of ITLOS.
3 However, the provisional measures can be modified or
4 revoked only if the circumstances justifying them have
5 changed or ceased to exist. This is an express
6 requirement of Article 290, paragraph 2.

7 Therefore, Mr President, it is to be seen whether
8 Italy has cited any change of circumstances in the
9 intervening period, that is from the time ITLOS issued
10 its Order on August 24th 2015 and Italy filed an
11 application for provisional measures on December 11th
12 2015. India sees none.

13 Italy cites the same grounds blaming India for the
14 delay in filing the charge sheet, to which India fully
15 responded before ITLOS, and it will of course be
16 countered again by India's counsel, while completely
17 glossing over the fact that it is Italy who has
18 thwarted India at every step to proceed with the case
19 and bring it to conclusion.

20 One cannot fault Italy for objecting to the
21 jurisdiction of India, and it had full opportunity to
22 do so before the Indian courts, but did Italy do so?
23 No, Mr President. Italy and the Marines kept using
24 dilatory tactics to obstruct the process rather than
25 allowing the designated agencies, be it the Special
26 Court set up on the directions of the Supreme Court,

1 or the National Investigation Agency, to proceed in
2 accordance with their mandate and bring the case to
3 a conclusion. Numerous petitions and applications
4 filed by Italy between 2012 and 2015 are a testimony
5 to this.

6 The pattern is clear, that Italy did not want the
7 case to proceed in the Indian court which was ready to
8 hear the matter on questions of jurisdiction and
9 therefore used various injunctive mechanisms to stall
10 the process.

11 Given Italy's objections to the exercise of
12 jurisdiction by India, it was open to Italy in 2012
13 itself to invoke the dispute settlement procedures
14 under UNCLOS. Italy took three and a half years to do
15 so. Who is to be blamed for this state of affairs?
16 Not India in the least. Italy now very conveniently
17 attempts to shift the blame on India.

18 Italy devotes a lot of space and time alleging
19 violations of human rights of the Marines and denial
20 of fair trial, but a look at the situation of the
21 Marines tells you the opposite narrative. The
22 Marines, despite the severity of the crime they are
23 charged with, have been out on bail since 2nd June
24 2012, and thereafter have never been incarcerated.
25 They are not under detention, Mr President.

26 Italy's allegations on Marines not being aware of

1 the charges against them flies in the face of the
2 record. The Tribunal may wish to recall that the
3 Kerala State Police had filed a charge sheet against
4 the accused Marines on May 18th 2012, three months
5 after the incident. However, due to the
6 jurisdictional challenge brought by Italy, the case
7 could not proceed in Kerala.

8 Again, the case could not proceed in the Special
9 Court as the National Investigation Agency was
10 restrained from filing a charge sheet pursuant to the
11 challenge on 26th March 2014 by the Marines to the
12 mandate of NIA to investigate or prosecute the
13 petitioners or submit the charge sheet; and the
14 Supreme Court Order following that on 28th March 2014,
15 ordering that the proceedings of the Special Court be
16 held in abeyance until it decides on the matter.

17 Though it is true, Mr President, that the trial in
18 the Special Court has not commenced, that is not due
19 to any negligence or slackness on India's part, but
20 due to the obstructive course of action adopted by
21 Italy. We do not blame Italy to have used what it
22 considers its procedural rights, but then they cannot
23 complain about the consequences of their own conduct.

24 As stated above, Italy had requested virtually the
25 same provisional measure with respect to Sergeant
26 Girone before ITLOS, which was rejected by ITLOS.

1 Therefore, in reality, what Italy is seeking is not an
2 additional provisional measure under Article 290,
3 paragraph 1 of UNCLOS, but rather a modification of
4 the provisional measure issued by ITLOS in its Order
5 of 24th August 2015, and a chance to relitigate the
6 matter that it has already extensively argued, both in
7 written and oral pleadings before ITLOS.

8 The time that will be taken by the Annex VII
9 Tribunal is an obvious fact, which was known to ITLOS
10 as well as Italy, but was not a consideration for
11 ITLOS in not accepting Italy's second request.

12 Therefore, in India's view, Italy fails to
13 identify any change in circumstances justifying the
14 present request.

15 Mr President, for obvious reasons of the short
16 time gap between Italy's submissions today and India's
17 response, we will not respond to all the points raised
18 by Italy today. We reserve our right to respond as
19 necessary tomorrow.

20 The rest of India's oral presentations are
21 structured as follows: Ambassador JS Mukul will
22 address the facts. A summary of some of the key facts
23 is necessary in order to render a correct account of
24 the facts presented in Italy's Request. He will also
25 give a brief overview of the proceedings in the Indian
26 courts.

1 Professor Pellet will follow and demonstrate that
2 Italy's present Request does not meet the conditions
3 set out in Article 290 of UNCLOS and constitutes an
4 ill-disguised attempt to appeal the 2015 ITLOS Order.

5 Mr Rodman Bundy will then show that just as there
6 was no urgency or imminent risk of prejudice
7 justifying Italy's second Request before ITLOS last
8 August, so also there is none with respect to its new
9 Request.

10 Then with your permission, Mr President,
11 Professor Pellet will come again and show that if
12 granted, the provisional measures that Italy seeks
13 again to get from your Tribunal would lead to
14 a pre-judgment of the case on the merits.

15 Thank you, Mr President. I would request you to
16 call Ambassador JS Mukul to the podium.

17 **THE PRESIDENT:** Thank you, Dr Chadha. I now invite
18 His Excellency Ambassador Mukul to take the floor.

19 **SPEECH BY AMBASSADOR MUKUL**

20 **MR MUKUL:** Mr President and members of the Tribunal, it
21 is indeed an honour and privilege for me to appear
22 before this Tribunal on behalf of the Republic of
23 India.

24 I will be giving a brief factual account of the
25 incident and the discrepancies in Italy's description

1 of facts, the investigation carried out and the
2 proceedings in the Indian courts. Italy's present
3 request is tempered with an inaccurate rendition of
4 the facts relating to the investigation conducted by
5 India and the legal proceedings thereupon.

6 India cannot accept implied criticism of the
7 Indian judicial system. Due process was duly
8 respected and all the Italian applications were duly
9 considered and addressed. I will attempt to give an
10 accurate narration of facts.

11 Mr President and members of the Tribunal, the
12 constitutional foundations upon which the criminal
13 justice system in India rests primarily revolves
14 around two interlinked principles: (i) access to
15 justice and (ii) the principle of fair trial.

16 The Constitution of India, in Article 21,
17 guarantees the right to life, not just to citizens,
18 but to non-citizens too. It states that:

19 "... no person shall be deprived of his life or
20 personal liberty except according to procedure
21 established by law."

22 Having guaranteed a substantive right in this
23 form, our Constitution in Article 32 also entitles
24 every person to move the Supreme Court of India for
25 enforcement of their fundamental rights, which
26 includes Article 21. The relevant portion of

1 Article 32 reads as follows:

2 "Remedies for enforcement of rights conferred by
3 this Part.

4 "(1) The right to move the Supreme Court by
5 appropriate proceedings for the enforcement of the
6 rights conferred by this Part is guaranteed."

7 The case of the two Italian Marines is perhaps the
8 most fitting illustration as to how these two
9 constitutional guarantees were administered to
10 non-citizens in a non-discriminatory manner. Not only
11 were they given immediate access to courts of justice,
12 but India also considered their requests in
13 a sympathetic fashion. And yet, Italy claims that its
14 citizens were deprived of due process of law.

15 The incident which triggered the present
16 controversy happened on 15th February 2012. At about
17 4.30 pm Indian Standard Time, an Indian fishing boat,
18 "St Antony", engaged in fishing activity at a distance
19 of about 20.5 nautical miles in the Arabian sea, off
20 the Indian Coast, was fired upon by two uniformed
21 persons on board an oil tanker merchant ship. Two
22 fishermen, citizens of India, were hit by the bullets
23 and succumbed on the spot to the injuries.

24 Upon a call received from the sea, enquiries
25 revealed that MV "Enrica Lexie" was identified as the
26 vessel of interest. There was prompt registration of

1 a First Information Report (FIR) on the same day
2 itself, which set the criminal justice process in
3 motion.

4 Since the FIR was registered at the coastal police
5 station, Neendakara, Kollam, Kerala, the Kerala State
6 Police commenced investigation immediately. The
7 investigation revealed that Sergeant Massimiliano
8 Latorre and Sergeant Salvatore Girone were involved in
9 the incident and they were arrested on 19th February
10 2012. The Kerala police, upon completion of
11 investigation, filed a charge sheet on 18th May 2012.

12 As already mentioned, the non-discriminatory
13 character of the basic rights enshrined in the
14 Constitution of India enabled the Italian Marines and
15 the Republic of Italy to institute proceedings before
16 the High Court of Kerala (Writ Petition No 4542/2012)
17 on 22nd February 2012 challenging the jurisdiction of
18 the Kerala Police to investigate the matter. Pending
19 decision before the High Court of Kerala, they
20 instituted a Writ Petition, that is Writ Petition No
21 135 of 2012, on 19th April 2012 before the Supreme
22 Court of India for safeguarding their rights.

23 When the High Court of Kerala, by an order dated
24 29th May 2012, refused to grant them relief in Writ
25 Petition No 4542/2012, they appealed to the Supreme
26 Court of India by filing Special Leave Petition No

1 2370 on 11th July 2012.

2 Meanwhile, the shipowners filed Writ Petition No
3 6083 of 2012 before the High Court of Kerala for
4 release of the vessel, which resulted in the High
5 Court directing its release. The Single Judge of the
6 High Court of Kerala ordered the release of the vessel
7 on 29th March 2012, but this decision was overturned
8 in appeal by the Division bench of the High Court of
9 Kerala on 4th April 2012.

10 However, the Supreme Court of India, on appeal, by
11 order dated 2nd May 2012, permitted the release of the
12 vessel on the assurance given by Italy regarding
13 co-operation in the investigation.

14 Therefore, within five months of the incident, the
15 highest court in India was seized of the concerns of
16 the Marines, the vessel owner and the Republic of
17 Italy. The Supreme Court of India heard arguments in
18 the Writ Petition and the Special Leave Petition on
19 a priority basis between August and September 2012 and
20 finally delivered a judgment on 18th January 2013.
21 Their case had travelled up the Indian judicial
22 hierarchy to its apex court within a year, and yet
23 regrettably, Italy asserts that due process rights
24 have been violated.

25 Italy wrongly asserts that the Indian courts
26 failed to even consider the issue of immunity of the

1 accused and such failure would violate standards of
2 due process. Italy omits to mention that both the
3 High Court of Kerala and the Supreme Court of India
4 considered the question of immunity. The High Court
5 of Kerala in its order dated 29th May 2012 rightly
6 opined that since disputed facts are involved, the
7 issue of immunity would be a matter of trial.

