

**ARBITRATION UNDER ANNEX VII OF THE UNITED NATIONS
CONVENTION ON THE LAW OF THE SEA**

PCA Case No. 2015-28

**DISPUTE CONCERNING
THE “ENRICA LEXIE” INCIDENT**

THE ITALIAN REPUBLIC v. THE REPUBLIC OF INDIA

**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

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SUMMARY

The Dispute Concerning the “Enrica Lexie” Incident concerns India’s assumption of jurisdiction over two Italian Marines, part of an anti-piracy Vessel Protection Detachment, on official duty on board the *MV Enrica Lexie*, an Italian-flagged oil tanker in international waters. The two Marines, Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone, were arrested by the Indian authorities on 19 February 2012, after the *Enrica Lexie* was forced from international waters into port at Kochi, in connection with an alleged shooting incident, also in international waters, in which two fishermen were killed.

The two Marines have been detained or subject to Indian bail restrictions curtailing their liberty ever since. They are not charged with any crime. Pursuant to the Provisional Measures Order of the International Tribunal for the Law of the Sea of 24 August 2015, pending the Annex VII proceedings with which the Tribunal is seised, all court proceedings in India have been suspended and no new proceedings may be initiated.

The Annex VII proceedings could last between two to four years, or more, before a final Award of the Tribunal is rendered. Sergeant Latorre is presently in Italy on medical grounds, pursuant to a relaxation of his bail conditions by the Indian Supreme Court in consequence of a serious brain stroke in September 2014. Italy understands that a necessary consequence of the suspension of all Indian proceedings is that Sergeant Latorre’s leave to remain in Italy, subject to undertakings by the Italian Government, must be construed as leave to remain in Italy during the pendency of the Annex VII proceedings. Italy has addressed this issue in an affidavit submitted to the Indian Supreme Court that is also annexed to this Request.

This Request for provisional measures is submitted pursuant to Article 290(1) of the United Nations Convention on the Law of the Sea seeking an Order from the Tribunal that India take such measures as are necessary to relax the bail conditions it has imposed on Sergeant Girone, the Marine who remains in India, to enable him to return to Italy, under the responsibility of the Italian authorities, pending the final determination of the Annex VII Tribunal. Sergeant Girone’s continuing deprivation of liberty, which is in breach of minimum guarantees of due process under international law, causes irreversible prejudice to Italy’s rights of jurisdiction over and immunity for its officials.

India would suffer no harm if the provisional measure sought by Italy were granted. No criminal trial can take place in India until the issues of jurisdiction and immunity have been decided by the Annex VII Tribunal. Italy has offered, and hereby renews, solemn undertakings to the effect that it will comply with an award of the Annex VII Tribunal requiring the return of the Marines to India. An individual cannot, however, be deprived of his liberty and other fundamental rights on the basis that he is a guarantee for the future compliance by a State with the award of an international tribunal.

CHAPTER 1 INTRODUCTION

1. By written Notification dated 26 June 2015 comprising a statement of the claim and the grounds on which it is based (together **“the Notification”**), the Italian Republic (**“Italy”**) instituted proceedings against the Republic of India (**“India”**) before an arbitral tribunal established under Annex VII of the United Nations Convention on the Law of the Sea (the **“Convention”** or **“UNCLOS”**). The Notification and its accompanying exhibits have now been formally filed with this Tribunal.

2. The dispute before this Annex VII Tribunal concerns the exercise of jurisdiction by India over an Italian-flagged vessel, the *MV Enrica Lexie*, and two Marines from the Italian Navy, Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone (the **“Marines”**). The Marines were on official duty on board the *Enrica Lexie* on 15 February 2012 when an incident took place approximately 20.5 nautical miles off the coast of India (the **“Enrica Lexie Incident”**). Having coerced the *Enrica Lexie* to change course and sail to Kochi, the Indian authorities compelled the Marines to disembark and arrested them on 19 February 2012. Sergeant Girone has been deprived of his liberty since then. Sergeant Latorre was authorised by the Indian Supreme Court to return to Italy subject to conditions and an undertaking that he would be returned to India after suffering a brain stroke in September 2014.

3. On 21 July 2015, pending the constitution of the Annex VII Tribunal, Italy submitted a request for provisional measures to the International Tribunal for the Law of the Sea (**“ITLOS”**) pursuant to Article 290(5) of the Convention. Italy requested that, pending the determination of the dispute by the Annex VII Tribunal, India be ordered to suspend the exercise of all domestic jurisdiction over the Enrica Lexie Incident and the Marines, and to adopt all measures necessary to enable Sergeant Girone to travel to and remain in Italy, and Sergeant Latorre to remain in Italy.

4. Following a hearing in Hamburg on 10-11 August 2015, ITLOS issued an Order on 24 August 2015 (**“the ITLOS Order”**) prescribing the following provisional measure:

Italy and India shall both suspend all court proceedings and shall refrain from initiating new ones which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal or might jeopardize or prejudice the carrying out of any decision which the arbitral tribunal may render.¹

5. Both Italy and India have taken steps to comply with the suspension of proceedings ordered by ITLOS.²

¹ The *“Enrica Lexie” Incident (Italy v. India), Provisional Measures, Order of 24 August 2015*, para. 141(1) (**Annex IT-35**) (**“ITLOS Order”**).

² 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

6. Italy now requests that, pursuant to Article 290(1) of UNCLOS, the Annex VII Tribunal (the “**Tribunal**”) prescribe the following additional provisional measure:

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

7. The provisional measure requested by Italy is appropriate in light of the following circumstances:

- (a) All court proceedings are stayed in consequence of the ITLOS Order. Italian and Indian judicial authorities have taken steps to comply with the ITLOS Order.
- (b) Italy has offered solemn undertakings to the effect that it will comply with an award of the Annex VII Tribunal requiring the return of the Marines to India.
- (c) It is a fundamental principle of due process that measures depriving individuals of their liberty need a proper basis in law. There is no such basis in this case. Sergeant Girone is not charged with any offence under Indian law. There is no justification for this failure of due process.
- (d) Criminal proceedings cannot take place in India because of the stay. Accordingly, pending the final decision in the Annex VII proceedings, Sergeant Girone cannot be charged in India or in Italy; nor can he be put on trial.
- (e) As of the date of the filing of the present Request, Sergeant Girone had been deprived of liberty for over 3 years and 9 months. In the four Annex VII arbitrations that concluded with the rendering of an award, proceedings lasted an average of 3 years, 3 months and 23 days.³ Absent any provisional measure from this Tribunal, Sergeant Girone may therefore end up being deprived of his liberty, without charge, for a total of over seven years.

to paragraph 141(2) of the ITLOS Order and Article 95(1) of the Rules of the Tribunal, 23 September 2015, with attachments (**Annex IT-37**).

³ That average is based on the following cases: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, 4 years, 2 months and 26 days; *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India*, 4 years, 8 months and 29 days; *Guyana v. Suriname*, 3 years, 6 months and 24 days; *Barbados v. Trinidad and Tobago*, 2 years, 1 month and 26 days; and *Arctic Sunrise Arbitration (Netherlands v. Russia)*, 1 year, 10 months and 10 days (where, however, the respondent State’s failure to participate in the proceedings had an impact on duration). Not included in this calculation is *Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, where proceedings ended with an award on agreed terms.

- (f) Sergeant Girone's deprivation of liberty is disproportionate, arbitrary and unlawful in the present circumstances.
- (g) Sergeant Girone is an officer of the Italian armed forces, who was exercising official functions at the time of the events leading to his arrest, and Italy is entitled to his immunity from Indian criminal jurisdiction.
- (h) Every additional day Sergeant Girone is compelled by India to stay within its jurisdiction and is deprived of his liberty constitutes an exercise of Indian jurisdiction that causes irreversible prejudice to Italy's rights in this dispute.

8. After this Introduction, this Request will provide a summary of the proceedings so far (**Chapter 2**), followed by a Statement of Facts (**Chapter 3**), a Statement of Legal Grounds (**Chapter 4**) and Submissions (**Chapter 5**).

CHAPTER 2
SUMMARY OF THE UNCLOS PROCEEDINGS

9. In the Notification, filed on 26 June 2015, Italy requested the Tribunal to adjudge and declare as follows:

- (a) India has acted and is acting in breach of international law by asserting and exercising jurisdiction over the *Enrica Lexie* and the Italian Marines in connection with the Enrica Lexie Incident.
- (b) The assertion and exercise of criminal jurisdiction by India is in violation of India's obligation to respect the immunity of the Italian Marines as State officials exercising official functions.
- (c) It is Italy that has exclusive jurisdiction over the *Enrica Lexie* and over the Italian Marines in connection with the Enrica Lexie Incident.
- (d) India must cease to exercise any form of jurisdiction over the Enrica Lexie Incident and the Italian Marines, including any measure of restraint with respect to Sergeant Latorre and Sergeant Girone.
- (e) India has violated its obligation under the Convention to cooperate in the repression of piracy.⁴

10. Italy also requested the Tribunal “*to order India not to prosecute the criminal case against the Italian Marines and to terminate all legal proceedings connected to the Enrica Lexie Incident before the Indian Courts.*”⁵

11. Consistently with the relief it was seeking, Italy's Notification invited India to agree to provisional measures intended both to preserve Italy's rights and to prevent aggravation of the dispute.⁶

12. As India failed to agree to those measures within the two-week period specified under Article 290(5) of UNCLOS, Italy filed a Request for the prescription

⁴ Notification, para. 33.

⁵ Notification, para. 34.

⁶ Italy requested the following measures in the Notification (para. 31):

- i) India shall refrain from taking or enforcing any judicial or administrative measure against Sergeant Massimiliano Latorre and Sergeant Salvatore Girone in connection with the Enrica Lexie Incident, and from exercising any other form of jurisdiction over that Incident; and
- ii) India shall take all measures necessary to ensure that restrictions on the liberty, security and movement of the Marines be immediately lifted to enable Sergeant Girone to travel to and remain in Italy, and Sergeant Latorre to remain in Italy throughout the duration of the proceedings before the Annex VII Tribunal.

of Provisional Measures under the same provision on 21 July 2015.⁷ In its final submissions, Italy requested the prescription of the following provisional measures:

- (a) India shall refrain from taking or enforcing any judicial or administrative measures against Sergeant Massimiliano Latorre and Sergeant Salvatore Girone in connection with the Enrica Lexie Incident, and from exercising any other form of jurisdiction over the Enrica Lexie Incident; and
- (b) India shall take all necessary measures to ensure that restrictions on the liberty, security and movement of the marines be immediately lifted to enable Sergeant Girone to travel to and remain in Italy and Sergeant Latorre to remain in Italy throughout the duration of the proceedings before the Annex VII tribunal.⁸

13. Italy's Request was made on two principal grounds. First, Italy maintained that it stood to suffer serious and irreversible prejudice to its rights under UNCLOS if Indian jurisdiction over the Enrica Lexie Incident and the Italian Marines continued to be exercised. Second, Italy contended that it would suffer further serious and irreversible prejudice to its rights under UNCLOS if the Marines remain subjected to restrictions on their liberty and movement, notwithstanding the commencement of proceedings under UNCLOS.

14. India filed Written Observations on Italy's Request on 6 August 2015. India requested the Tribunal to reject Italy's request and "*to refuse [the] prescription of any provisional measure in [this] case*".⁹ India advanced various arguments to justify what it described as the "*inadmissibility*" of Italy's Request. First, India contended that ITLOS lacked jurisdiction.¹⁰ Second, India submitted that the measures requested by Italy were not justified because there was no urgency.¹¹ Third, according to India, Italy's requested measures would have prejudged the final award of the Annex VII Tribunal.¹² Fourth, India alleged that this situation did not create any irreparable prejudice to Italy's rights and that, by contrast, India's rights would be severely prejudiced by the prescription of the measures requested by Italy.¹³

15. On 10 and 11 August 2015 an oral hearing took place in Hamburg. In the course of the hearing, Italy formally undertook "*to return Sergeant Latorre and Sergeant Girone to India following the final determination of rights by the Annex VII*

⁷ Request of the Italian Republic for the Prescription of Provisional Measures under Article 290, paragraph 5, of the United Nations Convention on the Law of the Sea, 21 July 2015 (**Annex IT-32**) ("**Italy's ITLOS Request**").

⁸ See Verbatim Record ITLOS/PV.15/C24/3 (uncorrected), 11 August 2015, morning session, p. 20, lines 7-25 (Azzarello) (**Annex IT-34(c)**). This repeated the submissions made in Italy's ITLOS Request, para. 57 (**Annex IT-32**).

⁹ Written Observations of the Republic of India, 6 August 2015, para. 3.89 (**Annex IT-33**) ("**India's ITLOS Written Observations**").

¹⁰ India's ITLOS Written Observations, paras. 3.5-3.7 (**Annex IT-33**).

¹¹ India's ITLOS Written Observations, paras. 3.13-3.47 (**Annex IT-33**).

¹² India's ITLOS Written Observations, paras. 3.48-3.75 (**Annex IT-33**).

¹³ India's ITLOS Written Observations, paras. 3.76-3.88 (**Annex IT-33**).

tribunal, if this is required by the award of the tribunal.”¹⁴ During the oral hearing, Italy also stated it would have no objection in principle to provisional measures being addressed to both parties (rather than just India) if the Tribunal deemed this appropriate in the circumstances of this case to secure the correct balancing of interests between the parties.¹⁵ India did not change its position and insisted that the Tribunal refuse to prescribe any provisional measure.

