

REQUEST OF THE ITALIAN REPUBLIC FOR THE PRESCRIPTION OF PROVISIONAL MEASURES¹

¹*Note by the Registry:* Reproduced is a redacted version submitted by Italy on 9 August 2015.

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

**DISPUTE CONCERNING
THE ENRICA LEXIE INCIDENT**
THE ITALIAN REPUBLIC v. THE REPUBLIC OF INDIA

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

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TABLE OF CONTENTS

	<i>Page</i>
CHAPTER 1: INTRODUCTION	1
CHAPTER 2: STATEMENT OF FACTS	2
I. Developments since the submission of the Notification	2
II. Circumstances aggravating the prejudice to Italy’s rights	4
CHAPTER 3: JURISDICTION	6
CHAPTER 4: STATEMENT OF LEGAL GROUNDS	8
I. Rights of Italy at issue	8
II. Reasons for the Request and consequences if provisional measures are not granted	10
III. Urgency	14
CHAPTER 5: JUDGE <i>AD HOC</i>	16
CHAPTER 6: SUBMISSIONS	16

LIST OF ANNEXES	21
CONFIDENTIAL ADDENDUM	<i>See Volume 4</i>

**REQUEST FOR PROVISIONAL MEASURES UNDER ARTICLE 290,
PARAGRAPH 5, OF THE CONVENTION**

**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 to be constituted under Annex VII of the United Nations Convention on the Law of the Sea (the “**Convention**” or “**UNCLOS**”). A certified copy of the Notification is attached as an Appendix to this Request and, together with its accompanying exhibits, is attached hereto as **Annex A**.

2. As of the date of this Request, India has not given any formal response to Italy’s Notification.

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

4. In the Notification,¹ Italy requested that India adopt and implement provisional measures within two weeks from the date of the Notification. More than two weeks have elapsed since this request was made and the provisional measures have not been implemented by India. On the contrary, at a hearing before the Indian Supreme Court on 13 July 2015, the Indian Government refused to support the implementation of provisional measures sought by Italy.

5. In light of these developments, pursuant to Article 290(5) of the Convention, Italy now requests the International Tribunal for the Law of the Sea (the “**Tribunal**”) to prescribe the following provisional measures:

- (a) India shall refrain from taking or enforcing any judicial or administrative measures against Sergeant Massimiliano Latorre and Sergeant Salvatore

¹ Notification (**Annex A**), at paras. 31-32.

Girone in connection with the Enrica Lexie Incident, and from exercising any other form of jurisdiction over that Incident; and

- (b) 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.

6. This Request is made on the ground that Italy will suffer serious and irreversible prejudice to its rights under UNCLOS if, notwithstanding the submission of the dispute to arbitration under Annex VII of UNCLOS, India is allowed to continue exercising its jurisdiction over the Enrica Lexie Incident and the Italian Marines, all the while subjecting the Italian Marines to restrictions on their liberty, security and movement.

7. Facts and circumstances relating to the serious and irreversible prejudice to Italy that are highly sensitive in nature have been set out in a Confidential Addendum accompanying this Request, which forms an integral part hereof.

CHAPTER 2 STATEMENT OF FACTS

8. The facts that gave rise to the dispute are described in paragraphs 4 to 25 of the Notification. Those paragraphs are incorporated into this Request by reference.

9. This Chapter addresses in more detail the following facts which are germane to Italy’s present Request for provisional measures:

- (a) developments since the filing of Italy’s Notification on 26 June 2015; and
- (b) circumstances aggravating the prejudice to Italy’s rights.

I. Developments since the submission of the Notification

10. Following the submission of the Notification by Italy on 26 June 2015, two applications were filed by the Marines in the Indian Supreme Court, each premised on and

consistent with the commencement of international proceedings under UNCLOS, and supporting the implementation of provisional measures sought by Italy in its Notification.

11. In the first application,² the Marines asked the Indian Supreme Court to defer the hearing of a petition, scheduled for 14 July 2015, until the final determination of the dispute submitted to Annex VII arbitration. The deferral of this hearing on the terms sought by the Marines would have had the effect of staying domestic proceedings throughout the pendency of the Annex VII arbitration.