8 Italy seeks to contend before this Tribunal the
9 same misunderstanding which it did before ITLOS, while
10 arguing that no charges have been brought against
11 Sergeant Girone. I say this at the cost of
12 repetition, that as soon as Sergeant Girone was
13 arrested on 19th February 2012, he was informed of the
14 charges against him. This was in compliance of
15 Article 22 of the Constitution of India, which
16 mandates that every person arrested be informed about
17 the grounds of arrest.

18 In fact, within four days, on 23rd February 2012,
19 Italy had filed a petition before the High Court of
20 Kerala questioning the jurisdiction and claiming
21 immunity for the Marines. This would leave no doubt
22 that Sergeant Girone was informed about the charges
23 against him.

24 Mr President, members of the Tribunal, on Italy's
25 challenge to the jurisdiction of the State of Kerala,
26 the Supreme Court held that it was the Union of India

1 and not the State of Kerala that had jurisdiction in
2 the matter. The Supreme Court directed the Union of
3 India, in consultation with the Chief Justice of
4 India, to designate a special court to try the case.
5 The pending proceedings before Chief Judicial
6 Magistrate Kollam were also directed to be transferred
7 to the Special Court.

8 In pursuance of the Supreme Court directive, the
9 Central Government entrusted the investigation of the
10 case to the National Investigation Agency, NIA, on
11 1st April 2013, and on 15th April 2013 also appointed
12 a Special Court for the expeditious trial of the case.

13 During the course of the hearing before the
14 Supreme Court on 26th April 2013, Italy challenged the
15 jurisdiction of the National Investigation Agency to
16 conduct the investigation.

17 Even though Italy assured the Supreme Court of
18 India that it would make available the Italian Marines
19 on board MV "Enrica Lexie" for investigation while
20 getting the vessel released on 2nd May 2012, repeated
21 requests by NIA to get witnesses to India were not
22 heeded, resulting in delay of investigation. Italy
23 therefore seeks to mislead this Tribunal when it
24 states that the NIA failed to complete the
25 investigation in time.

26 Italy then filed a fresh petition before the

1 Supreme Court on 26th March 2014 *inter alia* disputing
2 the jurisdiction of the National Investigation Agency
3 and asserting immunity for the Marines. The Supreme
4 Court on 28th March 2014 granted Italy's interim
5 prayer and ordered to keep the proceedings of the
6 Special Court in abeyance until the issues raised by
7 the Petitioners are decided.

8 It is therefore clear that Italy has repeatedly
9 sought orders stalling the investigation and
10 prosecution of the case, and now unfairly alleges that
11 India has not brought charges against the Marines.

12 Mr President, members of the Tribunal, the
13 concerns of Italy and its citizens received a fair and
14 unbiased hearing in the Indian courts at every stage,
15 with complete regard to the principles of natural
16 justice. By its order dated 30th May 2012, the High
17 Court of Kerala granted bail to Sergeant Latorre and
18 Sergeant Girone.

19 Thereafter, by order dated 20th December 2012, the
20 High Court of Kerala permitted Massimiliano Latorre
21 and Salvatore Girone to travel to Italy for a period
22 of two weeks.

23 By order dated 18th January 2013, the Supreme
24 Court of India also permitted them to travel to Italy
25 for a period of four weeks.

26 Yet again, by order dated 22nd February 2013, the

1 Supreme Court of India permitted them to travel to
2 Italy for another period of four weeks.

3 On 12th September 2014, the Supreme Court
4 permitted Sergeant Latorre to travel to Italy for
5 a three-month period, which permission was extended by
6 the Supreme Court by orders dated 14th January 2015,
7 9th April 2015 and 13th July 2015.

8 On 10th December 2014, Sergeant Girone filed
9 an application for relaxation of his bail conditions
10 and to permit him to travel to Italy, only to withdraw
11 it on 16th December 2014. Sergeant Latorre continues
12 to stay in Italy.

13 I must emphasise that in none of the hearings
14 mentioned, the Union of India objected to the
15 relaxation of bail conditions. In all these hearings,
16 the Union of India and the Supreme Court have acceded
17 to every request of Sergeant Latorre and Sergeant
18 Girone, whether they are medical needs or the exercise
19 of their right to vote. Yet, Italy seeks to assert
20 that the rights of Sergeant Girone have been violated.

21 To conclude, this brief recapitulation of the
22 factual situation and proceedings in the Indian courts
23 shows that India has attempted to bring the case to
24 a quick closure, and it is Italy and the two accused
25 that have impeded the process. Also, the Marines have
26 always been given a sympathetic consideration in

1 accordance with law, including for travel to Italy.

2 Thank you, Mr President. Mr President, I now
3 request you to invite Professor Alain Pellet to take
4 the floor.

5 **THE PRESIDENT:** Thank you, Ambassador Mukul. I now
6 invite Professor Alain Pellet to take the floor.

7 **SPEECH BY PROFESSOR ALAIN PELLET**

8 **PROFESSOR PELLET:** Thank you, Mr President.

9 Mr President, members of the Tribunal, recently, in
10 a case before the ICJ, I started my presentation by
11 sympathising with the judges for having to endure
12 several times the same pleadings¹⁶⁰. I am afraid that
13 you are in the same position, at least for the four of
14 you who had already sat in the ITLOS when we pleaded
15 the first provisional measures requested by Italy last
16 August. Quite inconveniently, Italy has rewound the
17 same film. We cannot but largely play again much the
18 same role. I apologise for the inconvenience, but it
19 is completely beyond our control.

20 As just explained by Dr Chadha, my task this
21 afternoon is precisely to show that absent any new
22 fact, there is no ground for the Tribunal to call into
23 question the provisional measures prescribed by the
24 ITLOS in its Order of 24th August 2015.

¹⁶⁰ CR 2016/8, 16 March 2016, p. 25, para. 1

1 I will briefly discuss four points:

2 First, I will recall that the measure requested by
3 Italy is a mere reiteration of one of those it had
4 requested in July.

5 Second, I will show that the conditions for
6 changing the position adopted by the ITLOS are by no
7 means fulfilled, in effect;

8 Third, the circumstances have not changed and the
9 same causes must produce the same effects.

10 Finally, by granting the provisional measures
11 requested by Italy, the Tribunal would be in breach of
12 the very spirit and the basis of the system of
13 provisional measures provided for in Article 290 of
14 UNCLOS.

15 As Dr Chadha explained, I will not attempt to
16 answer Italy's presentation of this morning, although
17 it happens that we had in many respects anticipated
18 their arguments.

19 Mr President, members of the Tribunal, at the end
20 of its new request for provisional measures:

21 "Italy respectfully requests that the Tribunal
22 prescribe the following provisional measure:

23 "India shall take such measures as are necessary
24 to relax the bail conditions on Sergeant Girone in
25 order to enable him to return to Italy, under the
26 responsibility of the Italian authorities, pending the

1 final determination of the Annex VII Tribunal."¹⁶¹

2 In its July request, Italy had requested the ITLOS
3 to first prescribe that:

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

10 This first request was not accepted as such by the
11 ITLOS. However, it prescribed that both parties, not
12 India alone, shall:

13 "... suspend all court proceedings and shall
14 refrain from initiating new ones which might aggravate
15 or extend the dispute submitted to the Annex VII
16 Arbitral Tribunal or might jeopardise or prejudice the
17 carrying out of any decision which the Arbitral
18 Tribunal may render."¹⁶²

19 On the other hand, the ITLOS did not uphold the
20 second Italian submission which read as follows, and
21 was reiterated at the end of the hearings:

22 "(b) India shall take all measures necessary to
23 ensure that restrictions on the liberty, security and

¹⁶¹ Italy's Request for the Prescription of Provisional Measures under Article 290, Paragraph 1, of the United Nations Convention on the Law of the Sea, 11 December 2015 ("Italy's Request"), p. 33, para. 112

¹⁶² *The "Enrica Lexie" Incident (Italy v. India), Provisional Measures*, Order of 24 August 2015, para. 141(1)

1 movement of the Marines be immediately lifted to
2 enable Sergeant Girone to travel and to remain in
3 Italy, and Sergeant Latorre to remain in Italy
4 throughout the duration of the proceedings before the
5 Annex VII Tribunal."¹⁶³

6 Since Latorre was already in Italy and was granted
7 leave to stay there for humanitarian reasons by the
8 Indian Supreme Court¹⁶⁴, there was indeed no reason to
9 accept Italy's submission in as much as he was
10 concerned. Apparently, this has not discouraged Italy
11 to start over with the same request. It now asks you
12 to prescribe the following provisional measure:

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

18 Save for some minor drafting changes, including
19 the expression "under the responsibility of the
20 Italian authorities", which is stating the obvious,
21 this is exactly the same submission as the one
22 dismissed by the ITLOS in its Order of 24th August

¹⁶³ Italy's ITLOS Request, para. 57

¹⁶⁴ See Supreme Court of India, Order permitting Mr Latorre to return to Italy for a period of four month for medical treatment, 12 September 2014 (Written Observations of India, 6 August 2015, Annex 43), Supreme Court of India Order of 14 January 2015 granting an extension to Sergeant Latorre (ItSC, Annex 30), Supreme Court of India Order of 9 April 2015 granting a further extension to Sergeant Latorre (ItSC, Annex 31), Supreme Court of India, Order of 13 July 2015 (Italy's ITLOS Request, Annex F) and Supreme Court of India, Order of 13 January 2016 (Annex IN-5)

1 2015. It is obvious that Italy attempts to obtain
2 a change of the clear position taken by the Hamburg
3 Tribunal.

4 Mr President, members of the Tribunal, I can very
5 easily concede that, contrary to the judgments of the
6 ITLOS or the award this Tribunal will give, orders
7 prescribing provisional measures are binding but not
8 final. In this respect, they are not properly *res*
9 *judicata*. However, they are adopted following
10 adversarial proceedings and after a careful
11 examination of the case presented by each Party and
12 Article 290(6) of UNCLOS provides that:

13 "... the parties to the dispute shall comply
14 promptly with any provisional measures prescribed
15 under this article."

16 This is true concerning the order adopted by the
17 ITLOS in August last year. The Tribunal had the
18 benefit of written observations by the Parties and of
19 argument in oral pleadings which it carefully examined
20 before making its decision, and I repeat, a legally
21 binding decision.

22 Indeed, as provided for in Article 290,
23 paragraph 2 of UNCLOS:

24 "Provisional measures may be modified or revoked
25 as soon as the circumstances justifying them have
26 changed or ceased to exist."

1 This text is clear: a modification, and clearly an
2 addition is a modification, can only be contemplated
3 if the circumstances at the origin of the previous
4 order "have changed". Clearly, they have not, and
5 this is or should be the end of the matter.

6 Honestly, Mr President, Italy invokes no change of
7 circumstances. Or, if we want to read their pleadings
8 very generously, such a change would appear to be the
9 ITLOS Order itself. Thus, at paragraph 7 of its new
10 Request for provisional measures, Italy explains that,
11 as a consequence of the Tribunal decision, "all court
12 proceedings are stayed in consequence of the ITLOS
13 Order"; therefore, since "Italian and Indian judicial
14 authorities have taken steps to comply with the ITLOS
15 Order [as Italy rightly notes] criminal proceedings
16 cannot take place in India because of the stay".