16. On 24 August 2015, ITLOS prescribed a modified version of the first measure requested by Italy in the following terms:

... pending a decision by the Annex VII arbitral tribunal ... Italy and India shall both suspend all court proceedings and shall refrain from initiating new ones which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal or might jeopardize or prejudice the carrying out of any decision which the arbitral tribunal may render.¹⁶

17. The ITLOS Order required Italy and India to submit an initial report on compliance with the measures prescribed not later than 24 September 2015.¹⁷

18. Developments since the ITLOS Order are addressed in the final section of the Statement of Facts (Chapter 3) of this Request.

¹⁴ Verbatim Record ITLOS/PV.15/C24/3 (uncorrected), 11 August 2015, morning session, p. 19, lines 31-33 (Azzarello) (**Annex IT-34(c)**).

¹⁵ Verbatim Record ITLOS/PV.15/C24/1 (uncorrected), 10 August 2015, morning session, p. 36 (Verdirame) (**Annex IT-34(a)**).

¹⁶ ITLOS Order, para. 141(1) (**Annex IT-35**).

¹⁷ ITLOS Order, paras. 138 and 141(2) (**Annex IT-35**).

CHAPTER 3 STATEMENT OF FACTS

19. This Chapter expands upon the summary of facts in the Notification,¹⁸ in particular by taking into account the debate on issues of fact in the proceedings before ITLOS insofar as relevant for present purposes, as well as developments since the ITLOS proceedings.

20. Before proceeding with this factual account, two general considerations must be emphasised.

21. *First*, having been precluded from exercising jurisdiction over the *Enrica Lexie* Incident by India, Italy has been hindered in providing a definitive account of that Incident. India thwarted Italy's exercise of jurisdiction in a number of ways, most importantly by keeping the Italian Marines under the custody of its courts and initiating criminal investigations notwithstanding Italy's prompt – and promptly communicated – assertion of jurisdiction over the *Enrica Lexie* Incident. India also failed to respond to Italy's requests for cooperation in its criminal investigation.¹⁹

22. *Second*, in discussing the facts related to the case, it must be borne in mind that the Marines have not been charged with, let alone convicted of, any offence. As a matter of basic fairness and due process, the Marines are therefore to be presumed innocent. Yet, in both written and oral submissions made before ITLOS, India repeatedly and deliberately prejudged the guilt of the Marines.²⁰ The exercise of criminal jurisdiction by States comes with responsibilities that India has not fulfilled in this case.

23. The factual account provided by Italy in the Notification, and expanded upon below, is sensitive to both of these considerations. Neither of these considerations, however, needs to stand in the way of the Tribunal's decision on the present Request and, in due course, of its final determination of the dispute. This is because all facts material to this decision and that determination are either not in dispute between the parties or can be ascertained without prejudice to the above considerations.

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

24. In 2011, in line with the global effort to counter piracy, and to ensure freedom of navigation and the protection of Italian-flagged vessels, the Government of Italy enacted Government Decree No. 107 of 2011 (subsequently converted into Law No. 130 of 2 August 2011), which provided for the deployment of Vessel Protection Detachments (“VPDs”) from the Italian Navy on board vessels flying the Italian flag

¹⁸ Notification, paras. 4-25.

¹⁹ Letter from the Office of the Public Prosecutor of the Republic attached to the Court of Rome to the Competent Judicial Authority of the Republic of India, 15 March 2012 (**Annex IT-38**).

²⁰ India's ITLOS Written Observations, paras. 1.6 and 2.2 (**Annex IT-33**); Verbatim Record ITLOS/PV.15/C24/2 (uncorrected), 10 August 2015, afternoon session, pp. 1-2 (Chadha) (**Annex IT-34(b)**).

to ensure the security of such vessels travelling in international waters that are at a high risk of piracy.²¹

25. On 6 February 2012, in accordance with Italian Law No. 130 (2011), a VPD consisting of six Marines from the Italian Navy was deployed on board the *Enrica Lexie* at the port of Galle in Sri Lanka. This was to protect the vessel against piracy during its voyage from Sri Lanka to Djibouti, which required it to pass through what was an IMO-designated high-risk area in international waters.

II. The 15 February 2012 Incident

26. The incident that gave rise to this dispute took place on 15 February 2012 about 20.5 nautical miles off the Indian coast of Kerala in what was an IMO-designated high-risk area for piracy.²² It involved the Italian-flagged oil tanker, the *Enrica Lexie*, which was *en route* from Sri Lanka to Djibouti, and a suspected pirate attack. It is alleged that two fishermen on board the fishing boat *St. Antony* were killed by gunfire from the *Enrica Lexie*, the shots having been fired – it is alleged – by Sergeant Latorre and Sergeant Girone.

27. During the incident the *Enrica Lexie* sent out a “*Ship Security Alarm System Message*”, which described the “*Nature of distress*” as “*Piracy/armed attack*”, and which was timed at 11.23 Coordinated Universal Time (UTC).²³ On the same day there was at least one other report of a piracy incident in the area, said to involve an aborted attack on a tanker at about 16.50 UTC.²⁴

28. Following the incident, the *Enrica Lexie* resumed its intended course and proceeded on its route to Djibouti, remaining in international waters throughout.

III. The Use of Ruse and Coercion by India

29. As set out in the Notification,²⁵ the Indian authorities used ruse and coercion to cause the *Enrica Lexie* to change its course and head for Kochi on the Kerala coast. In order to cause such a change, the Maritime Rescue Co-ordination Centre of India (“MRCC”) first contacted the *Enrica Lexie* by telephone, claiming that it had caught two suspected pirate boats in connection with a “*piracy incident/firing incident*” and (on that false pretext) instructed her to sail to Kochi to identify suspected pirates. In a subsequent email sent to the Master, the MRCC referred to this conversation and again asked the *Enrica Lexie* to head for Kochi, without explaining that the *Enrica Lexie* itself was the suspect vessel.²⁶ In an interview with the Indian media, the Coast

²¹ Legge 2 Agosto 2011 n. 130, published in Gazzetta Ufficiale n. 181 del 5 Agosto 2011 (**Annex IT-2**).

²² See *Appendix I* hereto.

²³ Ship Security Alarm System Message sent out by the *Enrica Lexie* on 15 February 2012 (**Annex IT-3**).

²⁴ International Maritime Bureau Report of 15 February 2012 (**Annex IT-4**).

²⁵ Notification, paras. 10-12.

²⁶ Email from MRCC Mumbai to Master of the *Enrica Lexie*, 15 February 2012 (**Annex IT-8**).

Guard Regional Commander confirmed the above account, causing the interviewer to remark: “*The Coast Guard had actually tricked the Italian ship.*”²⁷

30. The Indian authorities later sent out a Coast Guard Dornier aircraft and at least two vessels (thought to include the “ICGS [*Indian Coast Guard Ship*] Samar” and the “ICGS Lakshmibai”, both of which were armed and at least one of which had police personnel on board).²⁸ The aircraft and the vessels intercepted the *Enrica Lexie* in international waters, instructed her to proceed to Kochi, followed her there, and continued to patrol around and monitor her when she reached Kochi anchorage at night.

31. India disputed Italy’s account of these events in its written and oral submissions to ITLOS.²⁹ The evidence supporting Italy’s account is, however, incontrovertible. Such evidence, which originates from India, includes the following:

- (a) The Report of India’s National Maritime Search and Rescue Board of 4 June 2012, which states *inter alia*: “*On receipt of information, ICGS Samar on patrol off Vizhinjam coast was diverted and ICGS Lakshmibai was sailed from Kochi at 1935 h on 15 Feb 12 (with 04 police personnel embarked) to the most probable area for search and interdiction of the suspected merchant vessel. Further, Coast Guard Dornier ex-747 Sqn (CG) was launched for sea-air coordinated search.*” (emphasis added). After stating that suspicion attached to the *Enrica Lexie*, and that the *Enrica Lexie* was “*directed to alter course and proceed to Kochi anchorage*”, the Report continues: “*UKMTO [the UK Maritime Trade Operations centre in Dubai which operates an emergency incident response centre] confirmed of having received a message from MT Enrica Lexie. At 1950 h on 15 Feb 12, CG Dornier located MT Enrica Lexie and vectored ICG ships for interception. CG Dornier also directed the vessel to proceed to Kochi anchorage for investigation. ICGS Lakshmibai intercepted MT Enrica Lexie at about 2045 h on 15 Feb 12 and escorted the vessel till Kochi anchorage.*”³⁰
- (b) The Statement given in the Kerala proceedings by the pilot of the Indian Coast Guard Dornier who says: “*We directed them to amend the course and proceed to Kochi harbour and informed to be in channel 16 and 10. We contacted them continuously over VHF. The ship altered the course towards Kochi and we shadowed it to Kochi anchorage till 22.30 hrs.*” In the same statement the pilot adds: “*At 21.25 hrs. we came into communication with ICGS Lakshmibai which was also*

²⁷ “Coast Guard, fishermen made a smart move”, *The Times of India* (Electronic Edition), 18 February 2012 (**Annex IT-39**), quoting S.P.S. Basra, the Indian “Coast Guard regional commander (western region)”.

²⁸ Letter from the Indian “Dy Director General of Shipping” to the Owners of the *Enrica Lexie*, 16 February 2012 (**Annex IT-5**); National Maritime Search and Rescue Board, Report, 4 June 2012, p. 11 (**Annex IT-6**); Statement by Commandant Alok Negi, Coast Guard Air Enclave Kochi, 19 February 2012 (**Annex IT-7**).

²⁹ India’s ITLOS Written Observations, para. 2.3 (**Annex IT-33**); Verbatim Record ITLOS/PV.15/C24/2 (uncorrected), 10 August 2015, afternoon session, p. 1 (Chadha) (**Annex IT-34(b)**).

³⁰ National Maritime Search and Rescue Board, Report, 4 June 2012, p. 11 (**Annex IT-6**).

*engaged in the searching operation. Lakshuibai contacted the vessel over VHF at 21.30 hrs. Lakshuibai intercepted the vessel and escorted to Kochi anchorage at 22.35 hrs.*³¹

- (c) The coordinates given in the pilot's witness statement, as depicted in an illustrative map created by Italy, show that the *Enrica Lexie* was intercepted and diverted by the Indian Coast Guard Dornier aircraft, some 36 nautical miles off the Indian coast.³²

IV. Events following the Arrival at Kochi Anchorage

32. India continued to apply coercion in the days following the arrival of the *Enrica Lexie* at Kochi.

33. As attested in another document originating from India – the Boarding Officer's Report – an armed police, Coast Guard and Rapid Response and Rescue Force contingent of at least 36 personnel boarded the *Enrica Lexie* in the early morning of 16 February 2012.

34. The Master and crew of the *Enrica Lexie* refused to divulge any information and stated that the issue was *sub judice* under Italian law.³³ However – the Boarding Officer's Report notes – “[c]ontinuous pressure was maintained on the crew and master” and “continued interrogation by the boarding team” resulted in the Master handing over information and documentation.³⁴

35. Late on 16 February 2012, pursuant to the orders of the Indian authorities, the *Enrica Lexie* left Kochi anchorage and proceeded to the oil terminal of Kochi Port, where she docked in the early hours of 17 February 2012.³⁵ On 19 February 2012, Sergeant Latorre and Sergeant Girone were compelled to disembark and were arrested by the Kerala police and placed in custody.

V. Italy's Prompt Assertion of Jurisdiction

36. Upon being informed of the deaths of the two fishermen on board the *St. Antony*, the Italian authorities asserted jurisdiction over the *Enrica Lexie*, the Incident and those on board the *Enrica Lexie* (including the two Marines) and the Office of the Prosecutor at the Military Tribunal in Rome initiated an investigation into the Incident.

37. This crucial fact is confirmed in various contemporaneous documents.

³¹ Statement by Commandant Alok Negi, Coast Guard Air Enclave Kochi, 19 February 2012 (**Annex IT-7**).

³² See **Appendix 2** hereto.

³³ Boarding Officer's Report MV *Enrica Lexie*, 16-17 February 2012, para. 9 (**Annex IT-9**).

³⁴ Boarding Officer's Report MV *Enrica Lexie*, 16-17 February 2012, paras. 10-11 (**Annex IT-9**).

³⁵ Log book of the Master of the *Enrica Lexie*, p. 3 (**Annex IT-14**).

38. *First*, the Boarding Officer's Report – already mentioned above – recorded that the crew had indicated that the issue was *sub judice* under Italian laws.³⁶ Thus already on 16 February 2012, less than 24 hours after the incident, the Master and crew of the *Enrica Lexie* had been in contact with the Italian authorities and India had been informed that the Incident was subject to Italian prosecutorial investigation.

39. *Second*, Italy asserted its jurisdiction in a Note Verbale that it sent to India on 16 February 2012. Transmitted within 24 hours of the Incident, the Note Verbale emphasised “*the Italian Navy detachment is exclusively answerable to the Italian judicial Authorities.*”³⁷ In a further Note Verbale the next day, 17 February 2012, Italy again asserted that “*the Italian judicial Authorities are the sole competent judicial Authorities for the case in question.*”³⁸

40. *Third*, a communication was sent by the Prosecution Office at the Military Tribunal of Rome, dated 17 February 2012, to the Commanding Officer of the Military Protection Detachment on board the *Enrica Lexie*, requesting information “*with the maximum urgency*” for the purposes of a preliminary investigation.³⁹ The opening of a full criminal investigation into the Incident by the Prosecution Office within the Military Tribunal of Rome was also addressed in a communication to the Head of the Cabinet at the Italian Ministry of Defence a few days later, on 24 February 2012. This document reads as follows:

In reference to your request for information of today ... this office has opened a criminal proceeding under the number 9463/2012 (RGNR = General Registrar for the entry of Criminal notices) against LATORRE Massimiliano and GIRONI Salvatore – belonging to the Regiment San Marco and to the Military Protection Detachment embarked on board of the Italy Tanker “Enrica Lexie” – for the crime of murder, in reference to the events [that] occurred in international waters in the Indian Ocean the 15th of February.⁴⁰

41. Italy thus asserted exclusive jurisdiction over the *Enrica Lexie* within 24 hours of the Incident and drew this assertion and exercise of jurisdiction to the immediate attention of the Indian Government and to the Indian police and investigating authorities. Following the opening of its investigation, on 15 March 2012, the Public Prosecutor at the Tribunal of Rome as well as two prosecutors in his office sent letters rogatory through diplomatic channels to seek India's cooperation in the conduct of the criminal investigation.⁴¹ The letters rogatory were never answered.