12. In the second application,³ Sergeant Latorre, who is currently in Italy on medical grounds with the leave of the Indian Supreme Court, sought to extend the term of his stay in Italy, which was due to expire on 15 July 2015, in view of the commencement of international proceedings under UNCLOS. Sergeant Latorre's application further relied on the urgent medical and humanitarian reasons summarised at paragraph 21 of the Notification and addressed in more detail in the Confidential Addendum to this Request.

13. In discussions between Italy and India on the first application by the Marines, it became clear that the Indian Government was not prepared to support the deferral of the hearing for a period determined by reference to the pendency of international proceedings. The Indian Government was only prepared, at most, to support a much shorter deferral, without regard to the fact that the legality of the exercise of jurisdiction by India is now to be determined by the Annex VII arbitral tribunal. At a hearing on 13 July 2015, the Supreme Court issued notice to the Union of India to file a written submission setting out its position in response to the Marines' application,⁴ and listed the matter for a further hearing on 26 August 2015. At present, it is not known whether that hearing will take place as scheduled and will see the Indian Supreme Court decide the issue or whether, as has invariably been the case in the past with other hearings, the hearing date will be adjourned to some other as yet uncertain date in the future.

14. At the same hearing on 13 July 2015, the Indian Supreme Court rejected Sergeant Latorre's application for an extension of his term in Italy until the final determination of the dispute by the Annex VII arbitral tribunal,⁵ only extending Sergeant Latorre's leave to stay in Italy by a period of six months. This term is, however, plainly inadequate given that it is inevitable that the international proceedings will last longer than that and given Sergeant Latorre's serious medical situation set out in the Confidential Addendum. Crucially, and

² Application for Deferment of Article 32 Writ Petition, 4 July 2015 (**Annex E**); Supreme Court of India Order of 13 July 2015 (**Annex F**).

³ Application for Directions on Behalf of Chief Master Sergeant Massimiliano Latorre, 4 July 2015 (**Annex I (Confidential Annex)**); Supreme Court of India Order of 13 July 2015 (**Annex F**).

⁴ Supreme Court of India Order of 13 July 2015 (**Annex F**).

⁵ *Ibid.*

contrary to the provisional measures requested by Italy in the Notification, the basis for the Supreme Court’s Order is that Sergeant Latorre remains fully subject to Indian jurisdiction.

15. In discussions between Italy and India during the period following the submission of Italy’s Notification, the Indian Government further indicated that it would vigorously oppose any application by Sergeant Girone seeking a lifting of measures restricting his liberty and movement to enable him to return to Italy during the pendency of the Annex VII proceedings, and that the Indian Government considered it inevitable that the Supreme Court would reject any such application. The Supreme Court had already rejected an application by Sergeant Girone for leave to travel to Italy in December 2014. The position of the Indian Government on Sergeant Girone confirms reports in the press, which Italy has reason to believe are accurate, according to which the Indian Government views Sergeant Girone’s presence in India as a “guarantee that Latorre will come back to India from Italy”.⁶

16. In the light of the Indian Government’s position, and in the absence of any formal charges, Sergeant Girone’s continuing detention in India and the measures of constraint imposed on Sergeant Latorre are arbitrary and unjustified, and should not be allowed to continue while international proceedings are pending.

17. Given these developments, it is now clear that none of the existing political and legal processes will lead to the implementation by India of the provisional measures requested by Italy in the Notification. On the contrary, India persists in exercising jurisdiction and in subjecting the Italian Marines to measures that restrict their liberty and movement. It has therefore become apparent that the only mechanism through which Italy can preserve its rights in the present dispute pending the constitution of the Annex VII arbitral tribunal, is if India is compelled to cease its prejudicial acts by this Tribunal in accordance with Article 290(5) of UNCLOS.

II. Circumstances aggravating the prejudice to Italy’s rights

18. The Marines are part of the Italian Navy, and are agents and officials of the Italian State. At the time of the events that led to their arrest, they were exercising official functions as members of a Vessel Protection Detachment deployed by the Italian Navy on a counter-piracy operation in the context of international action aimed at ensuring the safety and freedom of navigation. Harm to the Marines’ rights, health and well-being directly engages the rights of Italy. No question of exhaustion of local remedies arises.

⁶ The Economic Times, “Italian marines case: Home ministry says it had objected to marines’ return”, 3 January 2015 (Annex H).

19. The prejudice to Italy's rights caused by India's continued exercise of jurisdiction and unjustified restriction of the liberty and movement of the Italian Marines is aggravated by the circumstances in which the Marines find themselves as a result of India's conduct, as explained in this Request and in the Notification.