17 Therefore, Italy alleges, "Absent any provisional
18 measure from this Tribunal, Sergeant Girone may
19 therefore end up being deprived of his liberty,
20 without charge, for a total of over seven years".

21 Is this not a formidable handling of paradox by
22 Italy, Mr President?

23 Opening act: Italy acts before Indian courts in
24 order to have a stay in the proceedings, it wins its
25 case or cases.

26 Act II: Italy requests from the ITLOS that India

1 shall refrain from taking or enforcing any judicial or
2 administrative measures against Sergeant Girone, it
3 partly wins again, even if Italy too must exert the
4 same restraint.

5 Act III: because of Italy's successive judicial
6 victories, Girone risks not to recover full liberty of
7 movement until this Tribunal gives its Award.

8 *Therefore*, that is clearly as a consequence of the
9 ITLOS Order, you are asked to prescribe his immediate
10 release.

11 If I may, Mr President, please allow me to open
12 a parenthesis, even if I tread a bit on Rodman Bundy's
13 toes. It is indeed totally inappropriate to allege
14 that Sergeant Girone would be (i) deprived of his
15 liberty; (ii) without charge. This is indeed playing
16 with words.

17 As just recalled by our Agent, Girone's
18 deprivation of his liberty is extremely relative: he
19 enjoys freedom of movement in Delhi with the only
20 rather light obligation to appear once a week at the
21 police station nearby the place where he lives, that
22 is the residence of the Ambassador of Italy. It is
23 not serious to allege that no charge has been brought
24 against him; the alleged killing of two unarmed
25 fishermen is indeed a serious charge.

26 Now, Mr President, members of the Tribunal, to

1 come back to my subject, it is indeed paradoxical for
2 Italy to suggest that because of the measure
3 prescribed by the ITLOS, which, I have to recall, did
4 not uphold its request to relax Girone from his bail
5 conditions, this Tribunal should now grant the
6 precisely same request. Nothing has changed in the
7 circumstances which then prevailed, they were fully
8 known by the ITLOS. There is not the slightest reason
9 to reverse the decision of the Hamburg Tribunal.

10 As I have just recalled, only a change of
11 circumstances may justify a modification of
12 provisional measures under Article 290, paragraph 2,
13 of UNCLOS, and this corresponds to a very general
14 principle of law acknowledged by the ICJ in several
15 recent judgments, the references of which are given in
16 our Written Observations¹⁶⁵.

17 As the court put it in its Order of 22nd April
18 2015 in *Timor-Leste*, in order to rule on a request to
19 modify a previous order indicating interim measures,
20 the judicial or for that matter arbitral body must
21 first ascertain whether, in light of the facts brought
22 before it by the Requesting State, there has been

¹⁶⁵ See e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures*, I.C.J. Reports 1993, p. 337, para. 22. See also *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Order of 16 July 2013, *Provisional Measures*, I.C.J. Reports 2013, p. 234, para. 17 and *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, *Provisional Measures, Order of 22 April 2015*, para. 12

1 a change in the situation which called for the
2 indication of the initial provisional measures.

3 I quote the court:

4 "If so, it must then consider whether such
5 a change justifies the modification or revocation of
6 the measures previously indicated."¹⁶⁶

7 In the present case there has been no such
8 change¹⁶⁷.

9 Let me, Mr President, briefly review all the
10 circumstances which, according to Italy, would justify
11 a reversal of the ITLOS Order. I will refer to what
12 Italy has written in its Request¹⁶⁸ and, if need be,
13 I will return to what has been said this morning
14 tomorrow afternoon.

15 (a) Both States have complied with the Tribunal's
16 Order; as I have just shown, this is not a serious
17 argument. The ITLOS decision is a result of the
18 circumstances then prevailing, it cannot be taken into
19 consideration to modify the decision. It is not
20 a change of circumstances.

21 (b) Still listing the reasons invoked by Italy:
22 Italy prevails itself of its undertakings that it will
23 comply with a decision of this Tribunal to return the

¹⁶⁶ ICJ, Order of 22 April 2015, *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, *Provisional Measures*, para. 12

¹⁶⁷ See IWO, pp. 32-34, paras. 3.21-3.27

¹⁶⁸ See Italy's Request, para. 7

1 Marines to India; this has been pleaded at some length
2 in August.¹⁶⁹

3 Let me quote what the Italian Agent declared at
4 the very end of Italy's presentation on 11th August
5 2015:

6 "There should ... be no doubt that Italy will
7 abide by the undertaking -- that I re-affirm in the
8 context of my final submission -- to return Sergeant
9 Latorre and Sergeant Girone to India following the
10 final determination of rights by the Annex VII
11 Tribunal, if this is required by the award of the
12 Tribunal ... Italy invites the Tribunal to make its
13 order subject to the conditions that it deems
14 appropriate in this regard."¹⁷⁰

15 Mr President, we have explained why the past
16 conduct of Italy both in this case and more generally
17 for constitutional requirements raises doubt on the
18 feasibility of these undertakings. We think that
19 there is no need to come back on this issue.

20 (c) It is definitely not true that Sergeant
21 Girone, quoting Italy, "is not charged with any
22 offence under Indian law"; he is accused of murder.

¹⁶⁹ See ITLOS/PV.15/C24/1, 10 August 2015, morning, p. 39, lines 25-31 (Mr Bethlehem) (IR, Annex IT-34(a)); ITLOS/PV.15/C24/2, 10 August 2015, afternoon, pp. 40-42 (IR, Annex IT-34(b)) and ITLOS/PV.15/C24/3, 11 August 2015, morning, p. 19, lines 28-33 (Mr Azzarello) (IR, Annex IT-34(c)) and *The "Enrica Lexie" Incident (Italy v. India), Provisional Measures*, Order of 24 August 2015, paras. 118, 124 and 130

¹⁷⁰ ITLOS/PV.15/C24/3, 11 August 2015, morning, p. 19, lines 28-33 and 38-39 (Mr Azzarello) (IR, Annex IT-34(c))

1 This is indeed a sufficient charge for depriving an
2 individual of his liberty, which is not seriously the
3 case here. Here again there is nothing new in this
4 situation, the continuation of which is the result of
5 Italy's action¹⁷¹.

6 (d) Italy's argument turns around in circles when
7 it alleges again that, quoting from the Request,
8 "criminal proceedings cannot take place in India
9 because of the stay". This is a result of Italy's
10 actions in exercising its proclaimed rights but with
11 the unavoidable consequences of delaying any decision,
12 and these circumstances were fully known by the ITLOS
13 last August.¹⁷²

14 (e) According to Italy, Sergeant Girone risks
15 being deprived of his liberty for four more years if
16 you, members of the Tribunal, do not decide that he
17 must be released from his bail. Well, again, this
18 unavoidable consequence of this arbitration, initiated
19 by Italy, was indeed known when the ITLOS was called
20 to decide the matter last August, and by no means
21 constitutes a new circumstance.

¹⁷¹ See e.g. for Italy, ITLOS/PV.15/C24/1, 10 August 2015, morning, p. 3, lines 34-39, p. 4, lines 41-43 (Mr Azzarello), pp. 32-34 (Mr Verdirame) (Annex IT-34(a)) and ITLOS/PV.15/C24/3, 11 August 2015, morning, p. 2, lines 7-8 and 10-13 (Mr Bethlehem), p. 14, lines 27-36 and p. 15, lines 36-38 (Mr Verdirame) (Annex IT-34(c)) and for India, ITLOS/PV.15/C24/2, 10 August 2015, afternoon, pp. 5-10 (Mr Narasimha) and p. 25, lines 22-36, p. 32, lines 34-43 (Mr Bundy) (Annex IT-34(b)) and ITLOS/PV.15/C24/4, 11 August 2015, afternoon, pp. 1-3 (Mr Narasimha), p. 8, lines 27-40 (Mr Bundy) (Annex IT-34(d))

¹⁷² See fn. 171 above. See also ITLOS/PV.15/C24/1, 10 August 2015, morning, pp. 29-38 (Mr Verdirame) (Annex IT-34(a)) and ITLOS/PV.15/C24/2, 10 August 2015, afternoon, pp. 22-32 (Mr Bundy) (Annex IT-34(b))

1 (f) Whether the situation is "disproportionate,
2 arbitrary and unlawful" relates to the merits, and has
3 by no means in any case changed since last summer.¹⁷³

4 (g) The same is true with respect to the Italian
5 claim that the Marines are entitled to immunity from
6 criminal jurisdiction¹⁷⁴; this relates to the merits,
7 and was known last August. And,

8 (h) This is also true, concerning Italy's argument
9 that India's conduct caused "irreversible prejudice to
10 Italy's rights in this dispute".¹⁷⁵

11 Now, Mr President, the gist of the argument is
12 that Sergeant Girone has been deprived of due process
13 because India has failed formally to charge him, and
14 failed to decide the jurisdictional issues as a result
15 of alleged delays in the Indian court proceedings, and
16 thus there would be a risk of irreparable prejudice.

¹⁷³ See e.g. ITLOS/PV.15/C24/1, 10 August 2015, morning, p. 4, line 16 (Mr Azzarello), p. 31, line 28 (Mr Verdirame) and p. 39, lines 8-10 (Mr Bethlehem) (Annex IT-34(a)) and ITLOS/PV.15/C24/3, 11 August 2015, morning, p. 6, lines 11-13 (Mr Bethlehem) (Annex IT-34(c)) and *The "Enrica Lexie" Incident (Italy v. India), Provisional Measures*, Order of 24 August 2015, para. 39

¹⁷⁴ See e.g. for Italy, ITLOS/PV.15/C24/1, 10 August 2015, morning, p. 2, lines 37-38, p. 25, lines 21-24, p. 26, lines 12-20, p. 31, lines 26-30 and p. 36, lines 2-7 (Mr Wood) (Annex IT-34(a)) and ITLOS/PV.15/C24/3, 11 August 2015, morning, p. 11, lines 39-41 (Mr Wood) and p. 14, lines 5-7 (Mr Verdirame) (Annex IT-34(c)) and for India, ITLOS/PV.15/C24/2, 10 August 2015, afternoon, p. 2, lines 30-35 (Ms Chadha), pp. 15-16 (Mr Pellet) (Annex IT-34(b)) and ITLOS/PV.15/C24/4, 11 August 2015, afternoon, p. 13 (Mr Pellet) (Annex IT-34(d)) and *The "Enrica Lexie" Incident (Italy v. India), Provisional Measures*, Order of 24 August 2015, paras. 111, 113 and 122-126

¹⁷⁵ See e.g. for Italy, ITLOS/PV.15/C24/1, 10 August 2015, morning, p. 29, lines 29-32, p. 35, lines 8-11, p. 36, lines 5-7 and 40-43 and p. 37, lines 6-9 (Mr Verdirame) and p. 38, lines 46-48 (Mr Bethlehem) (Annex IT-34(a)) and ITLOS/PV.15/C24/3, 11 August 2015, morning, pp. 13-15 (Mr Verdirame) (Annex IT-34(c)) and for India, ITLOS/PV.15/C24/2, 10 August 2015, afternoon, pp. 22-32, and in particular, pp. 31-32 (Mr Bundy) (Annex IT-34(b)) and ITLOS/PV.15/C24/4, 11 August 2015, afternoon, pp. 4-9, and in particular, p. 7 (Mr Bundy) (Annex IT-34(d)) and *The "Enrica Lexie" Incident (Italy v. India), Provisional Measures*, Order of 24 August 2015, paras. 70, 89, 91-92, 95 and 99

1 These contentions sound familiar equally. It is
2 because Italy also advanced the same arguments last
3 year before ITLOS. Recall, for example, what Italy
4 said in its request for provisional measures dated
5 21st July 2015:

6 "Two Italian naval officers have been subjected to
7 the custody of the Indian courts for three and a half
8 years without being charged with any offence."¹⁷⁶

9 Or what Professor Verdirame argued last August
10 during the oral hearings:

11 "... not only has India failed to charge the
12 Marines and failed to identify the Statute under which
13 they would have to defend themselves, India has also
14 not decided if, after all, it has jurisdiction under
15 UNCLOS."¹⁷⁷

16 And similarly, "... there is the obligation to
17 formulate charges promptly"¹⁷⁸, and that Italy's
18 request with respect to the Marines is justified "by
19 the applicable standards of due process"¹⁷⁹.