³⁶ Boarding Officer's Report MV *Enrica Lexie*, 16-17 February 2012, para. 9 (**Annex IT-9**).

³⁷ Note Verbale 67/438, 16 February 2012 (**Annex IT-10**).

³⁸ Note Verbale 69/456, 17 February 2012 (**Annex IT-12**).

³⁹ Communication from the Office of the Prosecutor at the Military Tribunal of Rome to the Commanding Officer of the Military Protection Detachment of the *Enrica Lexie*, 17 February 2012 (**Annex IT-11**).

⁴⁰ Communication from Office of the Prosecutor of the Military Tribunal of Rome to the Head of Cabinet at the Ministry of Defence, 24 February 2012 (**Annex IT-13**).

⁴¹ Letter from the Office of the Public Prosecutor of the Republic attached to the Court of Rome to the Competent Judicial Authority of the Republic of India, 15 March 2012 (**Annex IT-38**).

VI. The Indian Legal Proceedings

42. Italy's Notification, at paragraphs 16-20, summarised proceedings in India following the arrest of the Marines on 19 February 2012. *Appendix 3* attached to this Request contains a detailed chronology of those proceedings.

43. For present purposes Italy draws attention to three aspects of the proceedings.

44. *First*, Italy challenged the exercise of Indian jurisdiction and asserted its immunity in respect of the Marines from the outset.

45. *Second*, notwithstanding the fact that India has exercised jurisdiction over the Marines for more than 3 years and 9 months since the Enrica Lexie Incident, India has not charged the Marines with any offence under Indian law. In this regard, it must be noted that:

- (a) Under Indian law the *filing* of charges occurs where, upon completion of an investigation, the police file in court a "charge-sheet"⁴² which concludes that there is sufficient evidence of criminal offences to bring charges.⁴³ The *framing* of charges occurs where the Court considers (after hearing submissions on behalf of the accused and the prosecution) that the charge-sheet, as filed by the police or modified by the Court, contains sufficient evidence for the case to proceed.⁴⁴ This much appeared to be common ground in the ITLOS proceedings.⁴⁵
- (b) There is no charge-sheet filed against the Marines and there are no charges framed. Again, this much was common ground in the ITLOS proceedings.⁴⁶

46. *Third*, there is no basis for the suggestion advanced by India before ITLOS that Italy is to blame for India's failure to file or frame charges.⁴⁷ An explanation of the delay is attached in *Appendix 4*.

VII. The Position of the Two Marines

47. At the date of the filing of this Request, India has exercised criminal jurisdiction over both Marines for more than 3 years and 9 months.

⁴² Also known as a "Final Report".

⁴³ See generally Indian Code of Criminal Procedure, 1973, Section 173 (**Annex IT-40**).

⁴⁴ See generally Indian Code of Criminal Procedure, 1973, Section 228 (**Annex IT-40**).

⁴⁵ See India's ITLOS Written Observations, para. 1.17 (**Annex IT-33**).

⁴⁶ See India's ITLOS Written Observations, paras. 1.17 and 2.12-2.13 (**Annex IT-33**). Although on 18 May 2012 the Kerala police purported to file a charge-sheet against the Marines: (1) that charge-sheet was invalid because (as found by the Supreme Court of India in its 18 January 2013 Judgment) Kerala did not have jurisdiction to act; and (2) in any event, no charges against the Marines have ever been framed.

⁴⁷ Verbatim Record ITLOS/PV.15/C24/2 (uncorrected), 10 August 2015, afternoon session, p. 10, lines 30-31 and 39-40 (Narasimha); p. 25, lines 22-36, and p. 28, lines 27-43 (Bundy) (**Annex IT-34(b)**).

48. The two Marines were initially subjected to imprisonment and were then placed under bail constraints requiring them to remain in Delhi. One of them, Sergeant Latorre, was granted a relaxation of the conditions of bail by the Supreme Court in September 2014 to allow him to return to Italy for an initial period of four months, which was then extended.⁴⁸ The Court accepted that this was necessary to aid his recovery from a brain stroke, to which the prolonged intense stress of the situation had been a contributing factor.⁴⁹ During his time in Italy, Sergeant Latorre has had to undergo heart surgery. The speech and movement disabilities suffered by Sergeant Latorre due to his brain stroke have persisted and further rehabilitation, treatment and therapy have been required.

49. Sergeant Latorre remains in Italy undergoing treatment and is being closely monitored by specialists.

50. The other Marine, Sergeant Girone, remains in India. In December 2014, he sought a relaxation of the conditions of bail to allow him to travel to Italy to spend time with his (then) 8-year old daughter and 14-year old son on medical grounds detailed in expert evidence submitted with his application.⁵⁰

51. On 16 December 2014, at a hearing before the Supreme Court of India (with the Chief Justice presiding), the Government of India, through its Additional Solicitor General, opposed the petition of Sergeant Girone. During the hearing, the Court made it clear that the petition would be rejected.⁵¹ For that reason, the petition was withdrawn.⁵²

52. At the end of August 2015, Sergeant Girone contracted Dengue Fever. On 27 August 2015, due to the severity of his symptoms, he was admitted to the Max

⁴⁸ On 14 January 2015, the Supreme Court of India granted a 3-month extension for Sergeant Latorre to remain in Italy. See Supreme Court of India Order of 14 January 2015 granting an extension to Sergeant Latorre (**Annex IT-30**). On 9 April 2015, the Supreme Court granted a further extension for Sergeant Latorre to remain in Italy until 15 July 2015. See Supreme Court of India Order of 9 April 2015 granting a further extension to Sergeant Latorre (**Annex IT-31**). On 13 July 2015, the Supreme Court granted an extension until 15 January 2016. See Supreme Court of India Order of 13 July 2015 (**Annex IT-41**).

⁴⁹ Application for Directions and Relaxation of Bail Conditions on Behalf of Chief Master Sergeant Massimiliano Latorre dated 5 September 2014 (**Annex IT-21 (Confidential Annex)**). See also Reports of Dr. Mendicini, Specialist Neurologist, Military Hospital in Taranto, 14 October 2014 and 14 November 2014 (**Annex IT-24 (Confidential Annex)**); Discharge Summary issued by Istituto Neurologico Carlo Besta, 25 November 2014 (**Annex IT-25 (Confidential Annex)**); Report of Dr. Eugenio Parati, Director of Cerebrovascular Diseases, Istituto Neurologico Carlo Besta, 1 December 2014 (**Annex IT-26 (Confidential Annex)**).

⁵⁰ Application for Directions and Relaxation of Bail Conditions on Behalf of Sergeant Major Salvatore Girone, 9 December 2014 (**Annex IT-22 (Confidential Annex)**).

⁵¹ A contemporary Indian newspaper report confirms that the application was withdrawn as a result of negative indications by the Court. See “Supreme Court disallows Italian marines’ plea”, *DNA India*, 16 December 2014 (**Annex IT-42**).

⁵² Supreme Court of India Order of 16 December 2014 recording the withdrawal of the application (**Annex IT-29**). A petition to extend Sergeant Latorre’s stay in Italy, filed on the same occasion (see Application for Directions and Relaxation of Bail Conditions on Behalf of Chief Master Sergeant Massimiliano Latorre, 9 December 2014 (**Annex IT-23 (Confidential Annex)**)), was also withdrawn at the 16 December 2014 hearing due to the negative reaction of the Court. However, as set out above in fn. 48, Sergeant Latorre’s permission to stay in Italy was extended at a hearing on 14 January 2015 and at subsequent hearings.

Healthcare Hospital in Delhi, where examinations confirmed a diagnosis of Dengue Fever. He was treated for conditions associated with the acute phase of the disease, including a significant drop in blood platelets, severe myalgia and high temperature. On 28 August, a team of doctors sent by Italy assessed Sergeant Girone and agreed with the Indian doctors that he should remain in hospital. On 31 August Sergeant Girone was discharged. He continues to be monitored at regular intervals.

VIII. Developments since the ITLOS Order of 24 August 2015

53. The Italian Ministry of Justice promptly drew the ITLOS Order to the attention of the Office of the Public Prosecutor at the Tribunal of Rome, which has independent constitutional responsibility for the open criminal investigation into the Enrica Lexie Incident. In response, the Public Prosecutor informed the Ministry of Justice that he had decided to stay the investigation into the Incident and to refrain from commencing any other connected investigation during the pendency of the Annex VII arbitral proceedings in order not to interfere with the determination of the case by the Annex VII Tribunal.⁵³ In Italy, all legal proceedings are, accordingly, suspended and no new ones have been initiated, in full compliance with the ITLOS Order.

54. In Delhi, at a hearing on 25 August 2015, the Special Court established to try the Marines ordered that its own proceedings be adjourned *sine die*.⁵⁴ The Special Court did so in the following terms: “*the file is consigned to be revived as and when appropriate directions are received. A copy of this Order be given datsi [sic]. File be consigned to record room.*”

55. On the following day, the Supreme Court of India ordered four proceedings pending in Indian courts to “*remain stayed/deferred till further orders*”, by reference to the ITLOS Order.⁵⁵ In the same Order of 26 August 2015, however, the Supreme Court also directed that “*the main case [be listed] on 13.01.2016 at 2.00 P.M.*”⁵⁶

56. On 7 December 2015, Italy submitted an Affidavit to the Supreme Court of India to inform it of developments in this arbitration as well as to address the situation of Sergeant Latorre, whose leave to remain in Italy expires on 15 January 2016. On the issue of Sergeant Latorre, Italy noted as follows:

This Hon’ble Court has scheduled the hearing of the main case, namely Writ Petition 236 of 2014 (tagged with Special Leave Petition (C) No. 20370 of 2012), on 13 January 2016 on its own motion. As, at the time of the hearing before this Hon’ble Court on 26 August 2015, the Annex VII Tribunal had not yet been constituted, Italy presumes that the purpose of the scheduled hearing is largely to enable the Hon’ble Court

⁵³ 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, para. 3 (**Annex IT-37(a)**).

⁵⁴ Order of the Special Designated Court of 25 August 2015 (**Annex IT-37(b)**).

⁵⁵ 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**); Order of the Supreme Court of India of 26 August 2015 (**Annex 37(c)**).

⁵⁶ Order of the Supreme Court of India of 26 August 2015 (**Annex IT-37(c)**).

to be informed of developments in the Annex VII arbitral proceedings, given its Order that all Indian proceedings be stayed/deferred till further orders. Proceeding with the highest respect for this Hon'ble Court, the purpose of this Affidavit is to inform the Hon'ble Court in a timely and transparent manner of developments in the Annex VII arbitral proceedings and to enable this Hon'ble Court to take such further steps *suo motu* as may be appropriate given the circumstances of the stay/deferment of all proceedings till further orders and the injunction on the Parties against any new proceedings pursuant to the ITLOS Provisional Measures Order.

This Hon'ble Court was pleased to grant extension of time to Sergeant Latorre to remain in Italy for further treatment and recuperation till 15 January 2016. Sergeant Latorre's health remains a matter of pressing concern...

It is Italy's understanding that the ITLOS Provisional Measures Order precludes the initiation of any new proceedings before the courts of either Party, any such proceedings being bound to aggravate or extend the dispute submitted to the Annex VII Tribunal. As such, any new proceedings before this Hon'ble Court in respect of Sergeant Latorre, including any application to extend the time for Sergeant Latorre to remain in Italy, would be in breach of the said Provisional Measures Order.

The preclusion of any new proceedings by the ITLOS Provisional Measures Order, however, cannot be understood to require that Sergeant Latorre be returned to India notwithstanding his continuing health situation, the stay/deferment of the Indian proceedings, and the likely two to four year period of the pendency of the Annex VII arbitral proceedings. This follows as a matter of good sense and a plain reading of the operative part of the Provisional Measures Order. It also follows from the stay/deferment of the Indian proceedings in consequence of the Order of this Hon'ble Court of 26 August 2015, which must be construed as applying to the Order of this Hon'ble Court dated 13 July 2015 granting Sergeant Latorre leave to remain in Italy. Any different understanding would have the consequence that contested proceedings before this Hon'ble Court would be necessarily required and that this would *per force* aggravate or extend the dispute submitted to the Annex VII Tribunal.

Having regard to the circumstances and issues herein described, Italy requests that this Hon'ble Court take such further steps and/or make such further Orders *suo motu* as may be necessary and appropriate, including in respect of Sergeant Latorre's extension of time to remain in Italy, given the above and the circumstances of the stay/deferment of all proceedings till further orders.