20. India continues to exercise criminal jurisdiction over the two Marines, both by imposing measures severely restricting their liberty and movement and by moving to commence a criminal trial.

21. As set out in the Notification, after the vessel had been forced to enter Indian territorial waters, the Marines were compelled to disembark from the *Enrica Lexie* and were arrested by the police of the state of Kerala on 19 February 2012.⁷ On 30 May 2012 the Kerala High Court granted bail, subject to conditions that, *inter alia*, required the Marines to surrender their passports and not to leave the territorial limits of the City Police Commissioner of Kochi.⁸ On 18 January 2013, following its judgment of the same date, the Indian Supreme Court ordered that the Marines "be removed to Delhi" and replaced the conditions imposed by the Kerala High Court with new ones, requiring the Marines not to "leave the precincts of Delhi without the leave of the Court" and to report once a week to a specified police station in Delhi.⁹

22. Both Marines remain subject to Indian criminal jurisdiction. As indicated at paragraph 14 above, on 13 July 2015 the Supreme Court of India refused Sergeant Latorre's application to remain in Italy throughout the pendency of the international proceedings. The Supreme Court decided instead only to extend Sergeant Latorre's permission to stay in Italy by a period of six months.

23. Sergeant Girone is still detained in India. As indicated in the Confidential Addendum, his request to travel to Italy was denied in December 2014. Given that Indian officials have justified the detention of Sergeant Girone in India as necessary to guarantee the return of Sergeant Latorre, the description of Sergeant Girone as "a hostage" is appropriate (see paragraph 15 above).

24. Thus, for nearly three-and-a-half years, the Marines have been subjected to the jurisdiction of the Indian courts and to bail restraints, although they have not been formally charged with any offence. The Indian Government seeks to justify this state of affairs by the complications and delays resulting from the judgment of the Indian Supreme Court of

⁷ Notification (**Annex A**), at paras. 11-15.

⁸ High Court of Kerala Order of 30 May 2012 (**Annex D**).

⁹ *Republic of Italy & Ors v. Union of India & Ors*, Supreme Court of India Judgment of 18 January 2013, (**Annex 19 of Notification**).

18 January 2013, which ordered that the Marines be tried by a Special Court to be set up by the Government of India in consultation with the Chief Justice (“**Special Designated Court**”). But any complications arising from the decision to try the Marines before an *ad hoc* court – to be established exclusively for the trial of the two Marines in the absence of a legal and procedural framework, and in defiance of fundamental principles of natural justice – are of India’s own making.

25. The Indian legal process has failed, throughout this period, properly to address Italy’s position on jurisdiction and immunity. Moreover, notwithstanding Italy’s efforts, prospects for a negotiated political settlement have now vanished. After such a long period of time, and in the context of the unjustifiable restrictions on liberty and movement of two officials of the Italian State, the situation has reached a level of critical urgency. The prejudice suffered by Italy is rendered more acute by circumstances of a medical and humanitarian nature which affect the position of each of the Marines, described in the Confidential Addendum to this Request.

CHAPTER 3 JURISDICTION

26. Article 290(5) of UNCLOS reads as follows:

5. Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea or, with respect to activities in the Area, the Seabed Disputes Chamber, may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4.

27. Under Article 290(5), the Tribunal may only prescribe provisional measures if it considers that *prima facie* the arbitral tribunal to be constituted in accordance with Annex VII would have jurisdiction. Italy submits that the relevant jurisdictional requirements in Part XV of UNCLOS are satisfied.

28. Both Italy and India are States Parties to the Convention, having ratified it, respectively, on 13 January 1995 and 29 June 1995. 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 means for the settlement of disputes concerning the interpretation or application of the Convention. India, for its part, has not made a declaration pursuant to Article 287, and is thus deemed to have accepted arbitration in accordance with Annex VII. Accordingly, by virtue of Article 287(5) of UNCLOS, as Italy and India have not accepted the same procedure for the settlement of the present dispute, it may be submitted only to arbitration in accordance with Annex VII of UNCLOS, unless the parties otherwise agree.

29. There is plainly a dispute between Italy and India concerning the interpretation or application of UNCLOS. Over the years this dispute has been the subject of numerous communications between the parties and public statements.¹⁰ As detailed in the Notification, Italy claims, pursuant to UNCLOS, in particular Parts II, V and VII, and notably Articles 2(3), 27, 33, 56, 58, 87, 89, 92, 94, 97, 100 and 300 of the Convention, and customary international law, that India has breached its international obligations.