20 As such, Italy's new Request is nothing more than
21 an attempt to relitigate points that it unsuccessfully
22 raised in the earlier proceedings. It wants a second

¹⁷⁶ Request of 21 July 2015, p. 15, para. 54; and see *ibid.*, p. 5, para. 24

¹⁷⁷ ITLOS/PV.15/C24/3, p. 14, lines 41-43

¹⁷⁸ ITLOS/PV.15/C24/1, p. 39, line 13

¹⁷⁹ ITLOS/PV.15/C24/1, p. 44, lines 38-40

1 bite at the apple.

2 Mr President, nothing, nothing is new among the
3 arguments on which Italy now alleges to base its claim
4 for obtaining modification of the ITLOS decision when
5 it adopted its Order of 24th August 2015. All this
6 was perfectly known by the ITLOS which did not uphold
7 Italy's submission. I cannot imagine why and how this
8 total absence of changes of circumstances could
9 justify a modification of or addition to an Order.

10 Before concluding this first presentation, I would
11 like, Mr President, members of the Tribunal, to
12 slightly widen the scope of my address and share with
13 you some more general considerations about Italy's
14 misuse of the system of provisional measures.

15 According to paragraph 1 of Article 290 of the
16 UNCLOS, the tribunal to which a dispute has been duly
17 submitted, whether the ITLOS or an Annex VII Tribunal,
18 "may prescribe any provisional measures which it
19 considers appropriate under the circumstances to
20 preserve the respective rights of the parties to the
21 dispute ... pending the final decision."

22 This is a very classical provision, the equivalent
23 of which can be found in Article 41 of the Statute of
24 the ICJ or Article 47 of the ICSID Convention.

25 Interestingly, "the circumstances" play a crucial
26 role in the decision to be taken by the courts or

1 tribunals on a request for provisional measures. And
2 the same is true when they are required to modify
3 a previous order granting (or refusing to grant) such
4 measures. This is expressly specified in Article 290,
5 paragraph 2 of UNCLOS, which I have quoted some
6 minutes ago, and which is echoed in Article 11,
7 paragraph 5 of the Rules applicable by this Tribunal.
8 And Article 76, paragraphs 1 and 2 of the Rules of the
9 ICJ provide that:

10 "1. At the request of a party, the Court may, at
11 any time before the final judgment in the case, revoke
12 or modify any decision concerning provisional measures
13 if, in its opinion, some change in the situation
14 justifies such revocation or modification.

15 "2. Any application by a party proposing such
16 a revocation or modification shall specify the change
17 in the situation considered to be relevant."

18 This makes very clear that even if provisional
19 measures are not *res judicata*, they can only be
20 modified if the situation which had called for their
21 "indication" or "prescription" changes in a "relevant"
22 way. In the first *Genocide* case, the ICJ rightly
23 considered:

24 "... an Order indicating, or declining to
25 indicate, provisional measures may be revoked or
26 modified, as stated in Article 76 of the Rules of

1 Court ... however according to that text, the Court
2 cannot revoke or modify an Order unless 'in its
3 opinion, some change in the situation justifies' doing
4 so, and where a request for measures has been
5 rejected, any fresh request must, according to
6 Article 75, paragraph 3 of the Rules of Court, be
7 'based on new facts'."

8 The Court added that:

9 "... the same applies when additional provisional
10 measures are requested ..."¹⁸⁰

11 And indeed, it is not because Italy has seized
12 a judicial body distinct from the one which had
13 decided the initial provisional measures that the
14 picture is changed. With all due respect, it would be
15 hardly tenable to contend that Annex VII Tribunals are
16 vested with an appellate jurisdiction in respect of
17 provisional measures. They can indeed modify an order
18 from the ITLOS if the circumstances so require,
19 exactly as the ITLOS itself could modify its own order
20 if it was the competent body to adjudicate on the
21 merits. But Annex VII Tribunals can certainly not be
22 called to review an order of the ITLOS all other

¹⁸⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures*, I.C.J. Reports 1993, p. 337, para. 22 – italics added. See also *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Order of 16 July 2013, *Provisional Measures*, I.C.J. Reports 2013, p. 234, para. 17 and *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, *Provisional Measures*, Order of 22 April 2015, para. 12

1 things being equal.

2 Indeed, contrary to the ITLOS, this Tribunal is
3 vested with the responsibility to decide on the merits
4 of the case, but it does not make any difference to
5 their respective competence in respect to provisional
6 measures.

7 Mr President, members of the Tribunal, Italy has
8 limited itself to pour old wine into old bottles.
9 Absent any new circumstance, the previous Order can
10 simply not be modified or supplemented. This by
11 itself, and by itself alone, is quite enough to
12 dismiss the Italian Request. It is therefore only *ex*
13 *abundanti cautela* that we will continue our
14 presentation, and to that end, may I ask you,
15 Mr President, to call Mr Rodman Bundy to the podium?

16 **THE PRESIDENT:** Thank you, Professor Pellet. I now call
17 Mr Rodman Bundy to address the Arbitral Tribunal.

18 **SPEECH BY MR BUNDY**

19 **MR BUNDY:** Thank you, Mr President, members of the
20 Tribunal. It is an honour for me to appear before
21 this distinguished Tribunal today, but I have to
22 confess that I have certain reservations in being
23 here. Italy's request for provisional measure with
24 respect to Sergeant Girone is in all material
25 respects, as Professor Pellet has explained, no

1 different today than it was eight months ago when it
2 applied for provisional measures before ITLOS.
3 Obviously, we know that ITLOS did not grant Italy's
4 request regarding Sergeant Girone in its 24th August
5 2015 Order. As my colleague and good friend
6 Professor Pellet has pointed out, nothing has changed
7 in the meantime to cause your Tribunal to reach
8 a different conclusion.

9 Italy's request of 11th December 2015, its second
10 request, and its pleadings again this morning, are
11 simply a repackaging of the same arguments it
12 unsuccessfully advanced before ITLOS. The facts
13 haven't changed and neither has the law. Ordinarily,
14 it shouldn't be necessary to rehearse these elements
15 again, but the Request is there and out of respect for
16 the Tribunal, I shall respond to Italy's arguments in
17 a manner that I hope will be of assistance.

18 My task this afternoon is to deal with the
19 question of urgency and the risk of irreparable harm,
20 two interrelated conditions that Italy must satisfy in
21 order to justify its request, but which it has not
22 done.

23 But before taking up these issues, I need to say
24 a few words about the fundamental need for any request
25 for provisional measures to take into account the
26 respective rights of both Parties, not just those put

1 forward by the applicant. That should be
2 self-evident. But Italy has shown a persistent
3 tendency to regard the preservation of the rights of
4 the Parties as a one-way street that focuses solely on
5 Sergeant Girone, but takes no account of the real
6 victims in this case. The real victims were the two
7 innocent fishermen on board the "St Antony" who were
8 killed by automatic weapons fire from the "Enrica
9 Lexie", and their families, as well as India's right
10 to see that justice is done on their behalf.

11 In the present case, while Sergeant Girone has
12 undoubtedly had restrictions placed on his liberty, he
13 still lives, as we have heard, under what are very
14 relaxed bail conditions for an individual who is
15 implicated in the murder of two unarmed private
16 citizens. He resides at the Ambassador's residence in
17 Delhi, free access to visitors, and a duty to report
18 just once a week to the local police authorities. And
19 I would suggest that that pales in comparison to the
20 prejudice that the victims and their families have
21 suffered.

22 Article 290, paragraph 1 of UNCLOS is clear with
23 respect to the need to take into account the
24 respective interests of both Parties. As we all know,
25 it provides that the court or tribunal having prima
26 facie jurisdiction "may prescribe any provisional

1 measures it considers appropriate under the
2 circumstances to preserve the respective rights of the
3 parties to the dispute".

4 That provision mirrors Article 41, paragraph 1 of
5 the Statute of the ICJ, which provides that the Court:

6 "... shall have the power to indicate, if it
7 considers that circumstances so require, any
8 provisional measures which ought to be taken to
9 preserve the respective rights of either party."

10 As the International Court has remarked on several
11 occasions:

12 "The Court must be concerned to preserve by such
13 measures the rights which may subsequently be adjudged
14 by it to belong to either party."¹⁸¹

15 It follows that there is a balance to be struck
16 whenever provisional measures are being considered.
17 It is a balance that I would suggest ITLOS was
18 perfectly conscious of when it issued its Order last
19 August. On the one hand, the Order noted that:

20 "... the Tribunal is aware of the grief and
21 suffering of the families of the two Indian fishermen
22 who were killed."¹⁸²

¹⁸¹ *Questions relating to the Seizure of Certain Documents and Data (Timor-Leste v. Australia)*, Order of 3 March 2014, I.C.J. Reports 2104, p. 152, para. 22; *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, p. 360, para. 24

¹⁸² ITLOS Order of 24 August 2015, para. 134

1 On the other, the Order also added:

2 "... the Tribunal is also aware of the
3 consequences that the lengthy restrictions on liberty
4 entail for the two Marines and their families."¹⁸³

5 As ITLOS observed:

6 "The Order must protect the rights of both Parties
7 and must not prejudice any decision of the Arbitral
8 Tribunal to be constituted under Annex VII."¹⁸⁴

9 What Italy fails to acknowledge is that its
10 request last July was completely one-sided and
11 imbalanced. At the end of the day, ITLOS did not find
12 Italy's request regarding Sergeants Girone and Latorre
13 appropriate, and it was not accepted, and the same
14 situation exists today.