Having regard to these circumstances, this Affidavit is submitted to this Hon'ble Court to draw these issues to the attention of this Hon'ble

Court in a timely and transparent manner, having the utmost respect and regard for this Hon'ble Court. In these circumstances, Italy formally assures this Hon'ble Court that it will continue to regard the existing Affidavit of Undertaking of the Deponent (Ambassador Angeloni) dated 20 July 2015 given to this Hon'ble Court in respect of Sergeant Latorre's leave to remain in Italy as operative and binding and to be read as extending and applying during the period of the stay/deferment of the Indian proceedings till further orders, which Italy understands will be during the pendency of the Annex VII arbitral proceedings.⁵⁷

57. Italy agrees that the domestic judicial and prosecuting authorities in both Italy and India have an interest in being kept informed about developments in the Annex VII arbitration. Engagements with those authorities exclusively for this purpose do not contravene the ITLOS Order that all court proceedings be suspended. It is on this basis that Italy submitted the Affidavit to the Supreme Court.

⁵⁷ Additional Affidavit of Ambassador E. Angeloni, Ambassador of Italy in India, 7 December 2015, paras. 14-19 (**Annex IT-43**).

CHAPTER 4 STATEMENT OF LEGAL GROUNDS

58. The Tribunal's power to prescribe provisional measures is provided for in Article 290(1) of UNCLOS in the following terms:

If a dispute has been duly submitted to a court or tribunal which considers that *prima facie* it has jurisdiction under this Part or Part XI, section 5, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision.

59. Addressing each of the relevant elements of this provision, the remainder of the present Request will be organised in the following sections:

- (I) *Prima facie* jurisdiction**
- (II) Rights of Italy requiring preservation pending the final Award**
- (III) Italy's requested measure is appropriate under the circumstances**

I. *Prima Facie* Jurisdiction

60. Before ordering any provisional measure the Tribunal must consider "that *prima facie* it has jurisdiction" under Part XV of UNCLOS.⁵⁸ That threshold is met in this case:

- (a) Both Italy and India are States Parties to UNCLOS, having ratified it, respectively, on 13 January 1995 and 29 June 1995.
- (b) On 26 February 1997, Italy made a declaration pursuant to Article 287 of UNCLOS whereby it chose the International Tribunal for the Law of the Sea and the International Court of Justice as fora for the settlement of disputes concerning the interpretation or application of the Convention. India has not made any declaration pursuant to Article 287. Since Italy and India have not accepted the same procedure for the settlement of disputes, Article 287(5) of UNCLOS has the effect that any dispute between them concerning the interpretation or application of UNCLOS may be submitted only to arbitration in accordance with Annex VII of UNCLOS.
- (c) The present dispute has been the subject of numerous communications between the parties and public statements.⁵⁹ Extended attempts to negotiate a solution have taken place, with Ministers and other high-

⁵⁸ UNCLOS, Article 290(1).

⁵⁹ See, e.g., fn. 22 of the Notification listing Italy's Notes Verbales.

level government representatives of both States meeting several times to discuss possible solutions. As explained in the Notification (paragraph 26), these exchanges have not led to a resolution of the dispute. They did, however, constitute attempts to resolve the dispute satisfying section 1 of Part XV of UNCLOS.

- (d) According to Article 286 of UNCLOS, “*any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section*”, namely this Annex VII Tribunal.
- (e) Pursuant to Article 288(1), this Annex VII Tribunal “*shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.*”
- (f) Italy claims that India has breached its obligations under UNCLOS by exercising jurisdiction over the *Enrica Lexie*, the Incident, and the two Italian Marines that it arrested in connection with that Incident. These breaches follow, *inter alia*, from:
 - (1) India’s interference with Italy’s freedom of navigation;
 - (2) India’s arrest and detention of the Italian-flagged ship *Enrica Lexie*;
 - (3) the fact that the Incident took place beyond India’s territorial sea, some 20.5 nautical miles off the Indian coast, and that India began to exercise jurisdiction over the ship some 36 nautical miles off its coast;⁶⁰ and
 - (4) the fact that the individuals over whom India continues to exercise penal jurisdiction are Italian Marines who, as State officials exercising official functions pursuant to lawful authority, are immune from Indian penal jurisdiction.
- (g) Italy claims that India thus violated its obligations under Parts II, V and VII of UNCLOS, notably Articles 2(3), 27, 33, 56, 58, 87, 89, 92, 94, 97, 100 and 300, the content and application of which insofar as is relevant to this Request for the prescription of provisional measures is described in Section II of this Chapter.
- (h) Whether the Tribunal considers that India has breached those articles of UNCLOS is a matter for the merits, but there is plainly a “*dispute concerning the interpretation or application of this Convention*” over which this Tribunal has jurisdiction.

61. The Indian Supreme Court, too, considered that the case of the Italian Marines involved the interpretation or application of the Convention, observing that it had to

⁶⁰ See *Appendix 2* hereto.

be decided by reference “*most importantly*” to the provisions of UNCLOS.⁶¹ Whether under UNCLOS India had jurisdiction over the *Enrica Lexie*, the Incident and the two Italian Marines, is a matter for this Tribunal.

62. Moreover, in its Order on Provisional Measures, ITLOS considered “*that a dispute appears to exist between the Parties concerning the interpretation or application of the Convention*”⁶² and that *prima facie* this Annex VII Tribunal would have jurisdiction over that dispute.⁶³

II. Italy’s Rights to be Preserved

63. The rights of which Italy seeks the Tribunal’s protection are set forth in the Notification, in particular its paragraph 29. For the purposes of the present Provisional Measures Request, the following rights are particularly relevant:

- (a) **Article 2(3)**: Italy’s right that India exercise its sovereignty over the territorial sea, into which it directed the *Enrica Lexie* from the EEZ where the ship had been exercising the freedom of navigation, “*subject to this Convention and to other rules of international law*”. Such other rules include rules of international law on the immunity of States and their officials, notably that in respect of official acts a State official is immune from foreign criminal jurisdiction.
- (b) **Article 56(2)**: Italy’s right that India, in “*exercising its rights and performing its duties under this Convention in the exclusive economic zone, ... shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention*”. Italy’s rights, to which India is required by this provision of UNCLOS to have due regard, include its right to exercise jurisdiction over the *Enrica Lexie* Incident and the Marines, pursuant to Articles 92 and 97 of the Convention and customary international law, and its right for its State officials to be immune from Indian criminal jurisdiction.
- (c) **Article 58(2)**: Italy’s rights under Article 58 of the Convention that “*Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part*”. These rights include rights under Articles 92 and 97 of the Convention (addressed below), and rights under “*other pertinent rules of international law*”, including rules concerning jurisdiction and immunities.
- (d) **Article 87**, applicable to India’s EEZ by force of **Article 58(1)**: Italy’s right for ships flying its flag to enjoy freedom of navigation “*under the*

⁶¹ *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**). See also Notification of the Ministry of Home Affairs of India of 15 April 2013 (**Annex IT-44**).

⁶² ITLOS Order, para. 53 (**Annex IT-35**).

⁶³ ITLOS Order, paras. 51-54 (**Annex IT-35**).

conditions laid down in this Convention and by other rules of international law”, including rules of international law concerning jurisdiction and immunities.

- (e) **Article 89**: Italy’s right that India not “*purport to subject any part of the high seas to its sovereignty*”, which applies to the EEZ pursuant to Article 58(2). India breached this provision by exercising general criminal jurisdiction over events occurring in an area coming within its contiguous zone and EEZ, on the basis of Section 188A of the Indian Code of Criminal Procedure⁶⁴ and the Notification of the Indian Ministry of Home Affairs dated 27 August 1981 by which “*the Central Government hereby extends to the exclusive economic zone*” legislation including the entirety of the Indian Penal Code of 1860.⁶⁵ As described by the Chief Justice of India, the position under Indian law is that: “*The incident of firing from the Italian vessel on the Indian shipping vessel having occurred within the Contiguous Zone, the Union of India is entitled to prosecute the two Italian marines under the criminal justice system prevalent in the country.*”⁶⁶ The exercise of general criminal jurisdiction in the EEZ, including the contiguous zone, is contrary to Articles 89 and 33(1) of UNCLOS, and renders internationally unlawful the basis on which India has exercised jurisdiction over the Italian Marines.
- (f) **Article 92**, applicable to India’s EEZ pursuant to **Article 58(2)**: Italy’s right that ships flying its flag “*shall be subject to its exclusive jurisdiction*” when sailing in India’s EEZ.
- (g) **Article 97**, concerning “[p]enal jurisdiction in matters of collision or any other incident of navigation”, applicable to India’s EEZ pursuant to **Article 58(2)**: the right of Italy, as the flag State of the *Enrica Lexie* and as the State of which Sergeant Girone is a national, to exclusive jurisdiction in “*the event of a collision or any other incident of*

⁶⁴ “188A. Offence committed in exclusive economic zone: When an offence is committed by any person in the exclusive economic zone described in sub-section (1) of Section 7 of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 (80 of 1976) or as altered by notification, if any, issued under sub-section (2) thereof, such person may be dealt with in respect of such offence as if it had been committed in any place in which he may be found or in such other place as the Central Government may direct under Section 13 of the Said Act.” See the Judgment of Chelameswar J in *Republic of Italy & Ors v. Union of India & Ors*, Supreme Court of India Judgment of 18 January 2013, p. 98, para. 14 (**Annex IT-19**).

⁶⁵ Notification of the Ministry of Home Affairs of India of 27 August 1981 (**Annex IT-45**).

⁶⁶ Judgment of Altamas Kabir CJI in *Republic of Italy & Ors v. Union of India & Ors*, Supreme Court of India Judgment of 18 January 2013, p. 82, para. 100 (**Annex IT-19**). See also the same judgment at p. 8, para. 2, referring to provisions of the Indian Penal Code; p. 12, para. 9, referring to the judgment of the Kerala Court that the Indian Penal Code and the Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act conferred criminal jurisdiction over events occurring up to 200 nautical miles from the coast of India; pp. 69-70, para. 84, noting that “the Union of India extended the application of the Indian Penal Code and the Code of Criminal Procedure to the Contiguous Zone, which entitled the Union of India to take cognizance of, investigate and prosecute persons who commit any infraction of the domestic laws within the Contiguous Zone”; and p. 71, para. 86, noting “the extension of Section 188A I.P.C. to the Exclusive Maritime Zone, of which the Contiguous Zone is also a part”.

navigation” concerning a ship in the Indian EEZ “involving the penal or disciplinary responsibility of the master or any other person in the service of the ship”.

64. As relevant to this request for provisional measures, these rights of Italy under UNCLOS and other relevant rules of international law, which UNCLOS requires to be respected and which pursuant to Article 293 form part of the law to be applied by this Tribunal, may be summarised in two general propositions.

65. *First*, Italy has the right to exercise jurisdiction over the *Enrica Lexie* Incident and Sergeant Girone, and that India not do so.

66. *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 2011,⁶⁷ leaving Italy as the only State entitled to exercise any jurisdiction.

III. The Requested Measure is Appropriate under the Circumstances

67. In accordance with Article 290(1) of UNCLOS, a nexus must exist between the requested measure and the rights to be preserved. In the present case, the position of Sergeant Girone forms an inseparable element of Italy’s rights to be preserved: Sergeant Girone, an official of the Italian Republic, is deprived of his liberty by effect of India’s exercise of penal jurisdiction over him, the very exercise which is in dispute in the present case.

68. Furthermore, the close connection between the rights of individuals on board a ship and the rights of the flag State has been emphasised, *inter alia*, in *The M/V “SAIGA” (No. 2) Case*, in which ITLOS ruled that:

... the rights of the Applicant would not be fully preserved if, pending the final decision, the vessel, its Master and the other members of the crew, its owners or operators were to be subjected to *any* judicial or administrative measures in connection with the incidents leading to the arrest and detention of the vessel and to the subsequent prosecution and conviction of the Master...⁶⁸

69. The bond between Italy and the Marines is considerably stronger than the bond between the State and the crew in *The M/V “SAIGA” (No. 2) Case*. The Marines were not merely on board the *Enrica Lexie* as part of the crew (in a broad sense), but were on board as State officials exercising official functions, on behalf of Italy, aimed at preventing and repressing piracy, and at guaranteeing the security of navigation.

⁶⁷ Legge 2 Agosto 2011 n. 130, published in Gazzetta Ufficiale n. 181 del 5 Agosto 2011 (**Annex IT-2**).

⁶⁸ *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea), Provisional Measures, Order of 11 March 1998, ITLOS Reports 1998*, p. 24, at p. 38, para. 41.

70. This section of Italy's Request now turns to the issue of appropriateness, which is addressed under three sub-headings: first, the requested measure is appropriate under the circumstances to preserve Italy's rights in this dispute because it must follow from the stay ordered by ITLOS; second, the requested measure is appropriate because it is required by basic considerations of due process; and, third, other considerations render the request appropriate under the circumstances.

A. Italy's requested measure is appropriate because it must follow from the stay

71. The provisional measure prescribed by ITLOS protects the rights of each Party in the sense that each benefits from the other being required to stay existing court proceedings and being prohibited from commencing any new proceeding that would aggravate the dispute pending this Tribunal's Award. That plainly prevents any criminal trial in either State.

72. India continues to exercise penal jurisdiction over Sergeant Girone by requiring him to stay in Delhi as a guarantee that he will remain available for any future criminal trial there. This deprivation of liberty is being maintained without: a) his being subject to any criminal charge; or b) the possibility of any criminal trial until this Tribunal decides which State has and is entitled to exercise jurisdiction.

73. Crucially, each day that India exercises jurisdiction to keep an Italian Marine, who is immune from Indian jurisdiction, within Delhi is a day on which Italy suffers irreversible prejudice. That time cannot be recovered and it cannot be adequately compensated. If the Tribunal allows the *status quo* to continue until its Award, and that Award is in favour of Italy, then Italy's rights will have suffered grave, irreversible prejudice over a long period. Its State official will have been unlawfully kept in Delhi for many years (potentially seven years or more).