30. India's breaches of the provisions of UNCLOS follow, *inter alia*, from: (a) India's unlawful arrest and detention of the *Enrica Lexie*; (b) India's interference with Italy's freedom of navigation; (c) India's exercise of jurisdiction over the *Enrica Lexie* Incident and the Marines notwithstanding Italy's exclusive jurisdiction over the same by virtue of the undisputed fact that the Incident took place beyond India's territorial sea, some 20.5 nautical miles off the Indian coast; (d) India's exercise of criminal jurisdiction over the Italian Marines who, as State officials exercising official functions pursuant to lawful authority, are immune from criminal proceedings in India; and (e) the failure to cooperate in the repression of piracy by exercising criminal jurisdiction over the *Enrica Lexie* Incident and the Italian Marines.

31. Extended attempts to negotiate a solution have taken place, with Ministers and other high-level government representatives of both States meeting several times to discuss possible solutions. As explained in the Notification,¹¹ these efforts have not led to a solution.

¹⁰ E.g., see footnote 22 of the Notification (**Annex A**) listing Italy's Notes Verbales.

¹¹ Notification (**Annex A**), at para. 26.

CHAPTER 4
STATEMENT OF LEGAL GROUNDS

32. As a result of India’s failure to accede to the measures requested by Italy in the Notification, Italy’s rights in this dispute will suffer irreversible prejudice or be faced with a very significant risk of such prejudice before the Annex VII arbitral tribunal is in a position to act.

33. Italy submits that, in these circumstances, the prescription by the Tribunal of the provisional measures requested by Italy is entirely justified under each of the requirements for provisional measures set out in Article 290(1) and (5) of UNCLOS and Article 89(3) and (4) of the Rules of the Tribunal.

I. Rights of Italy at issue

34. The rights at issue in the present case are set out in the Notification, in particular paragraph 29 thereof. For the purposes of the present Request, attention is drawn to the following:

- (a) Italy’s right of exclusive jurisdiction over the Enrica Lexie Incident, including in relation to the exercise of criminal jurisdiction over the Marines; and
- (b) Italy’s rights in relation to its own immunity and the immunity of its officials.

35. Italy’s case in relation to these rights goes well beyond the plausibility threshold necessary for the prescription of provisional measures:¹²

- (a) Italy’s right as the flag State to exercise exclusive jurisdiction over vessels flying its flag is set out in UNCLOS. In this regard, Article 92(1) of UNCLOS, applicable to the exclusive economic zone by virtue of Article 58(2) of UNCLOS, provides for the exclusive jurisdiction of the flag State over vessels flying its flag “save in exceptional cases expressly provided for in international treaties or in this Convention”.¹³ None of the exceptions provided for in UNCLOS or in other treaties applies in the present instance.

¹² *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean (Ghana/Côte d’Ivoire)*, Provisional Measures, Order of 25 April 2015, at para. 58.

¹³ UNCLOS, Article 92(1).

- (b) Article 97(1) of UNCLOS, also applicable to the exclusive economic zone by virtue of Article 58(2) of UNCLOS, expressly provides that, in the event of an incident of navigation which gives rise to the penal responsibility of any person in the service of the ship, no penal proceedings may be instituted against such a person “except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national”.¹⁴ In the present dispute, Italy is both the flag State and the State of nationality.
- (c) As State officials exercising official functions on board the *Enrica Lexie* pursuant to lawful authority, the Marines are immune from proceedings in India. As set out in the Notification,¹⁵ various UNCLOS provisions require the Annex VII arbitral tribunal to consider and apply the rules of international law concerning the immunity of States and their officials or agents.
- (d) Italy exercised its jurisdictional rights over this case without hesitation or delay. By means of Notes Verbales sent on 16 and 17 February 2012, Italy informed the Indian authorities of its exercise of jurisdiction over the Marines prior to their arrest by India.¹⁶ Subsequently, Italy attempted to exercise and defend its exclusive jurisdiction promptly.¹⁷ In particular, Italy sent detailed requests for international legal assistance to India within weeks of the *Enrica Lexie* Incident, but these have never been addressed.¹⁸ Italy’s attempt to exercise jurisdiction has thus been frustrated not only by India’s decision to arrest and detain the Marines, and to commence proceedings against them, but also by India’s refusal to cooperate with the Italian investigating authorities. India’s conduct violates Italy’s rights in two ways: as an impermissible exercise of jurisdiction; and as an unlawful interference with Italy’s exercise of jurisdiction.
- (e) The rights that Italy is seeking to protect are a central component of the legal regime governing the seas and aimed at ensuring freedom of navigation and other internationally lawful uses of the sea.