15 Italy's new request, and its presentation again
16 this morning, also take no account of the prejudice
17 caused to the two fishermen. As Professor Pellet has
18 indicated, Italy cannot point to any new circumstance
19 since ITLOS issued its Order that genuinely alters the
20 balance or justifies your Tribunal prescribing
21 a provisional measure that ITLOS did not accept just
22 a short time ago.

23 Mr President, now let me turn to the question of
24 the urgency. Strangely, Italy seems to be equivocal

¹⁸³ *Ibid.*, para. 135

¹⁸⁴ *Ibid.*, para. 125

1 on the role that urgency plays in requests for
2 provisional measures. For example, in its Request,
3 Italy asserts that "urgency may not be a requirement
4 under Article 290(1)", a suggestion that was again put
5 forward this morning when India was accused of
6 conflating paragraphs 1 and 5 of Article 290.¹⁸⁵

7 But the legal position is well established under
8 international law. Urgency, as the Special Chamber in
9 the *Ghana/Côte d'Ivoire* case put it¹⁸⁶, in the sense of
10 "the need to avert a real and imminent risk that
11 irreparable prejudice may be caused to the rights in
12 interest", is a fundamental condition that must be
13 satisfied by an applicant for provisional measures to
14 be prescribed.

15 As the Special Chamber stated in the *Ghana/Côte*
16 *d'Ivoire* case, in no uncertain terms:

17 "Urgency is required in order to exercise the
18 power to prescribe provisional measures."¹⁸⁷

19 That certainly applies to Italy's Request for
20 an "additional" provisional measure, a so-called
21 "additional" provisional measure, in these
22 proceedings."

¹⁸⁵ Request, p. 31, para. 107

¹⁸⁶ *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015*, para. 41

¹⁸⁷ *Ibid.*, para. 42

1 As India pointed out in its Written Observations¹⁸⁸
2 the International Court of Justice takes the same
3 view, despite the fact that Article 41 of the Court's
4 Statute, just like paragraph 1 of Article 290 of
5 UNCLOS, makes no specific reference to urgency.

6 To quote what the eminent author, Shabtai Rosenne,
7 said in his study, which was cited this morning, on
8 Provisional Measures in International Law:

9 "Provisional measures are an exceptional remedy in
10 international litigation, and should only be granted
11 if the court or tribunal seised of the request is
12 satisfied that the urgency of the circumstances
13 justifies the granting of the request."¹⁸⁹

14 It follows that Italy's contention about the role
15 of urgency is misplaced, and indeed, at least in its
16 written request, I am not sure if that changed this
17 morning, but at least in its written request, Italy
18 does not seem to give its argument much credence,
19 because it goes on to assert that the prescription of
20 the requested provisional measure regarding Sergeant
21 Girone is urgent¹⁹⁰.

22 Italy then repeats exactly the same arguments it

¹⁸⁸ Written Observations, para. 3.30, citing *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, *Provisional Measures, Order of 8 March 2011*, *I.C.J. Reports 2011 (I)*, p. 21, para. 63, and other cases to the same effect

¹⁸⁹ S. Rosenne: *Provisional Measures in International Law*, Oxford University Press, 2005, p. 223

¹⁹⁰ Request, para. 107

1 made before ITLOS with respect to urgency, arguments
2 that did not carry the day last August, and which are
3 no more persuasive today.

4 Let me recall the situation as it stood last
5 August. Italy, as we know, only introduced its
6 request for provisional measures before ITLOS some
7 three years and four months after the incident took
8 place, and the Marines had initially been taken into
9 custody, and that in and of itself hardly speaks to
10 a situation of urgency.

11 As early as 2012, Italy and the Marines were
12 already contesting the exercise of jurisdiction over
13 the Marines by the Indian courts, but Italy did not
14 introduce its request for provisional measures for
15 more than three years afterwards. Urgency?

16 As for Sergeant Girone, he had applied for and
17 been granted leave by India's Supreme Court to return
18 to Italy for two weeks in December 2012 and four weeks
19 in February 2013. The distinguished Co-Agent
20 mentioned these two examples, I think there was
21 a slight misstatement in referring to another grant of
22 leave in January 2013, 18th January, but that's not
23 the case. 18th January, as I will come back to, was
24 the date of the Supreme Court judgment ordering the
25 establishment of the Special Court. Sergeant Girone
26 had been granted two separate times, in December 2012

1 and in February 2013, leave to return to Italy.

2 In December 2014, as we heard, Sergeant Girone
3 filed another request with the Supreme Court for
4 permission to return to Italy, but before the Supreme
5 Court could rule on that request, Sergeant Girone
6 unilaterally withdrew it, and he only filed a new
7 request in July 2015, after Italy had sent its
8 Annex VII Notification. Thus, for a period of 29
9 months, between February 2013 and July 2015, Sergeant
10 Girone never asked the Supreme Court to rule on the
11 relaxation of his bail conditions. That conduct is
12 also inconsistent with the notion that there is any
13 urgency.

14 Now let's look at the situation since last August
15 to see whether anything that has happened in the
16 meantime changes the equation.

17 First, ITLOS issued its order on 24th August in
18 which it prescribed a modified version of Italy's
19 first request ordering a stay of judicial proceedings
20 in both Italy and India, but did not accept Italy's
21 second request regarding Sergeants Girone and Latorre.

22 Second, on 6th November 2015, the PCA announced
23 that the constitution of this Tribunal had been
24 completed, something that was foreseen during the
25 proceedings before ITLOS.

26 Third, Italy filed its new request for provisional

1 measures on 11th December 2015.

2 Those are the three things that happened, the
3 ITLOS Order, the constitution of the Tribunal and
4 Italy's new Request.

5 In that Request, Italy advances the argument,
6 which was again repeated this morning, that its
7 requested measure regarding Sergeant Girone is now
8 appropriate because it must follow from the stay that
9 ITLOS ordered with respect to all court proceedings in
10 Italy and India.¹⁹¹

11 According to Italy, the fact that there can be now
12 no criminal trial in either state pending the outcome
13 of the Annex VII arbitration, means that Sergeant
14 Girone should not be required to stay in Delhi.

15 Like all the other arguments set out in the
16 Request, this contention is a repetition of what Italy
17 previously pleaded before ITLOS. It is really
18 tantamount, Mr President, either to saying that ITLOS
19 did not know what it was doing when it prescribed
20 a modified version of Italy's first request but
21 rejected its second request in its August Order --
22 I find that difficult to believe, considering that in
23 the 24th August Order there is a specific reference to
24 Italy's argument at paragraph 115 of that Order.

25 But either Italy is arguing that ITLOS really

¹⁹¹ Request, p. 23

1 didn't know what it was doing when it accepted
2 a modified version of the first request but didn't
3 accept the second request, or that the fact that ITLOS
4 rejected the second request concerning Sergeant Girone
5 now somehow constitutes a reason for accepting the
6 same request in these proceedings. The argument makes
7 no sense at all.

8 I have to apologise for rehashing the past,
9 Mr President, but since our opponents have resurrected
10 the argument, I need briefly to recall what counsel
11 for Italy pleaded last August before ITLOS, and
12 I quote from the compte rendu:

13 "If the [ITLOS] Tribunal agrees that India should
14 not exercise the very rights that form the object of
15 the dispute [in other words if Italy's request for
16 a stay of the Indian proceedings is accepted] all
17 restrictions placed on the Marines through the
18 exercise of that jurisdiction should be set aside
19 while proceedings are pending. The Second Request
20 [that was the request regarding Sergeant Girone]
21 therefore follows as a necessary consequence from the
22 First."¹⁹²

23 Then elsewhere in that same pleading before ITLOS,
24 counsel argued, and I quote once again:

25 "Italy's Second Request is justified on at least

¹⁹² ITLOS/PV.15/C24/1, p. 31, lines 6-10

1 three bases: as a consequence of the First Request
2 [here is the argument again]; by the applicable
3 international standards of due process [we certainly
4 heard that back in August and again this morning]; and
5 by the circumstances which have been assessed in
6 camera. Both of Italy's requests are justified by
7 reasons of urgency ...".¹⁹³

8 That is exactly what Italy is arguing before your
9 Tribunal. But the argument was not accepted as
10 a reason for granting Italy's second request last
11 August, and in India's submission there is no reason
12 that this Tribunal should reach a different conclusion
13 now.

14 Mr President, members of the Tribunal, Italy also
15 seeks to justify its new request for provisional
16 measures on the grounds that it is required by what it
17 calls "basic considerations of due process", because
18 allegedly Sergeant Girone has not been formally
19 charged¹⁹⁴. That allegation has been repeated like
20 a mantra, but pure repetition does not make the
21 allegation in any way true and it doesn't improve the
22 position in the same arguments that were made six
23 months ago.

24 The fact that Italy's new Request is in reality

¹⁹³ *Ibid.*, p. 38, lines 13-14

¹⁹⁴ Request, p. 13, paras. 45-46 and Section B. p. 25

1 an attempt to appeal from the Order of ITLOS is really
2 made clear in the 11th December 2015 Request itself.
3 As Italy states at paragraph 46 of its Request, and it
4 repeats it in the first paragraph of Appendix 4 to
5 that Request:

6 "There is no basis for the suggestion advanced by
7 de before ITLOS that Italy is to blame for India's
8 failure to file or frame charges."

9 No basis for the suggestion advanced by India
10 before ITLOS.

11 Apparently, Italy considers that its new Request
12 can serve as a kind of surrebuttal to India's
13 pleadings before ITLOS, and that the debate the
14 Parties engaged in seven months ago should now pick up
15 where it left off last August, notwithstanding the
16 fact that Italy's arguments were not upheld in the
17 meantime in the 24th August 2015 Order. As
18 Professor Pellet has explained, that is not a proper
19 purpose for a request for provisional measures.

20 But given that Italy has advanced the same
21 arguments both in its Request and again this morning,
22 I fear I have no choice but to respond on this
23 allegation, this due process allegation, and
24 I apologise if this gives rise to a sense of déjà vu,
25 but the record needs to be set straight because what
26 we heard this morning was anything but an objective

1 analysis of the facts.

2 Following reports of the firing of shots that
3 killed the two unarmed fishermen off the coast of
4 Kerala on 12th February 2012, the local police
5 authorities in Kerala filed what's known as a First
6 Information Report, an FIR, which indicated that prima
7 facie the shots had come from the "Enrica Lexie" and
8 were attributable to Sergeants Girone and Latorre.

9 The Marines were subsequently arrested on
10 19th February 2012, and following that, as we heard,
11 in June 2012 a charge sheet was filed against the
12 Marines before the Kerala court based on four
13 statutes: the Indian Penal Code, the Indian Code of
14 Criminal Procedure, the 1976 Indian Marine Zones Act,
15 and UNCLOS. The four specific statutes under which
16 the Marines were being charged were named in that
17 charge sheet.