74. Italy's case is supported by the Order of ITLOS in *Arctic Sunrise*. ITLOS drew attention to two core principles in the Netherlands' written statements: first, "[t]he settlement of such disputes between two states should not infringe upon the enjoyment of individual rights and freedoms of the crew of the vessels concerned" and, second, "every day spent in detention is irreversible."⁶⁹ Furthermore, as discussed more extensively below, in its Award on the merits in *Arctic Sunrise*, the Annex VII Tribunal confirmed that it could have regard to "general international law in relation to human rights".⁷⁰

75. Two factors which distinguish the present situation from *Arctic Sunrise* reinforce Italy's case.

76. *First* – and as discussed in more detail below – the violations of applicable standards of due process are more severe in the present case. The crew members in

⁶⁹ "Arctic Sunrise" (*Kingdom of the Netherlands v. Russian Federation*), *Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013*, p. 230, at p. 249, para. 87.

⁷⁰ "Arctic Sunrise" (*Kingdom of the Netherlands v. Russian Federation*) (PCA Case No. 2014-12), Award on the Merits, 14 August 2015, para. 197.

Arctic Sunrise had been formally charged,⁷¹ and their detention did not in any event go on for nearly as long as in this case.

77. *Second*, unlike the individuals in *Arctic Sunrise*, the Marines are officials of a State foreign to that exercising jurisdiction, who were engaged in official activities concerning the prevention and repression of piracy.

78. Crucially, States have a clear obligation under international law to address issues of immunity *in limine litis*. The International Court of Justice described this as “a generally recognized principle of procedural law”.⁷² The Special Rapporteur of the International Law Commission on the immunity of State officials from foreign criminal jurisdiction made the following observations on the nature of this principle:

... the issue of the immunity of a State official from foreign criminal jurisdiction should, in principle, be considered at an early stage of the judicial proceedings, or earlier still, at the pretrial stage, when a State exercising jurisdiction takes a decision on adopting criminal procedure measures precluded by immunity against an official... In principle, the early consideration of immunity is necessary in order to achieve its fundamental objectives: ensuring normal relations among States and the maintenance of their sovereignty. Immunity also needs to be considered at an early stage of the proceedings, *in limine litis*, because the outcome determines the forum State’s continued ability to exercise criminal jurisdiction over an official. If the court fails to consider the issue of immunity at the start of the proceedings, this may result in a violation of the forum State’s obligations arising from the rule on immunity. Moreover, the failure to consider the issue of immunity *in limine litis* itself may be deemed such a violation.⁷³

79. Without giving any explanation, the Indian Supreme Court failed to decide the question of immunity in its January 2013 Judgment. In the three years and six months between the arrest of the Marines in February 2012 and the stay of all domestic proceedings in August 2015, India did not even produce a first instance decision on immunity. This failure by India constitutes a manifest breach of India’s obligations under international law.

80. As a result of the commencement of the present arbitral proceedings, and of the stay of all domestic proceedings, the issue of immunity will now be determined by the Annex VII Tribunal. Italy would suffer continuing and irreversible prejudice if, notwithstanding the clear and necessary consequences of the stay and having failed to determine the issue *in limine litis* as it was obliged to do, India were allowed to continue to exercise criminal jurisdiction over an Italian State official with the effect of depriving Italy of his service, and him of his liberty, for years to come.

81. If India is required by this Tribunal provisionally to suspend the measures preventing Sergeant Girone’s return to Italy, Italy’s undertaking to return if this

⁷¹ “*Arctic Sunrise*” (*Kingdom of the Netherlands v. Russian Federation*) (PCA Case No. 2014–12), Award on the Merits, 14 August 2015, para. 113.

⁷² *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.

⁷³ Third Report on Immunity of State Officials from Foreign Criminal Jurisdiction, by Roman Anatolevich Kolodkin, Special Rapporteur, 2011, A/CN.4/646, para. 11 (references omitted).

Tribunal's Award requires it means that India will suffer no prejudice.⁷⁴ India cannot decide the issue of immunity for itself, during the pendency of this arbitration; nor can it, obviously, put Sergeant Girone on trial during that period.

82. Moreover, the granting of the requested measure on this basis would not cause prejudice to India because keeping Sergeant Girone in India pending this Tribunal's decision is not required by the purpose of bail conditions (under Indian law but also more generally). Under Indian law, the “[p]rincipal object of bail is to secure the attendance of the accused at the trial and ensure that he does not flee from justice”;⁷⁵ to address any possibility of the accused “tamper[ing] with the evidence” or influencing witnesses;⁷⁶ and to avoid the commission of “an offence similar to the offence of which he is accused, or suspected”.⁷⁷ None of these purposes requires Sergeant Girone's presence in Delhi in the present case pending this Tribunal's Award. While it is not accepted that there would be any risk of Sergeant Girone absconding from Indian justice anyway, Italy's undertaking to return him if so required by the Tribunal provides India with further reassurance about his attendance at trial if required by the Award of this Tribunal. As regards the investigation, India has stated that it is complete,⁷⁸ and there is consequently no possibility of Sergeant Girone tampering with evidence or influencing witnesses. No risk of him committing “an offence similar to the offence of which he is accused” arises in the circumstances, and no such concern has ever been raised.

83. By contrast, if Sergeant Girone is forced to remain in India throughout the pendency of the Annex VII proceedings, Italy's rights to exclusive jurisdiction and, especially, to immunity, would suffer irreversible prejudice every additional day an Italian Marine is kept in Delhi under Indian penal jurisdiction. Such prejudice is aggravated by the consideration, developed below, that Sergeant Girone's deprivation of liberty violates minimum guarantees of due process.

B. Italy's requested measure is appropriate because it is required by basic considerations of due process

84. The principle that considerations of humanity and international standards of due process apply to the law of the sea has been affirmed several times.

85. In the *Corfu Channel* case, the ICJ noted that elementary considerations of humanity are even “more exacting in peace than in war”.⁷⁹ ITLOS echoed this comment in *The M/V “SAIGA” (No. 2) Case*, when it said that “[c]onsiderations of

⁷⁴ Verbatim Record ITLOS/PV.15/C24/1 (uncorrected), 10 August 2015, morning session, pp. 45-46 (Bethlehem) (**Annex IT-34(a)**); Verbatim Record ITLOS/PV.15/C24/3 (uncorrected), 11 August 2015, morning session, p. 19, lines 29–33 (Azzarello) (**Annex IT-34(c)**).

⁷⁵ Justice M. L. Singhal, *Sohoni's Code of Criminal Procedure: Volume 5*, (21st ed., LexisNexis, 2015), p. 612 (**Annex IT-46**).

⁷⁶ Indian Code of Criminal Procedure, 1973, Section 437(3)(c) (**Annex IT-40**).

⁷⁷ Indian Code of Criminal Procedure, 1973, Section 437(3)(b) (**Annex IT-40**).

⁷⁸ Italy's ITLOS Request, para. 2.12 (**Annex IT-32**).

⁷⁹ *Corfu Channel (United Kingdom v. Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 4, at p. 22.

*humanity must apply in the law of the sea, as they do in other areas of international law.*⁸⁰

86. In the *Juno Trader* case, ITLOS considered:

... that article 73, paragraph 2, must be read in the context of article 73 as a whole. The obligation of prompt release of vessels and crews includes elementary considerations of humanity and due process of law.⁸¹

87. In endorsing this passage, a number of judges made explicit reference to human rights.⁸²

88. In *The “Tomimaru” Case*, ITLOS observed that domestic proceedings “*inconsistent with international standards of due process of law*” could breach Article 292 of the Convention,⁸³ even though due process is not specifically mentioned in Article 292 of UNCLOS.

89. In the *Louisa* case, even though the Tribunal found that it lacked jurisdiction, it emphasised its view “*that States are required to fulfil their obligations under international law, in particular human rights law, and that considerations of due process of law must be applied in all circumstances.*”⁸⁴ (emphasis added). In its Order on Italy’s request for provisional measures in the present case, “*the Tribunal reaffirm[ed] its view that considerations of humanity must apply in the law of the sea as they do in other areas of international law*”, with a number of judges underscoring the principle that considerations of due process must be applied in all circumstances.⁸⁵

90. In the Award in *Arctic Sunrise*, an Annex VII Tribunal made the following observation on general international human rights law:

The Tribunal considers that, if necessary, it may have regard to general international law in relation to human rights in order to determine whether law enforcement action such as the boarding, seizure, and detention of the *Arctic Sunrise* and the arrest and detention of those on board was reasonable and proportionate. This would be to interpret the relevant Convention provisions by reference to relevant context. This is not, however, the same as, nor does it require, a determination of whether there has been a breach of Articles 9 and 12(2) of the ICCPR

⁸⁰ *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10, at p. 62, para. 155. See also *M/V “Virginia G” (Panama/Guinea-Bissau)*, Judgment, ITLOS Reports 2014, p. 4, at p. 101, para. 359; ITLOS Order, para. 133 (**Annex IT-35**).

⁸¹ “*Juno Trader*” (*Saint Vincent and the Grenadines v. Guinea-Bissau*), Prompt Release, Judgment, ITLOS Reports 2004, p. 17, at pp. 38-39, para. 77.

⁸² “*Juno Trader*” (*Saint Vincent and the Grenadines v. Guinea-Bissau*), Prompt Release, Separate Opinion of Judge Treves, ITLOS Reports 2004, p. 71; Joint Separate Opinion of Judges Mensah and Wolfrum, ITLOS Reports 2004, p. 57, at pp. 57-58, paras. 3-4.

⁸³ “*Tomimaru*” (*Japan v. Russian Federation*), Prompt Release, Judgment, ITLOS Reports 2005-2007, p. 74, at pp. 96 and 97, paras. 76 and 79.

⁸⁴ *M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, ITLOS Reports 2013, p. 4, at p. 46, para. 155 (references omitted).

⁸⁵ ITLOS Order, para. 133, and Declaration of Judge Paik, para. 8 (**Annex IT-35**).

as such. That treaty has its own enforcement regime and it is not for this Tribunal to act as a substitute for that regime.

In determining the claims by the Netherlands in relation to the interpretation and application of the Convention, the Tribunal may, therefore, pursuant to Article 293, have regard to the extent necessary to rules of customary international law, including international human rights standards, not incompatible with the Convention, in order to assist in the interpretation and application of the Convention's provisions that authorise the arrest or detention of a vessel and persons. This Tribunal does not consider that it has jurisdiction to apply directly provisions such as Articles 9 and 12(2) of the ICCPR or to determine breaches of such provisions.⁸⁶

91. Relevant “*general international law in relation to human rights*” and due process standards to be “*applied in all circumstances*” for the purposes of the present case include:

- (a) the obligation to formulate charges promptly and in detail; and
- (b) the principle that measures depriving individuals of liberty or otherwise restricting their liberty and movement should be necessary, proportionate and reasonable.

92. **The obligation to formulate charges promptly and in detail:** The obligation to formulate charges operates at two separate stages in the criminal process.

93. It applies, first, at the time of arrest. Article 9(2) of the ICCPR provides:

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

94. It also applies to any exercise of criminal jurisdiction, whether preceded by arrest or not. Article 14(3)(a) of the ICCPR provides:

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

95. Under Article 9(2), the Human Rights Committee has repeatedly held that delay in bringing charges should not exceed a few days.⁸⁷

⁸⁶ “*Arctic Sunrise*” (*Kingdom of the Netherlands v. Russian Federation*) (PCA Case No. 2014–12), Award on the Merits, 14 August 2015, paras. 197–198.

⁸⁷ *Kelly v. Jamaica*, Communication No. 253/1987, in General Assembly, *Official Records, Forty-sixth session, Supplement No. 40 (A/46/40)*, p. 241, at p. 247, para. 5.8.

96. As far as the obligation under Article 14(3)(a) is concerned, the Human Rights Committee explained:

The right of all persons charged with a criminal offence to be informed promptly and in detail in a language which they understand of the nature and cause of criminal charges brought against them, enshrined in paragraph 3 (a), is the first of the minimum guarantees in criminal proceedings of article 14. This guarantee applies to all cases of criminal charges, including those of persons not in detention, but not to criminal investigations preceding the laying of charges. Notice of the reasons for an arrest is separately guaranteed in article 9, paragraph 2 of the Covenant. The right to be informed of the charge “promptly” requires that information be given as soon as the person concerned is formally charged with a criminal offence under domestic law, or the individual is publicly named as such. The specific requirements of subparagraph 3 (a) may be met by stating the charge either orally – if later confirmed in writing – or in writing, provided that the information indicates both the law and the alleged general facts on which the charge is based. In the case of trials in absentia, article 14, paragraph 3 (a) requires that, notwithstanding the absence of the accused, all due steps have been taken to inform accused persons of the charges and to notify them of the proceedings.⁸⁸ (Emphasis added)

97. Both of these due process safeguards – under Articles 9(2) and 14(3)(a) – are part of customary international law, and reflected in the statutes of the *ad hoc* international criminal tribunals and of the International Criminal Court,⁸⁹ and elaborated on in the applicable rules of procedures and evidence.

98. **Measures depriving individuals of liberty or otherwise restricting their liberty and movement should be necessary, proportionate and reasonable:** The overarching principle is contained in Article 9(1) of the ICCPR which provides:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

99. Examples of deprivation of liberty other than detention and arrest include: “*police custody, arraigo, remand detention, imprisonment after conviction, house arrest, administrative detention, involuntary hospitalization, institutional custody of children and confinement to a restricted area of an airport, as well as being involuntarily transported.*”⁹⁰

100. The test in international human rights law for determining whether a deprivation of liberty arises consists of an assessment of the “*type, duration, effects*

⁸⁸ Human Rights Committee, General Comment No. 32, in General Assembly, *Official Records, Sixty-second session, Supplement No. 40 (A/62/40)*, p. 178, at p. 185, para. 31 (references omitted).