¹⁴ UNCLOS, Article 97(1).

¹⁵ Notification (**Annex A**), at para. 29(g).

¹⁶ Note Verbale 67/438, 16 February 2012 (**Annex 10 of Notification**); Note Verbale 69/456, 17 February 2012 (**Annex 12 of Notification**).

¹⁷ 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 11 of Notification**); 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 13 of Notification**).

¹⁸ Note Verbale 131/737 of 19 March 2012 (**Annex G**).

36. At the hearing in the Indian Supreme Court on 13 July 2015, the Additional Solicitor General of India, representing the Government of India in the proceedings, accepted that an international dispute has arisen over the legality of the exercise of jurisdiction by India. The key facts that give rise to the dispute are accepted by both parties. There is no disagreement on the Enrica Lexie Incident taking place in international waters, at approximately 20.5 nautical miles from the Indian coast – a fact which the Indian Supreme Court accepted in its judgment of 18 January 2013.¹⁹ Nor can there be any disagreement as to the fact that the Indian authorities are exercising criminal jurisdiction; that the Marines are subject to bail restrictions severely limiting their liberty and movement with serious effects on personal health and well-being; and that a charge sheet has not yet been issued.

II. Reasons for the Request and consequences if provisional measures are not granted

37. Italy seeks provisional measures on two principal grounds:

- (a) the serious and irreversible prejudice that will be caused to its rights under UNCLOS if Indian jurisdiction continues to be exercised over the Enrica Lexie Incident; and
- (b) the serious and irreversible prejudice to Italy’s rights if its Marines continue to be subjected to Indian jurisdiction, in particular, to measures restricting their liberty and movement, notwithstanding the commencement of international arbitration and the irreparable consequences for personal health and well-being that such restrictions will or are likely to cause.

38. As regards the *first ground*, Italy is requesting provisional measures to the effect of ordering India to refrain from exercising any form of jurisdiction over the Enrica Lexie Incident and the Marines throughout the duration of the proceedings before the Annex VII arbitral tribunal.

39. The prescription of these measures is appropriate and necessary in order to preserve Italy’s rights *pendente lite*. As confirmed in statements made by the Indian Additional Solicitor General at the hearing on 13 July 2015, both parties characterise the present dispute as a dispute over the legality of the exercise of jurisdiction to be determined under the UNCLOS dispute settlement procedures which bind both Italy and India. It follows from this

¹⁹ *Republic of Italy & Ors v. Union of India & Ors*, Supreme Court of India Judgment of 18 January 2013, (**Annex 19 of Notification**), at para. 84.

agreed characterisation of the dispute that Italy stands to suffer irreversible prejudice if India exercises jurisdiction before the issue is determined. The proper form of interim relief capable of safeguarding Italy's rights in these circumstances is to suspend the exercise of Indian jurisdiction until the final determination of the dispute in the forum which both parties recognise as competent – i.e., the Annex VII arbitral tribunal.

40. India has failed to draw this necessary inference from the commencement of international proceedings and insists on exercising jurisdiction. This is evident, in particular, from the following positions adopted by India since the Notification was filed:

- (a) India has not lifted any of the measures restricting the liberty and movement of Sergeant Girono and has signalled its clear intention to keep those measures in place, notwithstanding the commencement of international proceedings;
- (b) India has not permitted Sergeant Latorre to remain in Italy for a period determined by reference to the pendency of international proceedings;
- (c) India has not agreed to defer the next substantive hearing before the Indian courts on the matter of the Enrica Lexie Incident for a period to be determined by reference to the pendency of the international proceedings; and
- (d) a hearing of the Special Designated Court on 1 July 2015, the court that is charged with conducting the criminal trial of the Marines, made no reference whatsoever to the commencement of international arbitration but simply adjourned its proceedings until 25 August 2015 pending a judgment of the Indian Supreme Court on the Marines' Writ Petition challenging India's jurisdiction.