18 On 22nd February 2012, Italy filed a petition
19 before the High Court of Kerala, as we heard,
20 challenging the jurisdiction of the Kerala authorities
21 to register the FIR and carry out an investigation of
22 the incident¹⁹⁵. But before that petition could be
23 decided, Italy and the two Marines filed a further
24 petition before the Supreme Court of India on
25 19th April 2012. That was what became known as Writ

¹⁹⁵ Request, Annex IT-15

1 No 135¹⁹⁶.

2 In its Request, Italy seizes on a single sentence
3 buried, literally buried in Writ No 135 which asserted
4 that the proceedings before the Kerala court "have
5 failed to provide an expeditious remedy to the
6 Petitioner"¹⁹⁷. In reality, the petition before the
7 Kerala High Court raised a number of complex issues
8 that required consideration, and the Kerala court
9 dealt with these in a 60-page judgment rendered on
10 29th May 2012 which was an entirely reasonable period
11 within which to issue a judgment on a petition of this
12 nature.

13 But what's more important is Italy passes over the
14 fact that the focus of Writ 135 had nothing to do with
15 alleged delays. Italy's plea was that the Government
16 of India, rather than the Kerala authorities, "was
17 obliged to exert its exclusive jurisdiction" over the
18 two Marines¹⁹⁸.

19 That petition, 135, was essentially repeated in
20 yet another petition Italy made to the Supreme Court
21 in July 2012, asking the Court to impugn and stay the
22 operation of the Kerala court's judgment of 29th May,
23 and any further criminal proceedings in Kerala. So

¹⁹⁶ *Ibid.*, Annex IT-16

¹⁹⁷ *Ibid.*, Appendix 4, p. 45, para. 3(2).

¹⁹⁸ Request, Annex IT-16, folio p. B

1 the Supreme Court actually had two petitions to deal
2 with, not just one, during 2012.

3 The Supreme Court upheld significant parts of
4 Italy's petitions in its judgment of 18th January
5 2013. In a well-reasoned opinion, the Supreme Court
6 ruled that it was the Union of India, not Kerala, that
7 had jurisdiction to proceed with the investigation and
8 trial of the two Marines, that custody of the Marines
9 should be transferred to Delhi, and that India, in
10 consultation with the Chief Justice of India, was to
11 set up a Special Court to try the matter under the
12 four legal instruments referred to in the Kerala
13 proceedings: the 1976 Maritime Zones Act, the Indian
14 Penal Code, the Code of Criminal Procedure and
15 UNCLOS¹⁹⁹.

16 While Italy now complains that the Supreme Court
17 did not decide the question of jurisdiction, which
18 would have included the immunities question, the
19 Supreme Court specifically indicated that Italy and
20 the Marines could argue the question of jurisdiction
21 before the relevant court, which was the Special
22 Court²⁰⁰.

23 There was no failure of due process in any of
24 this. To the contrary, Italy achieved much of what it

¹⁹⁹ *Ibid.*, Annex IT-19, p. 83

²⁰⁰ *Ibid.*, p. 84

1 wanted by having the case transferred from Kerala.
2 Moreover, the Italian contention that Italy never
3 identified the statutes under which the Marines would
4 be tried is plainly incorrect. The Supreme Court,
5 just as the courts of Kerala, named the four
6 applicable legal instruments.

7 Notwithstanding this, Italy's Request then asserts
8 that India failed to implement the Supreme Court's
9 judgment, delayed designating the Special Court for
10 about three months until April 2013, and failed to
11 file a charge sheet²⁰¹. That's in the Request and we
12 heard it almost *ad infinitum* this morning from
13 virtually every one of Italy's pleaders.

14 Mr President, I would like to explain why these
15 contentions are also fundamentally misconceived, but
16 perhaps I could start in on that part of my pleading
17 after the customary break.

18 **THE PRESIDENT:** Thank you, Mr Bundy. Yes, we have
19 reached the time for a break, so we will adjourn until
20 5.00, and then you will continue your presentation.

21 **MR BUNDY:** Thank you, Mr President.

22 **(4.29 pm)**

23 **(A short break)**

24 **(5.00 pm)**

25 **THE PRESIDENT:** Mr Bundy, I invite you to continue your

²⁰¹ Request, Appendix 4, p. 46, paras. 4-5

1 presentation.

2 **MR BUNDY:** Thank you, Mr President. Before the break,
3 I had discussed the 18th January 2013 Order of the
4 Supreme Court, that's where it directed India to set
5 up the Special Court designated agency to investigate
6 the matter and that the Special Court would conduct
7 the proceedings against the Marines under the four
8 legal instruments, the Maritime Zones Act, the Penal
9 Code, the Code of Criminal Procedure and UNCLOS.

10 I now turn to Italy's contentions that India
11 failed to implement the Supreme Court's judgment
12 designating the Special Court and failed to file
13 a charge sheet. Let me explain why these contentions
14 are misconceived.

15 Italy overlooks at least four events of its own
16 making that seriously delayed matters, impeded the
17 investigation by the NIA, failed to respect the
18 undertakings that Italy itself had made, and
19 eventually resulted in the frustration of the Special
20 Court proceedings, including the ability of the
21 prosecutor to file a charge sheet with the Court or
22 with the Special Court, or for the Special Court to
23 frame formal charges against the Marines.

24 First, in February 2013, Italy and the Marines
25 lodged an application seeking a relaxation of the bail
26 conditions of the two Marines to allow them to return

1 to Italy for a period of four weeks to vote in the
2 Italian elections. That matter was decided by the
3 Supreme Court of India on 22nd February 2013²⁰².

4 In that decision, the Supreme Court noted that the
5 Marines had previously been granted leave to return to
6 Italy over the Christmas period a few months earlier,
7 and had duly returned afterwards, and it also noted
8 that Italy's Ambassador in New Delhi had filed an
9 Affidavit with the Supreme Court where he had taken
10 full responsibility to ensure that the Marines would
11 return to India if the new application was granted,
12 and in the light of those considerations, the Supreme
13 Court permitted the Marines to travel back to Italy.
14 Obviously there is no failure of due process there.

15 But then what happened? On 11th March 2013, while
16 the Marines were back in Italy, Italy sent a Note
17 Verbale to the Indian Ministry of External Affairs
18 stating in rather categorical terms, and I quote from
19 the Note Verbale:

20 "The two Italian Marines, Mr Latorre and
21 Mr Girone, will not return to India on the expiration
22 of the permission granted to them."²⁰³

23 Following that, ultimately the Marines did return
24 to India, but only after intense diplomatic efforts.

²⁰² Request, Annex IT-48

²⁰³ Request, Annex IT-50, p. 6, para. 3; ITLOS/PV.15/C24/2, p. 40, lines 6-13 and footnotes

1 Secondly, no sooner had India entrusted the
2 investigation of the shooting to the NIA in April 2013
3 than the Marines challenged the NIA's authority to
4 carry out the investigation²⁰⁴. The Supreme Court then
5 had to deal with that issue, and it did so in an Order
6 of 26th April 2013, noting that the Court was not
7 called upon to decide which agency should conduct the
8 investigation; rather it was "for the Central
9 Government to take a decision in the matter".²⁰⁵ The
10 Supreme Court also made it clear that, if there was
11 any jurisdictional error on the part of the Central
12 Government, it would always be open to the accused,
13 the Marines, to question the same before the
14 appropriate forum, which would be the Special Court²⁰⁶.

15 Again, this shows that due process was being fully
16 respected, but it also shows that Italy's conduct with
17 these constant petitions caused the Supreme Court
18 continually to have to get involved in ancillary
19 proceedings when such issues should have fallen to the
20 Special Court.

21 The third thing that happened is then Italy
22 obstructed NIA's investigation, which was the cause of
23 further delay.

²⁰⁴ Order of the Supreme Court, 26 April 2013; Request, Annex IT-50, p. 8, para. 4

²⁰⁵ *Ibid.*, pp. 10-11, para. 6

²⁰⁶ *Ibid.* p. 11, para. 7

1 The Tribunal may recall that after the shooting
2 incident occurred in 2012, Italy had provided a formal
3 statement to India in May 2012 that it would give its
4 assurances to the Supreme Court that if the presence
5 of the four other Marines on the vessel, if the
6 presence of those four other Marines who were
7 stationed on the "Enrica Lexie" at the time of the
8 incident was required by the Court or in response to
9 any lawful entity, Italy -- and I quote from their
10 assurance -- "shall ensure their presence before an
11 appropriate court or authority"²⁰⁷. That is what Italy
12 said in 2012.

13 After the NIA had been entrusted with the
14 investigation, on 13th May 2013, the NIA requested the
15 Indian Foreign Ministry to procure the presence of the
16 Marines, and India thus sent a Note Verbale to Italy
17 on 13th May asking the four Marines to come to India
18 to be questioned as part of the investigation.

19 Italy responded by a diplomatic note dated
20 15th May 2013, in which it expressed, and I quote from
21 the note:

22 "... its willingness and commitment to extend all
23 possible co-operation in order to establish the
24 unvarnished true and complete facts in the case."²⁰⁸

²⁰⁷ ITLOS/PV.15/C24/2, p. 27, lines 24-36

²⁰⁸ *Ibid.*, p. 27, lines 38-49

1 However, Italy's Note went on to say that while
2 Italy was fully committed to an expeditious completion
3 of the investigation, it would not be able to present
4 the four other Marines for examination in India
5 ostensibly because they had been posted to other
6 duties; duties which over the ensuing months Italy
7 never clarified.

8 India protested Italy's position, because it was
9 contrary to the undertaking that Italy had made in
10 2012. But after six months went by, without Italy
11 living up to its promise to ensure the presence of the
12 Marines in India, the NIA was left with no option but
13 to carry out the interviews with the four Marines by
14 videoconferencing, lest even more delay be incurred.
15 That was not in accordance with Italy's undertaking,
16 it was not the most appropriate means for carrying out
17 a murder investigation, and it did delay the
18 investigation.

19 Under Indian law, no formal charge sheet could be
20 prepared until the investigation was complete and
21 provided to the prosecutor and the Court. Because of
22 Italy's refusal to send the four Marines back to India
23 to assist in the investigation, the investigation was
24 not completed until the end of November 2013.

25 But shortly after that, and this is my fourth
26 example of where Italy has been I would suggest

1 economical with the facts, the Marines embarked on
2 a further series of tactics that frustrated the
3 commencement of the proceedings before the Special
4 Court.

5 In its Request, Italy refers to the fact that on
6 13th January 2014, and this was referred to again this
7 morning, the Marines made an application in the
8 Supreme Court complaining about India's so-called
9 "non-compliance" with the Supreme Court's Order of
10 18th January 2013, and "inordinate delay"²⁰⁹, but that
11 complaint disregarded the fact that India had complied
12 with the earlier order by designating the agency to
13 investigate the incident, and by establishing the
14 Special Court.