⁸⁹ Article 21(4)(a) of the Statute of the International Criminal Tribunal for the Former Yugoslavia (2009); Article 67(1)(a) of the Rome Statute of the International Criminal Court.

⁹⁰ Human Rights Committee, General Comment No. 35 (2014), CCPR/C/GC/35, para. 5.

and manner of implementation” of the measures in question.⁹¹ In applying this test, the Supreme Court of the United Kingdom has held that interference with a person’s private and family life is not merely “*a relevant consideration*” for the purposes of determining whether a particular measure amounts to a deprivation of liberty, but is also “*capable of tipping the balance*” of that determination.⁹² What must be considered is “*the concrete situation of the particular individual*”, including “*any subjective and/or person-specific factors, such as the particular difficulties of the subject’s family in visiting him*” and “*social isolation*”.⁹³

101. General Comment 35 of the Human Rights Committee explains that the notion of arbitrariness in the context of deprivations of liberty “*is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law, as well as elements of reasonableness, necessity and proportionality*”.⁹⁴

102. Importantly, the Tribunal in *Arctic Sunrise* accepted that it could determine whether various measures connected to the exercise of criminal jurisdiction, including “*deprivation of liberty, outside formal arrest and detention*”, accorded with “*general principles of reasonableness, necessity and proportionality*”.⁹⁵ In this respect, it may also be noted that:

- (a) International criminal tribunals have found that the principle of proportionality applies to decisions on the provisional release of accused persons, holding that a measure is proportionate “*only when it is (1) suitable, (2) necessary and when (3) its degree and scope remain in a reasonable relationship to the envisaged target. Procedural measures should never be capricious or excessive.*”⁹⁶
- (b) The Human Rights Committee has stated that the principle of proportionality also applies to measures that fall short of deprivation of liberty, e.g. restrictions on free movement under Article 12 of the ICCPR, noting the following:

... it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument

⁹¹ *Guzzardi v. Italy*, 6 November 1980, ECHR, Series A no. 39, para. 92.

⁹² *Secretary of State for the Home Department v. AP*, [2010] UKSC 24, para. 12.

⁹³ *Secretary of State for the Home Department v. AP*, [2010] UKSC 24, paras. 13-15.

⁹⁴ Human Rights Committee, General Comment No. 35 (2014), CCPR/C/GC/35, para. 12.

⁹⁵ “*Arctic Sunrise*” (*Kingdom of the Netherlands v. Russian Federation*) (PCA Case No. 2014-12), Award on the Merits, 14 August 2015, paras. 223-224 and 326. Having found that all of Russia’s law enforcement measures lacked a basis in international law, the Tribunal considered that it did not need to make a finding on the reasonableness, necessity and proportionality of those measures (*ibid.*, para. 333).

⁹⁶ *Prosecutor v. Limaj et al.*, ICTY, Appeal Chamber, IT-03-66-AR65, Decision on Request for Provisional Release, 31 October 2003, para. 13; *Prosecutor v. Pasko Ljubicic*, ICTY, Trial Chamber, IT-00-41-PT, Decision on Second Application for Provisional Release, 26 July 2005, para. 18.

amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.⁹⁷

103. In the present case, relevant considerations include:

- (a) Sergeant Girone would not be subject to the criminal jurisdiction of India *but for* the illegal use of ruse and coercive methods by India and for India's abuse of rights which caused the *Enrica Lexie* to change course. The illegality of his apprehension taints the subsequent and ongoing exercise of criminal jurisdiction by India over him.
- (b) As indicated before, in the four Annex VII arbitrations that concluded with the rendering of an award, proceedings lasted an average of 3 years, 3 months and 23 days from the filing of the Notification to the award.⁹⁸ If the Tribunal did not order India to revise the bail conditions it has imposed on Sergeant Girone, he may end up being deprived of his liberty, without charge, for a total of over seven years.
- (c) In circumstances in which Sergeant Girone has not been formally charged and a fundamental standard of due process has been manifestly breached, a relaxation of the bail conditions to the extent necessary to enable him to return to Italy for the duration of the Annex VII proceedings is proportionate, reasonable and appropriate.
- (d) The bail conditions restrict Sergeant Girone to the confines of the city of Delhi. The concrete effects of those bail conditions are, in the circumstances of Sergeant Girone's case, more severe than house arrest. Sergeant Girone is, against his will, forced to reside in a foreign country, thousands of miles away from his home. He is deprived of any regular contact with his family, including his children, Michele aged 14 and Martina aged 8, and his friends. By the time the Annex VII proceedings are concluded, one of Sergeant Girone's children will be approaching adulthood, the other will be a young adolescent. This is the heavy price paid by individuals sentenced to long terms of imprisonment upon conviction. Such a price would be unduly burdensome as a consequence of pre-trial detention in respect of accused persons charged with an offence. It is unacceptable and unjustifiable in respect of an individual who is not even subject to charge for any offence. Punishment without trial is wrong; punishment without charges is inexcusable.

Judged by their "*type, duration, effects and manner of implementation*",⁹⁹ and in the individual circumstances of Sergeant Girone, therefore, the bail conditions amount to a deprivation of liberty that is disproportionate, unnecessary and unreasonable. Furthermore, these bail conditions amount to an extreme and unduly severe

⁹⁷ 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.

⁹⁸ See *supra* fn. 3.

⁹⁹ *Guzzardi v. Italy*, 6 November 1980, ECHR, Series A no. 39, para. 92.

restriction on Sergeant Girone's liberty and movement which is also disproportionate, unnecessary and unreasonable, and contrary to Article 12 of ICCPR.

104. To conclude, the prescription of the requested measure is appropriate under the circumstances of this case for the following reasons:

- (a) Irreversible prejudice to Italy's rights of jurisdiction is extended and aggravated by the ongoing violations of due process arising in the context of the very exercise of jurisdiction by India which is contested by Italy and forms the subject-matter of the dispute submitted to this Tribunal;
- (b) Irreversible prejudice to Italy's right for Sergeant Girone to be immune from Indian criminal jurisdiction is extended and aggravated by the ongoing violations of due process in the exercise of such jurisdiction; and
- (c) The requested measure is necessary as it is required by the international law standards of due process which, in the settled jurisprudence under UNCLOS, apply in all circumstances, including the present ones, and the continuing violation of which has no justification in law.

C. Other considerations supporting the prescription of the requested measure

105. There are a number of other considerations which support the prescription of the provisional measure requested by Italy.

106. *First*, the suspension of domestic proceedings has placed Italy and India in the same position as regards criminal proceedings. In particular, no criminal trial can take place in either State until the Annex VII Tribunal has rendered its award. The position on the exercise of criminal jurisdiction is not however similarly balanced. India continues to exercise its criminal jurisdiction over Sergeant Girone, and is doing so in a disproportionate way, notwithstanding the stay of proceedings and the legal impossibility, during the pendency of the Annex VII arbitration, of further criminal proceedings.

107. *Second*, although urgency may not be a requirement under Article 290(1), the prescription of the requested measure is urgent. Urgency has been defined by a Chamber of ITLOS as the "need to avert a real and imminent risk that irreparable prejudice may be caused to the rights in issue".¹⁰⁰ Each of the elements in this definition is satisfied in the present case.

108. Italy has demonstrated that the irreversible prejudice to its rights is even more acute than in other cases, like *Arctic Sunrise*, where similar measures were prescribed.

¹⁰⁰ *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Provisional Measures, Order of 25 April 2015, para. 41.

In particular, the exercise of criminal jurisdiction by India, which the requested measure would address, causes an ongoing, disproportionate and arbitrary deprivation of liberty for an official of the Italian State in respect of whom Italy is entitled to immunity. As mentioned, India manifestly failed to determine the issue of immunity *in limine litis*, as it was obliged to do. It is of course true that a part of the irreparable damage has already occurred but this is no justification for inflicting more of it in the coming years throughout the pendency of these proceedings.

109. On the facts of this Request, the elements of imminence and real risk are also clearly satisfied. The exercise of criminal jurisdiction over Sergeant Girone and the deprivation of his liberty are not just imminent, they are actual and ongoing. The irreparable prejudice to Italy's rights is more than a matter of real risk, as it is certain and, again, ongoing. Italy therefore satisfies the test not simply on the basis of a real risk of prejudice, but on the higher threshold of *real* irreversible prejudice.

110. **Third**, if the two Marines are allowed to stay in Italy pending a decision of the Annex VII arbitral tribunal, India will suffer no prejudice. If the Tribunal ultimately decides in its Award that they must be returned, Italy will do so and has given solemn undertakings that it will comply with any such obligation. India anyway cannot try them in the meantime and so there is literally no prejudice to India in allowing their return to their home State, of which they are officials. If, by contrast, the Tribunal allows India to exercise its jurisdiction to keep Sergeant Girone in India pending the Tribunal's Award, and the Award is in favour of Italy, then irreversible prejudice will have been suffered by Italy because its State official will have unlawfully been kept in India in the exercise of Indian criminal jurisdiction for a period of approximately seven years.

111. It would, furthermore, represent an extraordinary and unacceptable departure from principles of sound administration of international justice if, in disputes between States, international courts and tribunals chose to proceed on the basis that their orders and judgments and the undertakings of States would not be honoured. The International Court of Justice has held that once a State has made an undertaking as to its conduct, "*its good faith in complying ... is to be presumed.*"¹⁰¹ Furthermore, the International Court of Justice has held that, even when making an order in respect of States found responsible for internationally wrongful acts, "*there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed.*"¹⁰² The conduct of neither Party to these proceedings has been found wrongful by this Tribunal and there is, *a fortiori*, no reason whatsoever to proceed on any basis other than the Parties' good faith in compliance with this Tribunal's orders and eventual Award.

¹⁰¹ 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. 147, at p. 158, para. 44.

¹⁰² See *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, p. 213, at p. 267, para. 150.

CHAPTER 5
SUBMISSIONS

112. For the above reasons, Italy respectfully requests that the Tribunal prescribe the following provisional measure:

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

Respectfully submitted,

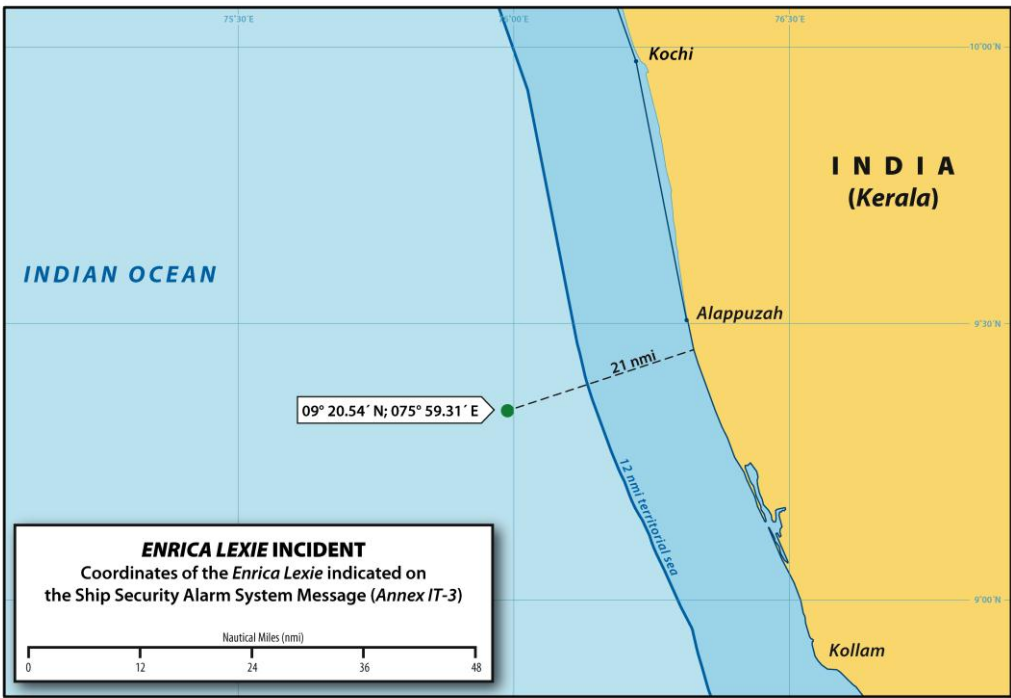


H.E. Ambassador Francesco Azzarello

Agent of the Italian Republic

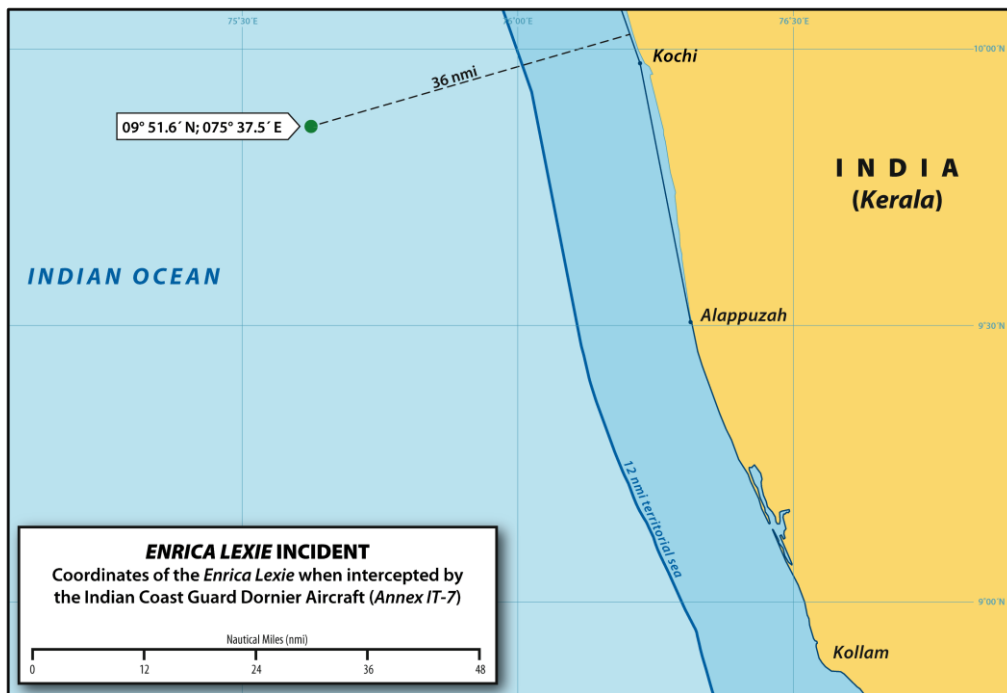
11 December 2015

APPENDIX 1:
**COORDINATES OF THE *ENRICA LEXIE* INDICATED ON THE SHIP
SECURITY ALARM SYSTEM MESSAGE (*ANNEX IT-3*)**



For illustrative purposes only

APPENDIX 2:
**COORDINATES OF THE *ENRICA LEXIE* WHEN INTERCEPTED BY THE
INDIAN COAST GUARD DORNIER AIRCRAFT (*ANNEX IT-7*)**



