PCA Case No. 2015-28

IN THE MATTER OF AN ARBITRATION

- before -

AN ARBITRAL TRIBUNAL CONSTITUTED UNDER ANNEX VII TO THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

THE ITALIAN REPUBLIC

- *v.* -

THE REPUBLIC OF INDIA

- concerning -

THE "ENRICA LEXIE" INCIDENT

AWARD

21 May 2020

ARBITRAL TRIBUNAL:

H.E. Judge Vladimir Golitsyn (President)
H.E. Judge Jin-Hyun Paik
H.E. Judge Patrick Robinson
Professor Francesco Francioni
Dr. Pemmaraju Sreenivasa Rao

REGISTRY:

Permanent Court of Arbitration

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GLOSSARY OF DEFINED TERMS / LIST OF ABBREVIATIONS

1976 Maritime Zones Act	The Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976, of the Republic of India
1981 Notification	Notification of the Ministry of Home Affairs of the Republic of India, No. S.O. 671(E), dated 27 August 1981
ILC Draft Articles Concerning the Law of the Sea	Draft Articles Concerning the Law of the Sea, with Commentaries, adopted by the International Law Commission at its eighth session, in 1956
ILC Draft Articles on State Responsibility	Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, adopted by the International Law Commission at its fifty-third session, in 2001
BMP4	Best Management Practices for Protection against Somalia Based Piracy, August 2011, produced and supported by, *inter alia*, International Chamber of Shipping, International Association of Independent Tanker Owners, the Society of International Gas Tanker and Terminal Operators, Operation Ocean Shield, and the United Kingdom Maritime Trade Operations
Boarding Party	A boarding party constituted of Commandant [redacted] and 36 police officers of the Republic of India, which boarded the "Enrica Lexie" on 16 February 2012
Captain Fredy	Mr. Fredy J., on 15 February 2012, captain and owner of the "St. Antony"
Captain Noviello	Mr. Carlo Noviello, on 15 February 2012, Master Supernumerary of the "Enrica Lexie"
Captain Vitelli	Mr. Umberto Vitelli, on 15 February 2012, Master of the "Enrica Lexie"
CET	Central European Time
CGAE	Coast Guard Air Enclave at Kochi, Republic of India
CINCNAV	Commander in Chief of the Naval Squadron, Operational Headquarters of the Italian Navy
COLREGS	Convention on the International Regulations for Preventing Collisions at Sea, done at London on 20 October 1972
Commandant [redacted]	Commandant [redacted], on 15 February 2012, Assistant Commandant and Boarding Officer of the Indian Coast Guard Ship "Lakshmibai"
Convention *or* **UNCLOS**	United Nations Convention on the Law of the Sea, done at Montego Bay on 10 December 1982
CSO	Company Security Officer
DIG	Deputy Inspector General, Republic of India
DIG [redacted]	DIG [redacted], on 15 February 2012, Commandant and Staff Observer at Coast Guard Air Enclave at Kochi
ILC Draft Articles on Immunity of State Officials	Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction, provisionally adopted by the International Law Commission at its sixty-sixth session, in 2014, and at its sixty-eighth session, in 2016
Hearing	Hearing on Jurisdiction and Merits before the Arbitral Tribunal, held from 8 to 20 July 2019 at the headquarters of the PCA at the Peace Palace in The Hague, the Netherlands
ICGS	Indian Coast Guard Ship