15 Actually, what was not mentioned this morning is
16 that most of the Marines' January 2014 application was
17 directed at NIA's request to transfer custody of the
18 Marines to the Special Court, and NIA's invocation of
19 what's known as the SUA Act, the Suppression of
20 Unlawful Activities Act, as potentially forming
21 a basis of charges. Counsel for the Marines argued
22 that the SUA Act was not part of the original charge
23 sheet or the Supreme Court's ruling of 18th January
24 2013²¹⁰, and that the Final Investigation Report

²⁰⁹ Request, Appendix 4, p. 46, para. 5(4) and Annex IT-51

²¹⁰ Request, Annex IT-51, pp. 11-12

1 dealing with the Marines should be filed only under
2 the four specific laws mentioned earlier, mentioned in
3 the 18th January 2013 Order: the Maritime Zones Act,
4 the Penal Code, the Code of Criminal Procedure and
5 UNCLOS²¹¹.

6 Once again, it was perfectly clear that the
7 Marines were well aware of the legal statutes under
8 which they would be charged.

9 After obtaining the views of the Ministry of Law
10 and Justice, which itself suggests the seriousness
11 with which India was treating the proceedings, the
12 Under Secretary of Home Affairs submitted an Affidavit
13 to the Supreme Court on 24th February 2014 reporting
14 that the Minister of Law and Justice considered that
15 the provisions of the SUA Act were not attracted in
16 the case. The Affidavit therefore stated that the
17 charge sheet would reflect this opinion²¹², and the
18 very same day the Supreme Court issued an Order taking
19 note of that position²¹³.

20 That should have been the end of the matter. NIA
21 should have been able to amend and file its report,
22 after which the charge sheet could be prepared, and
23 the Special Court would have been in a position to

²¹¹ *Ibid.*, p. 20, para. (b)

²¹² Request, Annex IT-54

²¹³ Request, Annex IT-55

1 hear the parties, frame charges and try the case. But
2 once again, the Marines raised another obstacle. For
3 at the 24th February 2014 session before the Supreme
4 Court, counsel for the Marines argued that, given that
5 the SUA Act was no longer applicable, NIA had no
6 authority to investigate or prosecute the case, or
7 submit the charge sheet. Counsel for the Marines
8 asked for the opportunity to brief these issues, which
9 was granted by the Supreme Court²¹⁴.

10 So now you had the Marines challenging even the
11 authority of NIA to carry out the investigation. But
12 instead of pursuing this course of action, less than
13 two weeks later the Marines filed a new application
14 before the Supreme Court. This was Writ No 236 of
15 6th March 2014. In that application, the Marines
16 requested the Supreme Court to find that the NIA
17 investigation was illegal, invalid, and null and
18 void²¹⁵.

19 Now, recall, Mr President, members of the
20 Tribunal, this was the same investigation with respect
21 to which less than one year earlier Italy had
22 expressed its willingness to extend all possible
23 co-operation in its Note Verbale of 15th May 2013, all
24 possible co-operation.

²¹⁴ *Ibid.*, p. 2

²¹⁵ Request, Annex IT-56, p. 33, para. 9a)

1 Suffice it to say that it is difficult to
2 reconcile Italy's undertaking to extend all possible
3 co-operation in the investigation with the Marines'
4 subsequent attempts to block the NIA investigation
5 before the Supreme Court.

6 Moreover, in the 6th March 2014 petition, the
7 Marines also asked the Supreme Court to declare the
8 designation of the Special Court illegal and without
9 jurisdiction, and that the Marines had functional and
10 sovereign immunity.²¹⁶

11 So you have the Marines, having successfully
12 challenged the Kerala courts, now challenging the
13 validity of the Special Court and now challenging
14 again, they had presaged this a year earlier, the
15 authority of NIA to carry out the investigation, and
16 that put a spanner into the works, and the result of
17 these manoeuvres was that on 28th March 2014, the
18 Supreme Court ordered the Special Court proceedings to
19 be kept in abeyance²¹⁷.

20 That being the case, and in the light of the
21 challenge to the jurisdiction of the NIA to submit its
22 investigation, no charge sheet could be filed because
23 the entity preparing the charge sheet was now being
24 sought to be enjoined from even filing it. And

²¹⁶ *Ibid.*, p. 34, paras. (b) and (d)

²¹⁷ Request, Annex IT-57

1 therefore, no charges could be framed by the Special
2 Court. That situation cannot be laid at India's
3 doorstep.

4 Remarkably, that's not the end of the story,
5 because having introduced Writ No 236 in March 2014,
6 the Marines then changed their mind the following
7 year. In an application lodged before the Supreme
8 Court on 8th July 2015, the Marines asked the Supreme
9 Court to defer consideration of the very writ that
10 they had introduced, pending the award of the
11 Annex VII Tribunal.

12 In other words, having asked the Supreme Court in
13 March 2014 to decide the jurisdiction and immunities
14 questions, the Marines engaged in a complete
15 about-face.

16 How, in these circumstances, Italy can come before
17 your Tribunal and argue that it is India that has been
18 dilatory in filing the charge sheet, or respecting due
19 process, when it is Italy and the Marines who made
20 constant applications that derailed the proceedings,
21 is disingenuous, to say the least.

22 The argument advanced by Italy in these
23 proceedings was no good when it was made before ITLOS
24 last year, it was not accepted by ITLOS as grounds for
25 changing the bail status of Sergeant Girone in its
26 24th August order, and it has not improved with time.

1 It certainly does not constitute a new fact or change
2 of circumstance justifying a modification of ITLOS's
3 previous order or the prescription of a so-called
4 additional order with respect to Sergeant Girone.

5 Just to be clear, Mr President, I should add that
6 India in no way contests the Marines' right to avail
7 themselves of all legal remedies available to them
8 before the Indian courts. India is a rule of law
9 country, and it is proud of its tradition, and as the
10 Co-Agent has said, all of the Marines' petitions were
11 carefully considered and addressed.

12 So the Marines were perfectly within their rights,
13 as was Italy, to file all of these applications before
14 the courts. But the other side of the coin is that to
15 the extent that Italy and the Marines filed
16 applications challenging the investigation,
17 challenging these proceedings before the Special
18 Court, something they were perfectly entitled to do,
19 they also must live with the procedural consequences
20 of those applications. And the consequences were that
21 the submission of the investigation report was blocked
22 from being submitted to the Special Court, which meant
23 that a formal charge sheet could not be drawn up, and
24 the Special Court was also blocked, which meant that
25 it could not frame the charges. That was
26 a consequence of the Marines' petitions, not any

1 action by India.

2 Equally unavailing is the argument that India had
3 an obligation under international law to address the
4 question of the Marines' alleged immunity *in limine*
5 *litis*, which it failed to do²¹⁸. That argument
6 founders for the same reasons as Italy's allegation of
7 lack of due process.

8 Without repeating what I have said about the
9 history of the Indian proceedings, let me just recall
10 the following: it was Italy that first challenged the
11 jurisdiction of the Kerala courts to decide the
12 Marines' situation, including the question of
13 immunity.

14 When India's Supreme Court ordered that the issues
15 be dealt with by a Special Court, it stated that the
16 question of jurisdiction, which inevitably would have
17 included the immunities issue, could be argued in
18 front of the Special Court.

19 Before the Special Court could start its work,
20 however, the Marines began to challenge the right of
21 the NIA to undertake the investigation of the
22 incident.

23 Once NIA had finished its report, the Marines
24 again challenged the legal basis of the investigation,
25 and challenged the jurisdiction of the Special Court,

²¹⁸ Request, p. 24, paras. 78 and 79

1 and the Special Court proceedings were thus placed in
2 abeyance.

3 At the same time, the Marines requested that the
4 Supreme Court decide the question of jurisdiction,
5 which would have included the immunity issue, but then
6 last year the Marines reversed themselves and asked
7 the Supreme Court to defer consideration of their
8 request for the duration of the Annex VII case.

9 Given those circumstances, the argument that India
10 is to blame for not deciding the immunity issue in
11 a timely manner is plainly wrong.

12 Mr President, I come to my conclusion.
13 Provisional measures are an exceptional remedy, the
14 prescription of which depends upon a compelling
15 showing by the applicant that circumstances exist
16 justifying their indication taking into account the
17 need to preserve the respective rights of both
18 parties. That is particularly the case in a situation
19 like the present, where Italy's request of December
20 has not been lodged in a vacuum, but rather just four
21 months after ITLOS already ruled that virtually the
22 same request was not appropriate.

23 The August 2015 Order of ITLOS was a carefully
24 balanced decision that reflected the fact that both
25 Parties have interests at stake in these proceedings
26 that need to be preserved pending your final award.

1 for India to have its claimed rights implemented in
2 contradistinction with the prescription of Article 290
3 of UNCLOS.

4 Indeed, there is no need for complicated reasoning
5 in this respect. First, in its Order dated
6 24th August 2015, the ITLOS expressly considered
7 India's argument according to which:

8 "... if granted, Italy's second requested
9 provisional measure [which is identical to that at
10 stake in the present proceedings] ... would prejudge
11 the decision of the Annex VII 7 Tribunal or preclude
12 its implementation."²¹⁹

13 That is the end of the quote from your Order.
14 Consequently, the ITLOS did not uphold Italy's second
15 submission, which it considered "inappropriate"²²⁰.

16 Second, as I have shown in my previous
17 intervention, Italy cannot invoke (and, in fact, does
18 not invoke) any change of circumstances which could
19 justify a reversal of this finding.

20 Then, third, since the Tribunal is not an
21 appellate body, it cannot reverse the ITLOS position.

22 Ergo, fourth, for this reason, and for all other
23 reasons on which the ITLOS based its decision, you
24 cannot, Mr President, members of the Tribunal, grant

²¹⁹ *The "Enrica Lexie" Incident (Italy v. India), Provisional Measures*, Order of 24 August 2015, para. 82

²²⁰ *Ibid.*, para. 127

1 Italy's request.

2 I say this, Mr President, with the utmost respect:
3 this is so not because this Tribunal is by any means
4 subordinated to the ITLOS, but simply because, as
5 I explained earlier, absent any change of
6 circumstances, a reversal of the position of the
7 Hamburg Tribunal would be incompatible with the very
8 system of provisional measures.

9 Now, Mr President, and again *ex abundanti cautela*,
10 please let me summarise, independently of this *ne bis*
11 *in idem* argument, the legal and factual reasons why,
12 on this ground too, Italy's request cannot be granted.
13 Unfortunately, I have to apologise that for doing
14 this, I will have mainly to summarily repeat my
15 argument before the ITLOS last August²²¹.

16 In law first²²². It is a well established
17 principle that an order of provisional measures "must
18 not prejudice any decision on the merits", as the
19 ITLOS has repeatedly held²²³, in line with the
20 *jurisprudence constante* of the ICJ²²⁴.