For illustrative purposes only

APPENDIX 3:
CHRONOLOGY OF THE INDIAN PROCEEDINGS

DATE	EVENT	ANNEX (where applicable)
15.02.12	Enrica Lexie Incident	
	Kerala Police “First Information Report” Recording a complaint by “Freddy”, the owner of the <i>St Antony</i> .	
19.02.12	Arrest of the Marines in Cochin (Kochi)	
22.02.12	Writ Petition No. 4542 of 2012 filed in Kerala High Court Italy and the Marines commence proceedings challenging India’s exercise of jurisdiction and asserting immunity of the Marines.	IT-15
19.04.12	Writ Petition No. 135 of 2012 filed in Indian Supreme Court Italy and the Marines file further proceedings directly in the Indian Supreme Court.	IT-16
18.05.12	Kerala Police “Final Report”/Charge-Sheet Kerala Police file charge-sheet against the Marines.	
29.05.12	Writ Petition No. 4542 of 2012 Judgment of Kerala High Court, dismissing Writ Petition No. 4542 of 2012.	IT-17
30.05.12	Order of Kerala High Court Grants bail to the Marines subject to conditions, including that the Marines stay within “ <i>the territorial limits of the City Police Commissioner, Kochi</i> ”, except to attend Court in Kollam.	
11.07.12	Special Leave Petition No. 20370 of 2012 (Writ Petition No. 4542 of 2012) Italy and the Marines file an appeal to the Indian Supreme Court against the decision of the Kerala High Court in Writ Petition No. 4542, which is then joined with Writ Petition No. 135 of 2012.	IT-18
07.08.12	Special Leave Petition No. 20370 of 2012 (Writ Petition No. 4542 of 2012); Writ Petition No. 135 of 2012 Letter from Counsel for India seeking a further 4 weeks to file a Counter Affidavit. Counsel for Italy and the Marines immediately files a letter opposing this request, given the urgency of the issues involved.	

08.12 to 04.09.12	Special Leave Petition No. 20370 of 2012 (Writ Petition No. 4542 of 2012); Writ Petition No. 135 of 2012 Hearing in the Indian Supreme Court The two matters are heard on various days over August and September 2012.	
04.09.12	Special Leave Petition No. 20370 of 2012 (Writ Petition No. 4542 of 2012); Writ Petition No. 135 of 2012 Hearing in the Indian Supreme Court Order reserving Judgment	IT-47
20.12.12	Kerala High Court Order Varies bail conditions to allow Marines to travel to Italy for a 2 week period.	
18.01.13	Special Leave Petition No. 20370 of 2012 (Writ Petition No. 4542 of 2012); Writ Petition No. 135 of 2012 Judgment and Order of Indian Supreme Court Supreme Court agrees with Marines that State of Kerala did not have jurisdiction. Supreme Court then orders <i>inter alia</i> , that: (1) India is to set up a Special Court to try the case; and (2) the Marines be moved to Delhi, subject to bail conditions.	IT-19
22.02.13	Indian Supreme Court Order Grants permission for Marines to travel to Italy for a 4 week period.	IT-48
01.04.13	Indian Ministry of Home Affairs Order In an executive order, the India Ministry of Home Affairs directs the “National Investigation Agency” (“NIA”) to take up the investigation, on the expressed basis that: (1) an offence has been committed under the “Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002” (“SUA”); and (2) the NIA has jurisdiction to investigate offences under SUA.	
02.04.13	Indian Supreme Court Order (in Writ Petition No. 135 of 2012 with Special Leave Petition No. 20370 of 2012) Adjourns matter till 16 April 2013, “ <i>to enable the learned Attorney General for India, to inform [the Supreme Court] of the steps take for constitution of a separate Court, which [the Supreme Court] had intended to be constituted for trial of the [Marines] on a Fast Track basis, in terms of the judgment delivered ... on 18th January, 2013</i> ”.	
04.04.13	NIA “First Information Report” Following the Ministry of Home Affairs 1 April 2013 Order, the NIA re-registers the case based, <i>inter alia</i> on the provisions of SUA.	

15.04.13	Indian Ministry of Home Affairs Notification Appoints: “ <i>the Court of Additional Sessions Judge-01, Patiala House, New Delhi</i> ” as the Special Court. Also appoints “ <i>the Chief Metropolitan Magistrate, Patiala House, New Delhi to deal with the case</i> ” and designates two “ <i>Special Public Prosecutors</i> ”.	IT-44
	Indian Ministry of Home Affairs Order In a further executive order (said to be “ <i>in supersession of</i> ” its 1 April 2013 Order), the Ministry of Home Affairs “ <i>designates and authorizes</i> ” the NIA “ <i>to take up the investigation and prosecution</i> ”.	IT-49
16.04.13	Indian Supreme Court Hearing India informs the Supreme Court of the Ministry of Home Affairs’ Order and Notification dated 15 April 2013. The Supreme Court relists the matter for hearing on 22 April 2013.	
22.04.13	Indian Supreme Court Hearing Indian Attorney-General informs the Supreme Court that the Ministry of Home Affairs has appointed the NIA to take over the investigation. The Supreme Court relists the matter for hearing on 26 April 2013.	
26.04.13	Indian Supreme Court Order (in Writ Petition No. 135 of 2012 with Special Leave Petition No. 20370 of 2012) The Supreme Court refuses to determine a complaint by the Marines that the NIA does not have jurisdiction. It also expresses “ <i>hope that the investigation will be completed at an early date and the trial will also be conducted on a day-to-day basis and be completed expeditiously as well</i> ”.	IT-50
28.11.13	Application by NIA to Special Court The NIA applies for transfer of Marines from custody of the Supreme Court to custody of the Special Court. The application is repeatedly adjourned, following Special Court hearings on 28 November 2013, 6 December 2013, 8 January 2014, 30 January 2014 and 25 February 2014.	
13.01.14	Application for Directions Filed by the Marines, complaining about “ <i>gross-non compliance</i> ” and “ <i>inordinate delay</i> ” by India in its implementation of the 18 January 2013 Judgment, including the complete failure (after almost a year) to present a “Final Report”.	IT-51
17.01.14	Indian Ministry of Home Affairs Order Executive order authorising prosecution of the Marines under SUA Sections 3(1)(a) and 3(1)(g).	IT-52
06.02.14	Indian Ministry of Home Affairs Order Executive order purporting to “ <i>supersede</i> ” the 17 January 2014 Order by “ <i>deleting the reference to section 3(1)(g)(i) of the [SUA]</i> ”.	IT-53

10.02.14	Indian Supreme Court Hearing The Indian Ministry of Home Affairs notifies the Court of its executive order dated 6 February 2014 (referred to above).	
24.02.14	Affidavit on Behalf of Union of India N.S. Bisht, Under Secretary Ministry of Home Affairs, files an Affidavit to “ <i>plac[e] on record the opinion given by the Law Ministry</i> ” that “ <i>the provisions of the SUA Act are not attracted to this case</i> ”, contrary to the previous position adopted by the Ministry of Home Affairs and the NIA. The Affidavit also states that “ <i>appropriate steps will be taken to ensure that the charge sheet reflects this opinion</i> ”.	IT-54
	Indian Supreme Court Hearing Following this Affidavit, the Supreme Court gives directions to determine the issue of whether the NIA itself has jurisdiction.	IT-55
06.03.14	Marines file Writ Petition No. 236 of 2014 under Article 32 of the Constitution of India (“the Article 32 Writ Petition”) The Marines file a further writ petition <i>inter alia</i> disputing jurisdiction and asserting immunity.	IT-56
28.03.14	Indian Supreme Court Hearing In the light of the Article 32 Writ Petition the Supreme Court “ <i>requests</i> ” the Special Court to keep its proceedings “ <i>in abeyance.</i> ” Notices in relation to the Article 32 Writ Petition are immediately issued to the Respondents: the Ministry of Home Affairs; the Ministry of External Affairs; the Ministry of Law and Justice and the NIA.	IT-57
31.03.14	Special Court Hearing Following the 28 March 2014 Supreme Court Order, the Special Court stays its proceedings until July 2014. Further stays are ordered at subsequent Special Court hearings.	IT-58
25.04.14	Freddy Bosco Transfer Petition Freddy Bosco, the owner of the <i>St Antony</i> fishing boat, files a petition seeking to transfer the Delhi Special Court proceedings to a “Special Court” in Kerala.	
18.07.14	Indian Supreme Court, Registrar Hearing The only Respondent to appear (Ministry of Home Affairs) requests a further 4 weeks to file its Counter Affidavit, which the Registrar grants. The Registrar fixes the next date of hearing as 22 September 2014 (which he later re-fixes for 25 September 2014).	IT-59

12.09.14	Indian Supreme Court Hearing Sergeant Latorre is granted permission to travel to Italy for a 3 month period, having suffered a stroke on 31 August 2014. The permission is extended at Supreme Court hearings on 14 January 2015, 9 April 2015 and 13 July 2015.	IT-60
25.09.14	Indian Supreme Court, Registrar Hearing The Ministry of Home Affairs confirms that it has filed its Counter Affidavit. The Registrar directs the Ministry of External Affairs to file any separate Counter Affidavit, within 4 weeks. The Registrar notes that the Ministry of Law and Justice and the NIA have still not responded and directs that they be re-served with Notices. He fixes the next hearing for 12 December 2014 (which he later re-fixes for 16 December 2014).	IT-61
16.12.14	Indian Supreme Court Hearing Applications dated 9 December 2014 to extend the stay in Italy of Sergeant Latorre and to allow Sergeant Girone to travel to Italy are withdrawn, following statements by the Court that the applications would be rejected.	IT-22, IT-23, IT-29
	Indian Supreme Court, Registrar Hearing The Registrar notes that the Ministry of External Affairs still has not filed its Counter Affidavit, whilst the Ministry of Law and Justice has still not responded to the Notice; he directs them both to file their respective Counter Affidavits within 4 weeks. The Registrar indicates that he will await return of the Notice served on the NIA. He lists the next hearing for 9 March 2015.	IT-62
14.01.15	Indian Supreme Court Hearing Sergeant Latorre is granted a 3 month extension to remain in Italy.	IT-30
10.03.15	Indian Supreme Court, Registrar Hearing The Ministry of Home Affairs is not represented. The Ministry of External Affairs appears and adopts the Counter Affidavit previously filed by the Ministry of Home Affairs. Neither the Ministry of Law and Justice, nor the NIA appear to explain their position, both having failed to file any Counter Affidavit. In these circumstances, the Registrar orders that " <i>the matter shall be processed for listing</i> ".	IT-63
09.04.15	Indian Supreme Court Hearing Sergeant Latorre is granted extension to remain in Italy until 15 July 2015.	IT-31

28.04.15	Indian Supreme Court Hearing The hearing of the Article 32 Writ Petition is due to start on 28 April 2015. However, the Indian Supreme Court does not take up the matter and instead directs that it be re-listed after the summer vacations.	IT-64
26.06.15	Commencement of International Proceedings Italy starts proceedings against India under UNCLOS Annex VII.	
01.07.15	Indian Special Court Hearing The Special Court extends the stay of its proceedings, ordering a further hearing on 25 August 2015.	
04.07.15	Article 32 Writ Petition, Deferment Application Following commencement of international proceedings, the Marines file: (1) an application for deferment of the hearing of the Article 32 Writ Petition; and (2) an application to extend Sergeant Latorre's leave to stay in Italy until after determination of the international proceedings.	
13.07.15	Indian Supreme Court Hearing The Supreme Court: (1) orders a further hearing of the deferment application on 26 August 2015; and (2) rejects Sergeant Latorre's extension application, only granting a further 6 months leave to stay in Italy, until 15 January 2016.	IT-41
25.08.15	Indian Special Court Hearing The Special Court orders that its own proceedings be adjourned <i>sine die</i> .	IT-37(b)
26.08.15	Indian Supreme Court Hearing Supreme Court orders that proceedings be stayed till further order, with a hearing to take place on 13 January 2016.	IT-37(c)

APPENDIX 4:
THE DELAY IN THE INDIAN PROCEEDINGS

1. There is no basis for the suggestion, advanced by India before ITLOS, that Italy is to blame for India's failure to file or frame charges.¹⁰³ The Indian proceedings can be divided into three stages.