41. As a consequence of the continuing exercise of jurisdiction by India, Italy's rights will suffer irreversible damage. In this regard, Italy notes that, in both the *Southern Bluefin Tuna* cases and in the "*Arctic Sunrise*" case, the Tribunal indicated provisional measures to ensure that "no action is taken which might prejudice the carrying out of any decision on the merits which the arbitral tribunal may render".²⁰ India's decision to persist in exercising jurisdiction, notwithstanding the commencement of international proceedings under UNCLOS, creates a clear risk of prejudice to the carrying out of future decisions of the Annex VII arbitral tribunal.

²⁰ *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 280, at p. 298, para. 90(1)(b). See also "*Arctic Sunrise*" (*Kingdom of the Netherlands v. Russian Federation*), *Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013*, p. 230, at p. 251, para. 98.

42. As regards the *second ground*, Italy is requesting provisional measures to the effect of ordering India to refrain from taking or enforcing any judicial or administrative measures against Sergeant Latorre and Sergeant Girone and, specifically, to lift all restrictions on the liberty, security and movement of the Marines in order to enable Sergeant Girone to travel to and to remain in Italy throughout the duration of the Annex VII proceedings and Sergeant Latorre to remain in Italy throughout the same period.

43. The close connection between the rights of individuals on board a ship and the rights of the State of nationality of the ship has been emphasised, *inter alia*, in the *M/V “SAIGA” (No. 2)* case and in the “*Arctic Sunrise*” case, and confirmed by Article 18 of the International Law Commission’s Draft Articles on Diplomatic Protection.²¹ In the *M/V “SAIGA” (No. 2)* case the Tribunal stated 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...²²

44. In the “*Arctic Sunrise*” case the Tribunal took note of the prejudicial harm to the rights of the Netherlands due to the continued detention of the crew of the *Arctic Sunrise* by the Russian Federation pending the constitution of the Annex VII tribunal and the conclusion of the dispute. The Netherlands had observed that the “continuing detention of the vessel and its crew has irreversible consequences”.²³ The Tribunal also noted the argument that, had the provisional measures requesting their release not been adopted, the crew members would have been deprived of their right to liberty and security as well as their right to leave the territory and maritime areas under the jurisdiction of the Russian Federation.²⁴

45. The connection between Italy and the Marines is considerably stronger than the bond between the flag States and the crews in the *M/V “SAIGA” (No. 2)* case or the “*Arctic Sunrise*” case. The Marines were on board the *Enrica Lexie* as State officials exercising State functions as part of measures aimed at preventing piracy and guaranteeing the safety of

²¹ Draft Articles on Diplomatic Protection, *Yearbook of the International Law Commission, 2006*, vol. II (Part Two), p. 24, Article 18.

²² *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.

²³ “*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.

²⁴ “*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.

navigation. Concerns about the rights of liberty and movement, which occupied a prominent position in the Tribunal's reasoning in the "*Arctic Sunrise*" case, carry even greater weight in the case of the Marines. Their rights of liberty and movement have been restricted, notwithstanding the absence of any formal charges, for nearly three-and-a-half years – a far longer period than in the "*Arctic Sunrise*" case. Throughout this time, Italy left no stone unturned in seeking to reach a negotiated solution with India, but the situation has now reached an impasse which coincides with an aggravation of the personal circumstances of both Marines, and a sense of growing and intense despair over their position.

46. This situation, and the risk of severe and irreversible prejudice to the Marines, and therefore to Italy's rights, are rendered more acute by the circumstances affecting health and well-being which are set out in these paragraphs but detailed fully in the Confidential Addendum. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]²⁵

47. As regards Sergeant Girone, he is, for all intents and purposes, being treated as a hostage, to be kept in India notwithstanding India's failure to issue criminal charges. This situation would be unjustifiable under any circumstances. Italy refers to the Confidential Addendum for further details concerning his humanitarian circumstances.