²²¹ ITLOS/PV.15/C24/2, 10 August 2015, afternoon, pp. 36-42 (Mr Pellet)

²²² See Written Observations of India, 6 August 2015, pp. 44-53, paras. 3.48-3.75 and ITLOS/PV.15/C24/2, 10 August 2015, afternoon, pp. 36-42 (Pellet) and ITLOS/PV.15/C24/4, 11 August 2015, afternoon, pp. 14-18 (Pellet). See also Written Observations of India, 26 February 2016, pp. 43-46, paras. 3.58-3.69

²²³ *Dispute concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Provisional Measures, Order of 25 April 2015, para. 98. See also *The "Enrica Lexie" Incident (Italy v. India)*, Provisional Measures, Order of 24 August 2015, para. 137

²²⁴ See e.g. I.C.J., Order, 11 September 1976, *Aegean Sea Continental Shelf, Interim Protection, Reports 1976*, p. 13, para. 44; Order, 15 October 2008, *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, Provisional Measures, Reports 2008, pp.

1 In the present case, granting Italy's request
2 would not only prejudice but purely and simply
3 prejudice your decision on the substance of the case.
4 This is plainly apparent when you compare Italy's
5 submission in the present phase with paragraph (d) of
6 the "relief sought" as described in its Notification
7 and Statement of Claims. You should have seen that on
8 the screen, but you will find it at tab 2 in your
9 folders.

10 Not only the claims are identical, but the grounds
11 on which they are based are also identical as shown in
12 the table which should be on the screen, which is
13 included in any case in your folders at tab 3.

14 Today, Italy invokes the -- I would have liked to
15 have the screen on. Well, let's go without it. You
16 have that in your folders at tab 2.

17 Today, Italy invokes the "rules of international
18 law on the immunity of States and their officials"²²⁵.
19 This also is one of the grounds on which Italy based
20 its claims in its initial Statement²²⁶. I could say,

397-398, para. 148; Order, 18 July 2011, *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand), Provisional Measures, Reports 2011*, p. 554, para. 68; Order, 13 December 2013, *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica); Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Reports 2013*, p. 408, para. 38 and Order, 3 March 2014, *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia), Provisional Measures, Reports 2014*, p. 160, para. 54

²²⁵ Italy's Request for the Prescription of Provisional Measures under Article 290, Paragraph 1, of the United Nations Convention on the Law of the Sea, 11 December 2015 ("Italy's Request"), para. 63(a)

²²⁶ Notification, para. 29 (g)

1 Mr President, that the act of which Sergeant Girone is
2 accused clearly does not fall within the scope of his
3 official functions, and this is in accordance with the
4 case law of the Italian Supreme Courts themselves²²⁷.

5 But having made this point, I will leave it there:
6 the issue has been discussed at already excessive
7 length on the occasion of Italy's first request for
8 provisional measures²²⁸, it belongs either to
9 preliminary objections or to the merits.

10 Today, Italy asserts that "Sergeant Girone is not
11 charged with any offence under Indian law"²²⁹. Italy
12 also affirmed in its Statement of Claim that:

13 "Although they have not been charged, the two
14 Marines continue to be placed under bail constraints
15 requiring them to remain in Delhi."²³⁰

16 Here again, Mr President, I could repeat, after
17 Dr Chadha, after Ambassador Mukul, and after Rod
18 Bundy, that alleging that Sergeant Girone is unaware

²²⁷ Constitutional Court of Italy, Judgment No. 238, 22 October 2014 (India Written Observations, 6 August 2015, Annex 44); Court of Cassation, 29 November, 2012, *Adler et al.*, (*Abou Omar* case), 46340/2012, ILDC (IT 2012) ([http://www.academia.edu/3854342/Criminal_Proceedings_v_Adler_and_ors_Abu_Omar_case_Final_](http://www.academia.edu/3854342/Criminal_Proceedings_v_Adler_and_ors_Abu_Omar_case_Final_.).

[Appeal_Judgment_No_46340_2012_ILDC_1960_IT_2012_](http://www.academia.edu/3854342/Criminal_Proceedings_v_Adler_and_ors_Abu_Omar_case_Final_.)). See also ITLOS/PV.15/C24/4, 11 August 2015, afternoon, p. 13 (Pellet) (Annex IT-34(d))

²²⁸ See e.g. India Written Observations, 6 August 2015, paras. 3.64-3.75; ITLOS/PV.15/C24/2, 10 August 2015, afternoon, p. 2, lines 30-35 (Ms Chadha), pp. 15-16 (Pellet) (Annex IT-34(b)) and ITLOS/PV.15/C24/4, 11 August 2015, afternoon, p. 13 (Pellet) (Annex IT-34(d)) and India Written Observations, 26 February 2016, paras. 3.51-3.52 and 3.61

²²⁹ Italy's Request, para. 7 (c)

²³⁰ Notification, para. 21; see also, para. 23

1 of the charges against him is not serious. But here
2 again, this has already been discussed in some details
3 between the Parties²³¹, and we have probably been wrong
4 to enter in such a debate. It too clearly relates to
5 the merits of the case.

6 Today, Italy claims that "as of the date of the
7 filing of the present Request, Sergeant Girone had
8 been deprived of liberty for over three years and nine
9 months"²³²; this was exactly its point in July last
10 year²³³.

11 Beside the fact that the limitation of his freedom
12 is very limited, suffice it to recall that, as I have
13 said earlier today, this is the result of the Marines
14 and Italy's conduct, and this also has been said in
15 some detail by Rodman Bundy. The Marines have
16 systematically opposed the pursuit of the proceedings
17 both before the Kerala courts, then before the Supreme
18 Court and the Special Court instituted by the Supreme
19 Court, to try this case (including for determining
20 whether Indian courts have jurisdiction to decide on

²³¹ See e.g. India Written Observations, 6 August 2015, paras. 1.16-1.20, 2.12-2.13 and 3.20-3.38; ITLOS/PV.15/C24/2, 10 August 2015, afternoon, pp. 5-10 (Mr Narasimha) and p. 25, lines 22-36, p. 32, lines 34-43 (Mr Bundy) (Annex IT-34(b)) and ITLOS/PV.15/C24/4, 11 August 2015, afternoon, pp. 1-3 (Mr Narasimha), p. 8, lines 27-40 (Mr Bundy) (Annex IT-34(d) and India Written Observations, 26 February 2016, paras. 2.6, 2.22-2.33, 3.42 and 3.54-3.57

²³² Italy's Request, para. 7 (e)

²³³ Notification, para. 23

1 it)²³⁴. Italy cannot blow hot and cold, start a fire
2 and call the firefighters. The judicial fate of the
3 two Marines would have been fixed a long time ago in
4 all fairness and objectivity by fully independent
5 Indian courts had they and Italy not opposed it. But
6 here as always, this is a question for the merits
7 which, like most of the Italian arguments, is
8 irrelevant at the present phase.

9 Suppose, members of the Tribunal, that you grant
10 Italy its request, you would have to prejudge all
11 these arguments at this provisional and preliminary
12 phase in clear contradiction with an undisputed
13 principle of international procedural law and with the
14 constant jurisprudence of international courts and
15 tribunals.

16 Now, Italy claims that -- and I quote from its new
17 Request:

18 "Italy's undertaking to ensure [Girone's] return
19 if this Tribunal's award requires it means that India
20 will suffer no prejudice."²³⁵

21 However, Italy overlooks the fact that ITLOS
22 already examined each of these arguments before

²³⁴ Supreme Court of India, Judgment, 18 January 2013, *Italy & Ors v. Union of India & Ors*, (Annex 19 to the Notification and ItSC). See e.g. India Written Observations, 6 August 2015, paras. 2.9-2.13 and 3.21-3.37; ITLOS/PV.15/C24/2, 10 August 2015, afternoon, pp. 5-10 (Mr Narasimha) and pp. 25-31 (Mr Bundy) (Annex IT-34(b)) and ITLOS/PV.15/C24/4, 11 August 2015, afternoon, p. 7 (Mr Bundy) (Annex IT-34(d)) and India Written Observations, 26 February 2016, paras. 2.24-2.35 and 3.39-3.45

²³⁵ Italy's Request, p. 25, para. 81

1 rejecting Italy's request in its August Order. As we
2 have noted in our Written Observations, ITLOS's
3 reasoning in this respect is clear and complete, it
4 does not call for any additional comment²³⁶.

5 This said, legally speaking, this is not the main
6 point. The basic issue is that, Mr President, members
7 of the Tribunal, you could not accede to Italy's
8 Request without, by the same token, granting Italy's
9 claim; that is by deciding that India must cease to
10 exercise any measure of restraint with respect to
11 Sergeant Girone, which is precisely one of the
12 submissions in the Notification of Claim by Italy.

13 Provisional measures cannot be an occasion to get
14 "provisionally" what you claim as the end result of
15 the proceedings. They have no role to play when
16 an established situation does not threaten nor
17 jeopardise the outcome of the lawsuit.

18 Both parties have the same claims as to the
19 exercise of jurisdiction over the crimes of which
20 Sergeant Girone is accused. Pending your award on the
21 merits, both India and Italy have the same rights to
22 adopt bail conditions. There is no reason to accept
23 that Italy's claimed rights prevail over India's. In
24 such a situation, provisionally and until the final
25 decision is made, the maxim *quieta non movere* must

²³⁶ IWO, p. 45, para. 3.68

1 apply.

2 In the present case, Sergeant Girone's liberty of
3 movement is curtailed in some but limited respect.
4 And describing his situation as "disproportionate,
5 arbitrary and unlawful in the present circumstances"
6 is, at best, highly exaggerated. The limitations to
7 which he has been submitted must be put in balance
8 with the charge of murder he is facing. This,
9 Mr President, is the real proportionality which must
10 be taken into consideration.

11 Before concluding, Mr President, members of the
12 Tribunal, please let me draw your attention to Chapter
13 IV of our Written Submission which India, very
14 moderately, chose to entitle "The Tendentious
15 Character of Italy's Request". This is indeed a very
16 polite way of explaining that, from our point of view,
17 Italy is seriously misusing its procedural rights and
18 the system of provisional measures.

19 It infringes the very general principle *ne bis in*
20 *idem*; it totally overlooks the crucial requirement of
21 a material change of circumstances in order to have
22 provisional measures modified, which, as recalled by
23 Rodman Bundy, are and must remain an exceptional
24 remedy; and it attempts to transform this Tribunal
25 into an appellate body of the ITLOS, thus clearly
26 misconceiving the relations between both tribunals.

1 Mr President, members of the Tribunal, this puts
2 an end to my presentation, and at the same time to
3 India's first round. In the name of all our
4 delegations, I thank you very much for your attention,
5 and I wish you a good evening.

6 **THE PRESIDENT:** Thank you, Professor Pellet. This brings
7 us to the end of the first round of arguments from
8 both parties. According to the schedule, we will
9 continue the hearing tomorrow at 10.00 am, to hear the
10 second round of oral arguments, first by Italy, and
11 then by India.

12 The hearing stands adjourned.

13 **(5.38 pm)**

14 **(The hearing adjourned until 10.00 am the following day)**

15

16