(1) 15 February 2012 to 18 January 2013

2. This entire period, of almost a year, was taken up by the Indian courts in hearing objections to jurisdiction and immunity.

3. In summary:

- (1) On 22 February 2012, promptly after the arrest of the Marines, challenges as to jurisdiction and immunity were raised in the Kerala High Court (Writ Petition No. 4542 of 2012).¹⁰⁴
- (2) On 19 April 2012, the Marines filed further proceedings directly in the Supreme Court (Writ Petition No. 135 of 2012) because the Kerala proceedings had "*failed to provide an expeditious remedy*".¹⁰⁵
- (3) The Supreme Court hearing did not occur until August 2012.¹⁰⁶
- (4) The Supreme Court (having reserved judgment on 4 September 2012)¹⁰⁷ then took a further four and a half months, until 18 January 2013, to give judgment.
- (5) Even then, after almost a year, the Supreme Court's 18 January 2013 Judgment: (a) failed to determine the question of jurisdiction; and (b) failed entirely to address the question of immunity.¹⁰⁸

¹⁰³ Verbatim Record ITLOS/PV.15/C24/2 (uncorrected), 10 August 2015, afternoon session, p. 10, lines 30-31 and 39-40 (Narasimha); p. 25, lines 22-36, and p. 28, lines 27-43 (Bundy) (**Annex IT-34(b)**).

¹⁰⁴ Writ Petition No. 4542 of 2012, 22 February 2012 (**Annex IT-15**).

¹⁰⁵ Writ Petition No. 135 of 2012, 19 April 2012, p. F (**Annex IT-16**).

¹⁰⁶ This was a hearing of Writ Petition No. 135 of 2012, as well as an appeal from the judgment of the Kerala High Court in Writ Petition No. 4542 of 2012.

¹⁰⁷ Order of the Supreme Court of India of 4 September 2012 (**Annex IT-47**).

¹⁰⁸ *Republic of Italy & Ors v. Union of India & Ors*, Supreme Court of India Judgment of 18 January 2013 (**Annex IT-19**).

(2) 18 January 2013 to 31 March 2014

4. During this period, the Indian authorities failed to implement the 18 January 2013 Indian Supreme Court Judgment, such that by March 2014 they had not even filed a charge-sheet.

5. In summary:

(1) The Supreme Court's 18 January 2013 Judgment specifically required the proceedings to be "*disposed of expeditiously*".¹⁰⁹

(2) However, India only identified a Special Court and appointed an investigating authority, the "National Investigation Agency" ("NIA") on 15 April 2013, almost three months after the 18 January 2013 Supreme Court Judgment.¹¹⁰ At the hearing on 22 February 2013 the Supreme Court made adverse comment about India's delays: "*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 not been taken to constitute the Special Court, as directed, the Central Government is directed to do so, without any further delay.*"¹¹¹

(3) Following its appointment in April 2013 the NIA failed to file any charge-sheet.

(4) Accordingly, on 13 January 2014 the Marines made an application in the Supreme Court complaining about "*gross non-compliance*" and "*inordinate delay*" by India in its implementation of the 18 January 2013 Judgment, including the failure to file a charge-sheet.¹¹²

(5) As at 28 March 2014 (which is when the Supreme Court requested that the Special Court proceedings be stayed, see below) the NIA had still failed to file any charge-sheet.

6. India has claimed that the NIA investigation was in fact completed by November 2013.¹¹³ If that is correct, then the subsequent failure to file or frame charges is all the more surprising.

7. India has also relied on an alleged failure to "*make the witnesses available*" (i.e., four Marines who were on the *Enrica Lexie* other than Sergeant Latorre and Sergeant Girone) and says that this "*further added to the delay*".¹¹⁴ However the

¹⁰⁹ *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**).

¹¹⁰ Notification of the Ministry of Home Affairs of India of 15 April 2013 (**Annex IT-44**).

¹¹¹ Order of the Supreme Court of India of 22 February 2013, para. 15 (**Annex IT-48**).

¹¹² Application for Directions, 13 January 2014 (**Annex IT-51**).

¹¹³ See India's ITLOS Written Observations, para. 1.17 (**Annex IT-33**), where India says that the NIA completed its investigation within seven months of NIA's appointment in April 2013.

¹¹⁴ India's ITLOS Written Observations, paras. 1.19, 3.29-3.34 (**Annex IT-33**).

dispute about questioning of these Marines was not causative of any material delay.¹¹⁵ In any event, Italy acted in accordance with the requirements of Indian law at all times.

(3) 28 March 2014 to the ITLOS Order

8. This period was taken up with multiple failures by the Indian authorities to engage with the Marines' Article 32 Writ Petition, in repeated breach of orders and deadlines set by the Indian Supreme Court.

9. In summary:

- (1) On 6 March 2014 the Marines filed a Writ Petition under Article 32 of the Constitution of India (“**the Article 32 Writ Petition**”), which pursued general challenges to the jurisdiction of India and in relation to immunity, as well as specific challenges to the jurisdiction of the NIA¹¹⁶ under Indian law.¹¹⁷
- (2) On 28 March 2014 the Indian Supreme Court ordered the Special Court to keep its proceedings “*in abeyance*” and ordered the Registrar of the Supreme Court to notify the Article 32 Writ Petition to the four Respondents, namely: (a) the Ministry of Home Affairs; (b) the Ministry of External Affairs; (c) the Ministry of Law and Justice; and (d) the NIA.¹¹⁸
- (3) Thereafter, there were four hearings in front of the Supreme Court Registrar on 18 July 2014,¹¹⁹ 25 September 2014,¹²⁰ 16 December 2014,¹²¹ and 10 March 2015:¹²²

¹¹⁵ On India's own chronology, the NIA only completed its investigation (“*except for the examination of thesefour [sic] Italian marines*”) on 20 September 2013, and the 4 Marines were then questioned through video link on 11 November 2013. See India's ITLOS Written Observations, p. 25 (**Annex IT-33**). Accordingly, out of the total period of 3.5 years since the Marines were arrested, about 1.5 months (at the most) turns on the “4 Marines” issue.

¹¹⁶ In essence, the Marines complained that: (1) the NIA only had jurisdiction to investigate offences under the “Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002” (“**SUA**”); whereas (2) SUA, a piece of anti-terrorism legislation, did not apply in this case as finally recognised by the Indian authorities in the Affidavit of N.S. Bisht, Under Secretary, Ministry of Home Affairs of India, 24 February 2014 (**Annex IT-54**).

¹¹⁷ Writ Petition No. 236 of 2014 under Article 32 of the Constitution of India, 6 March 2014 (**Annex IT-56**) (“**Article 32 Writ Petition**”).

¹¹⁸ Order of the Supreme Court of India of 28 March 2014 (**Annex IT-57**).

¹¹⁹ Order of the Supreme Court of India of 18 July 2014 (**Annex IT-59**). At the 18 July 2014 hearing, three of the Respondents (Ministry of External Affairs, Ministry of Law and Justice and the NIA) failed to appear, having failed to respond to the Notices of the Article 32 Writ Petition. The only Respondent to appear (Ministry of Home Affairs) requested a further 4 weeks to file its Counter Affidavit, which the Registrar granted. The Registrar fixed the next date of hearing as 22 September 2014 (which he later re-fixed for 25 September 2014).

¹²⁰ Order of the Supreme Court of India of 25 September 2014 (**Annex IT-61**). At the 25 September 2014 hearing the Ministry of Home Affairs filed its Counter Affidavit. The Registrar directed the Ministry of External Affairs to file any separate Counter Affidavit, within 4 weeks. The Registrar noted that the Ministry of Law and Justice and the NIA had still not responded and directed that they be re-

- (a) The Ministry of Home Affairs appeared at the 18 July 2014 hearing, asked for a further four weeks to file its counter affidavit and eventually filed a counter affidavit only on 25 September 2014;
 - (b) The Ministry of External Affairs failed to appear at the first three hearings and then, on 10 March 2015 appeared, stating that it adopted the affidavit filed by the Ministry of Home Affairs;
 - (c) The Ministry of Law and Justice and the NIA failed to appear at any hearing or to file any response.
- (4) Eventually, at the 10 March 2015 hearing, the Supreme Court Registrar ordered that “*the matter shall be processed for listing*” and accordingly the substantive hearing of the Writ Petition was set down to start on 28 April 2015.
- (5) However on 28 April 2015, because pleadings had not been completed, the Supreme Court, on its own motion passed an order to “[l]ist the matters after summer vacations”, i.e., after 1 July 2015.¹²³

served with Notices. He fixed the next hearing for 12 December 2014 (which he later re-fixed for 16 December 2014).

¹²¹ Order of the Supreme Court of India of 16 December 2014 (**Annex IT-62**). The Registrar noted that the Ministry of External Affairs still had not filed its Counter Affidavit, whilst the Ministry of Law and Justice had still not responded to the Notice; he directed them both to file their respective Counter Affidavits within 4 weeks. The Registrar indicated that he would await return of the Notice served on the NIA. He listed the next hearing for 9 March 2015.

¹²² Order of the Supreme Court of 10 March 2015 (**Annex IT-63**). The Ministry of Home Affairs was not represented. The Ministry of External Affairs appeared and adopted the Counter Affidavit previously filed by the Ministry of Home Affairs. The Ministry of Law and Justice and the NIA failed to appear, both having failed to file any Counter Affidavit. In these circumstances, the Registrar ordered that “*the matter shall be processed for listing*”.

¹²³ Order of the Supreme Court of India of 28 April 2015 (**Annex IT-64**).

LIST OF ANNEXES

ANNEX ¹²⁴	DESCRIPTION
I. Documents from ITLOS Case No. 24	
IT-32	Request of the Italian Republic for the Prescription of Provisional Measures under Article 290, paragraph 5, of the United Nations Convention on the Law of the Sea, 21 July 2015 (“ Italy’s ITLOS Request ”)
IT-33	Written Observations of the Republic of India, 6 August 2015 (“ India’s ITLOS Written Observations ”)
IT-34	Verbatim Records <ul style="list-style-type: none"> (a) Verbatim Record ITLOS/PV.15/C24/1 (uncorrected), 10 August 2015, morning session (b) Verbatim Record ITLOS/PV.15/C24/2 (uncorrected), 10 August 2015, afternoon session (c) Verbatim Record ITLOS/PV.15/C24/3 (uncorrected), 11 August 2015, morning session (d) Verbatim Record ITLOS/PV.15/C24/4 (uncorrected), 11 August 2015, afternoon session
IT-35	<i>The “Enrica Lexie” Incident (Italy v. India), Provisional Measures, Order of 24 August 2015 (“ITLOS Order”)</i>
IT-36	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
IT-37	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, with attachments <ul style="list-style-type: none"> (a) 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 (b) Order of the Special Designated Court of 25 August 2015

¹²⁴ For ease of reference, running heads have been added at the top of each document. Page numbers have also been added to any document longer than one page that does not already contain page numbers.

ANNEX ¹²⁴	DESCRIPTION
	(c) Order of the Supreme Court of India of 26 August 2015
	(d) Order of the Supreme Court of India of 2 September 2015
II. Other documents	
IT-38	Letter from the Office of the Public Prosecutor of the Republic attached to the Court of Rome to the Competent Judicial Authority of the Republic of India, 15 March 2012
IT-39	“Coast Guard, fishermen made a smart move”, <i>The Times of India</i> (Electronic Edition), 18 February 2012
IT-40	Indian Code of Criminal Procedure, 1973, Sections 173, 228 and 437
IT-41	Order of the Supreme Court of India of 13 July 2015
IT-42	“Supreme Court disallows Italian marines’ plea”, <i>DNA India</i> , 16 December 2014
IT-43	Additional Affidavit of Ambassador E. Angeloni, Ambassador of Italy in India, 7 December 2015
IT-44	Notification of the Ministry of Home Affairs of India of 15 April 2013
IT-45	Notification of the Ministry of Home Affairs of India of 27 August 1981
IT-46	Justice M. L. Singhal, <i>Sohoni’s Code of Criminal Procedure: Volume 5</i> , (21 st ed., LexisNexis, 2015), pp. 611-612
IT-47	Order of the Supreme Court of India of 4 September 2012
IT-48	Order of the Supreme Court of India of 22 February 2013
IT-49	Order of the Ministry of Home Affairs of India of 15 April 2013
IT-50	Order of the Supreme Court of India of 26 April 2013
IT-51	Application for Directions, 13 January 2014
IT-52	Order of the Ministry of Home Affairs of India of 17 January 2014
IT-53	Order of the Ministry of Home Affairs of India of 6 February 2014
IT-54	Affidavit of N.S. Bisht, Under Secretary, Ministry of Home Affairs of India, 24 February 2014
IT-55	Order of the Supreme Court of India of 24 February 2014

ANNEX ¹²⁴	DESCRIPTION
IT-56	Writ Petition No. 236 of 2014 under Article 32 of the Constitution of India, 6 March 2014 (“ Article 32 Writ Petition ”)
IT-57	Order of the Supreme Court of India of 28 March 2014
IT-58	Order of the Special Designated Court of 31 March 2014
IT-59	Order of the Supreme Court of India of 18 July 2014
IT-60	Order of the Supreme Court of India of 12 September 2014
IT-61	Order of the Supreme Court of India of 25 September 2014
IT-62	Order of the Supreme Court of India of 16 December 2014
IT-63	Order of the Supreme Court of India of 10 March 2015
IT-64	Order of the Supreme Court of India of 28 April 2015