48. As the Tribunal held in the *M/V "SAIGA" (No. 2)* case, "considerations of humanity must apply in the law of the sea, as they do in other areas of international law."²⁶ This echoes a similar observation by the International Court of Justice in the *Corfu Channel* case in which the Court stated that "elementary considerations of humanity, even more exacting in peace than in war" are a "general and well-recognized" principle of international law.²⁷

49. The duration and circumstances of the custody and bail conditions imposed on the Marines already amount to a breach of their fundamental rights guaranteed, *inter alia*, under Articles 9 and 14 of the International Covenant on Civil and Political Rights, to which both Italy and India are parties. Despite nearly three-and-a-half years since the Marines were first arrested, they have not yet been informed of the charges against them – an inexcusable breach

²⁵ Clinical Report of Doctor Mendicini, Head of Neurology, Military Hospital in Taranto, 30 June 2015 (**Annex O (Confidential Annex)**), at p. 2; Clinical Report of Doctor Mendicini, Head of Neurology, Military Hospital in Taranto, 2 January 2015 (**Annex M (Confidential Annex)**); Clinical Report of Doctor Mendicini, Head of Neurology, Military Hospital in Taranto, 31 March 2015 (**Annex N (Confidential Annex)**).

²⁶ *M/V "SAIGA" (No.2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10, at p. 62, para. 155.

²⁷ *Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment, I.C.J. Reports 1949, p. 4, at p. 22.

of their fundamental rights and a situation so deplorable that it was criticised by the Chief Justice of the Indian Supreme Court at a hearing on 16 December 2014.²⁸

50. Italy notes that, if the requested provisional measures are not granted, the Marines will be compelled to continue to apply to the Indian Supreme Court on an *ad hoc* and ongoing basis in respect of every humanitarian circumstance and in respect of the deferment of the Indian criminal proceedings during the pendency of the Annex VII arbitral proceedings. Italy’s right to have the issues in dispute determined by the Annex VII arbitral tribunal will therefore not simply be irreversibly prejudiced but would also be fundamentally compromised.

51. In sum, the international dispute between Italy and India concerns the legality of the exercise of jurisdiction by India. India agrees with this characterisation, and also agrees that this dispute is not for the Indian courts to settle but for the Annex VII arbitral tribunal. Yet, India wants to press on regardless with its exercise of jurisdiction over the Enrica Lexie Incident in the coming months and throughout the duration of the international proceedings. India also insists on severely limiting the rights, liberty and movement of the Marines, the consequences of which are exacerbated by the serious and potentially irreversible medical and humanitarian circumstances faced by Sergeant Latorre and Sergeant Girone, as detailed in the Confidential Addendum accompanying the Request. Unless the Tribunal orders India to refrain from such exercises of jurisdiction and to lift the measures in relation to the Marines, Italy’s rights will suffer serious and irreversible prejudice.

III. Urgency

52. In relation to “urgency”, Italy repeats and relies on all the facts and matters set out in the preceding section which show that the rights in question are suffering irreversible prejudice or damage or at the very least under a real and imminent risk of suffering irreversible prejudice or damage. India’s conduct is ongoing and further action is likely to be taken before the Annex VII arbitral tribunal will be “in a position to ‘modify, revoke or affirm those provisional measures’”.²⁹

53. In particular, Italy emphasises that it commenced proceedings as soon as it became clear that no political settlement could be reached. The risk of prejudice to Italy’s rights has risen sharply over the last months. It has crystallised acutely in the last weeks, once it became clear that a resolution of the dispute could not be achieved and that the trajectory on which

²⁸ See <http://www.dnaindia.com/india/report-supreme-court-disallows-italian-marines-plea-2044405>.

²⁹ *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p.10, at p. 22, paras. 67-68.

India was set would lead to a criminal trial of the Marines. With one Marine continuing to be arbitrarily deprived of his rights to liberty and movement, and the other faced with an acute medical condition and a difficult rehabilitation while a return to India at the discretion of the Indian courts hangs over him, this situation has produced a sense of hopelessness and anguish in the two Marines.

54. Two Italian naval officers have been subjected to the custody of the Indian courts for three-and-a-half years without being charged with any offence. For that entire period Italy's rights to investigate the conduct of its Marines guarding an Italian vessel outside the territorial sea of any State and, as appropriate, either to take action against them or to return them to the service of Italy, and in either case to ensure their health, have been prejudiced. Italy has a legal duty of care to the Marines. The prejudice to Italy's rights has increased each day that the Marines have been subjected to the jurisdiction of the Indian courts. "[E]very day spent in detention is irreversible."³⁰ That time can never be recovered and there is no reparation that could be ordered in a subsequent arbitral award, or subsequent interim measures order of an arbitral tribunal whenever it is constituted, that could reverse that prejudice. The prejudice has been exacerbated by the medical issues addressed in the Confidential Addendum. Prejudice to health is also incapable of being adequately addressed by a later order or award. With diplomatic efforts having failed and the dispute having been referred to arbitration, this Request to the Tribunal is the first opportunity in which the urgency of India suspending its exercise of jurisdiction over Italy's Marines can be addressed. Italy is seising the Tribunal of this Request at the very first opportunity.