ICJ	International Court of Justice
ILC	International Law Commission
IMO	International Maritime Organisation
India	Republic of India
India's Counter-Memorial	Counter-Memorial, dated 14 April 2017
India's Rejoinder	Rejoinder on the Merits – Reply on Jurisdiction – Reply to Italy's Counter on India's Counter-Claims, dated 15 December 2017
India's Written Observations on Italy's Request for the Prescription of Provisional Measures	Written Observations of the Republic of India on the Request of the Italian Republic for the Prescription of Provisional Measures under Article 290, paragraph 1, of the United Nations Convention on the Law of the Sea, dated 26 February 2016
INS	Indian Naval Ship
IST	Indian Standard Time
Italian Law on VPDs	Law Decree No. 107 of 12 July 2011, of the Italian Republic: Extension (of international missions of the Armed Forces and Police available for implementing Resolutions 1970 (2011) and 1973 (2011) adopted by the Security Council of the United Nations and intervention by way of cooperation in the development and support of peace and stabilisation processes). Urgent anti-piracy measures. (11GO148)
Italy	Italian Republic
Italy's Memorial	Memorial, dated 30 September 2016
Italy's Rejoinder	Rejoinder on Jurisdiction and on India's Counter-Claims, dated 9 March 2018
Italy's Reply	Reply on the Merits – Counter-Memorial on Jurisdiction – Counter-Memorial on India's Counter-Claims, dated 11 August 2017
Italy's Request for the Prescription of Provisional Measures	Request by Italy to the Arbitral Tribunal for the Prescription of Provisional Measures under Article 290, Paragraph 1, of the United Nations Convention on the Law of the Sea, dated 11 December 2015
ITLOS	International Tribunal for the Law of the Sea
ITLOS Request	Request by Italy to the International Tribunal for the Law of the Sea for the prescription of provisional measures under Article 290, paragraph 5, of the United Nations Convention on the Law of the Sea, dated 21 July 2015
Log Book	Log Book maintained by Captain Vitelli
Marines	Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone
MRCC	Maritime Rescue Coordination Centre
MSCHOA	Maritime Security Centre – Horn of Africa
NIA	National Investigation Agency of the Republic of India
NIA Report	Investigation Report of the National Investigation Agency in RC No 04/2013/NIA/DLI, dated 4 April 2013
Notification and Statement of Claim	Notification under Article 287 and Annex VII, Article 1 of UNCLOS and Statement of Claim and Grounds on Which it is Based, dated 26 June 2015
Parties	Italy and India
PCA *or* **Registry**	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice

Piroli Report	Summary Investigation Report by Division Admiral Alessandro Piroli entitled "Attempted Pirate Attack against Merchant Vessel Enrica Lexie – 15 February 2012. Death of Indian Citizens", dated 11 May 2012
Provisional Measures Order	Order of the Arbitral Tribunal on the Request for the Prescription of Provisional Measures, dated 29 April 2016
ReCAAP	Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia
Resolution 2077	United Nations Security Council Resolution 2077 (2012), adopted by the Security Council at its 6867th meeting, on 21 November 2012, UN Doc. S/RES/2077
Rules of Procedure	Rules of Procedure for the Arbitration adopted by the Arbitral Tribunal, dated 19 January 2016 (as amended)
SMT	Ship Mean Time
Special Operations Group of the Carabinieri	Special Operations Group, Anti-Crime Unit, of the Carabinieri of Rome
SSAS	Ship Security Alarm System
SUA	Suppression of Unlawful Acts Against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002, of the Republic of India
Supreme Court	Supreme Court of India
Template Agreement	Template Agreement between the Ministry of Defence of Italy and the Ship Owner
Tribunal Witnesses	Persons called to give evidence at the Hearing as witnesses of the Arbitral Tribunal
UKMTO	United Kingdom Marine Trade Operations
UTC	Coordinated Universal Time
VCLT	Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969
VDR	Voyage Data Recorder
VPD	Vessel Protection Detachment
VPD Manual	Manual for Vessel Protection Detachments on Board Italian Merchant Vessels, 2011

AGENTS, REPRESENTATIVES, AND COUNSEL NOMINATED BY THE PARTIES TO RECEIVE COMMUNICATIONS

AGENT OF ITALY

H.E. Mr. Francesco Azzarello
Ambassador to the Federative Republic of Brazil (as of 7 January 2020)
Minister Plenipotentiary (until 6 January 2020)
Ministry of Foreign Affairs and International Cooperation, Italy

AGENT OF INDIA

Mr. Sandeep Arya
(as of 23 April 2020)
Joint Secretary (Europe West)
Ministry of External Affairs, India

Mr. G. Balasubramanian
(from 7 June 2019 to 22 April 2020)
Joint Secretary (Europe West)
Ministry of External Affairs, India

Dr. Vishnu Dutt Sharma
(from 7 August 2017 to 6 June 2019)
Additional Secretary (Legal and Treaties) (as of 19 December 2018)
Joint Secretary (Legal and Treaties) (until 18 December 2018)
Ministry of External Affairs, India

Dr. Neeru Chadha
(until 6 August 2017)
Former Additional Secretary and Legal Advisor
Ministry of External Affairs, India

CO-AGENTS OF INDIA

H.E. Mr. Venu Rajamony
(as of 7 August 2017)
Ambassador of India to the Netherlands

Ms. Uma Sekhar
(as of 21 June 2019)
Joint Secretary, Legal and Treaties Division
Ministry of External Affairs, India