55. In summary, if the requested provisional measures are not granted forthwith then:

- (a) there will be further and continuing breaches causing serious, irreversible and deepening prejudice to Italy's rights at issue;
- (b) action is likely to be taken by India that would prejudice the carrying out of any decision on the merits which the Annex VII arbitral tribunal may render; and
- (c) irreparable harm to health and well-being will or is very likely to follow, with the consequence of serious and irreversible prejudice to Italy's rights by virtue of the nexus between Italy and the Marines.

³⁰ "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.

CHAPTER 5
JUDGE *AD HOC*

56. Pursuant to Article 17(2) of the Statute of the Tribunal, Italy chooses Professor Francesco Francioni to participate as a member of the Tribunal.

CHAPTER 6
SUBMISSIONS

57. For the above reasons, Italy respectfully requests that the Tribunal prescribe 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 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.

Respectfully submitted,

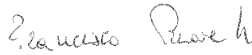
A handwritten signature in dark ink, appearing to read 'Francesco Azzarello', written in a cursive style.

H.E. Ambassador Francesco Azzarello
Agent of the Italian Republic

21 July 2015

CERTIFICATION

Pursuant to Articles 63(1), 64(3) and 89(4) of the Rules of the Tribunal, I hereby certify that the copies of the Notification instituting arbitral proceedings against the Republic of India and the documents annexed to the Request for provisional measures of 21 July 2015 are true copies and conform to the original documents, and that the translations into English made by the Italian Republic are accurate translations.



H.E. Ambassador Francesco Azzarello
Agent of the Italian Republic

21 July 2015

LIST OF ANNEXES

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

Annex A

Notification and Statement of Claim (with Annexes 1 to 31) of the Italian Republic, in the *Dispute concerning the Enrica Lexie Incident* with the Republic of India, 26 June 2015

Annex B

Letter from H.E. Paolo Gentiloni, Minister of Foreign Affairs and International Cooperation of the Italian Republic, to Mr. Philippe Gautier, Registrar of ITLOS, appointing Ambassador Francesco Azzarello as Agent for Italy in the proceedings before ITLOS, 21 July 2015.

Annex C

Supreme Court of India Order of 12 September 2014

Annex D

High Court of Kerala Order of 30 May 2012

Annex E

Application for Deferment of Article 32 Writ Petition, 4 July 2015

Annex F

Supreme Court of India Order of 13 July 2015

Annex G

Note Verbale 131/737 of 19 March 2012

Annex H

The Economic Times, “Italian marines case: Home ministry says it had objected to marines’ return”, 3 January 2015

Annex I (Confidential Annex)

Application for Directions on Behalf of Chief Master Sergeant Massimiliano Latorre, 4 July 2015

Annex J (Confidential Annex)

Admitted Case Summary, Department of Neurology (Unit 2), Sir Ganga Ram Hospital, 2 September 2014

Annex K (Confidential Annex)

Medical Case Summary of Dr. Rajashekar Reddi, Principal Consultant and Head of Unit Neurology, Max Institute of Neurosciences, Max Super Speciality Hospital, 9 September 2014

Annex L (Confidential Annex)

Report of Professor Riccardo Caruso, Department of Neurology and Psychiatry, Sapienza – Università di Roma, 2 September 2014

Annex M (Confidential Annex)

Clinical Report of Doctor Mendicini, Head of Neurology, Military Hospital in Taranto, 2 January 2015

Annex N (Confidential Annex)

Clinical Report of Doctor Mendicini, Head of Neurology, Military Hospital in Taranto, 31 March 2015

Annex O (Confidential Annex)

Clinical Report of Doctor Mendicini, Head of Neurology, Military Hospital in Taranto, 30 June 2015

Annex P (Confidential Annex)

Updated Report of Professor Gabriele Masi, Director of the Centre for Psychiatry and Psychopharmacology in Childhood, Fondazione Stella Maris, 9 July 2015

Annex Q (Confidential Annex)

Second Report of Doctor Stefano Vicari, Director of the Department of Child Neuropsychiatry, Bambino Gesù, 10 July 2015