H.E. Mr. J.S. Mukul
(until 6 August 2017)
Ambassador of India to the Netherlands

DEPUTY AGENT OF INDIA

Dr. Luther M. Rangreji
(as of 7 August 2017)
Director (Legal and Treaties)

Ministry of External Affairs, India

Dr. Vishnu Dutt Sharma
(until 6 August 2017)
Additional Secretary (Legal and Treaties) (as of 19 December 2018)
Joint Secretary (Legal and Treaties) (until 18 December 2018)
Ministry of External Affairs, India

COUNSEL OF ITALY

Sir Daniel Bethlehem KCMG QC
Member of the Bar of England and Wales;
20 Essex Street Chambers

Dr. Ben Juratowitch QC
Solicitor Advocate, England and Wales;
Solicitor of the Supreme Court of Queensland;
Partner, Freshfields Bruckhaus Deringer

COUNSEL OF INDIA

Professor Alain Pellet
Emeritus Professor, University Paris Nanterre;
Former Chairman of the International Law Commission; Member of the Institut de Droit International

Mr. Rodman Bundy
Member of the New York Bar; former avocat à la Cour d'appel de Paris; Partner, Eversheds Harry Elias LLP, Singapore

I. HISTORY OF THE PROCEEDINGS

A. INSTITUTION OF THE PROCEEDINGS

1. The present Arbitration was instituted on 26 June 2015 when the Italian Republic (hereinafter "Italy") served on the Republic of India (hereinafter "India") a "Notification under Article 287 and Annex VII, Article 1 of UNCLOS and Statement of Claim and Grounds on Which it is Based" (hereinafter the "Notification and Statement of Claim") in respect of "the dispute concerning the Enrica Lexie Incident".

2. Italy and India (hereinafter the "Parties") are States Parties to the United Nations Convention on the Law of the Sea (hereinafter the "Convention" *or* "UNCLOS").[1] While, subsequent to its ratification of the Convention, on 26 February 1997, Italy made a declaration pursuant to Article 287 of the Convention accepting the jurisdiction of the International Tribunal for the Law of the Sea (hereinafter "ITLOS") and the International Court of Justice (hereinafter the "ICJ"), India has not made any such declaration. Therefore, as Italy and India have not accepted the same procedure for the settlement of disputes concerning the interpretation or application of the Convention, pursuant to Article 287, paragraphs 3 and 5, of the Convention, any dispute that may arise between the Parties in this regard may be submitted only to arbitration instituted in accordance with Annex VII to the Convention, unless the Parties agree otherwise. The Parties have not agreed on any other procedure.

3. According to Italy, the Parties' dispute concerns an incident that occurred on 15 February 2012 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, who were on official duty on board the "Enrica Lexie" at the time of the incident (hereinafter the "Marines").

4. According to India, the "incident" in question concerns the killing of two Indian fishermen on board an Indian vessel named the "St. Antony", allegedly by rifle fire from the two aforementioned Marines stationed on the "Enrica Lexie". India contends in this regard that, while the present case has been labelled the "'Enrica Lexie' Incident", it should more accurately be referred to as the "'St. Antony' Incident".

[1] Italy ratified the Convention on 13 January 1995. India ratified the Convention on 29 June 1995.

5. As the case, when it was instituted by Italy, was registered by the Registry of the Permanent Court of Arbitration (hereinafter the "PCA" *or* the "Registry") as the arbitration concerning "the 'Enrica Lexie' Incident" in the absence of any objections from the Parties at the first procedural meeting, and given that during the proceedings and in the Arbitral Tribunal's Order on Provisional Measures the case was continuously referred to as the arbitration concerning the "Enrica Lexie" Incident, the Arbitral Tribunal, without prejudice to the nature of the incident, will do likewise in the present Award.

6. In its Notification and Statement of Claim, Italy requested the Arbitral Tribunal, once constituted, to adjudge and declare that:

> (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.[2]

B. PROCEEDINGS AT ITLOS ON PROVISIONAL MEASURES

7. On 21 July 2015, pending the constitution of this Arbitral Tribunal, Italy filed with ITLOS a "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" (hereinafter "ITLOS Request").

8. In its final submissions before ITLOS, Italy requested that ITLOS 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 necessary measures to ensure that restrictions on the liberty, security and movement of the Marines be immediately lifted to enable Sergeant

[2] Notification and Statement of Claim, para. 33.

> 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.[3]

9. On 6 August 2015, India filed "Written Observations of the Republic of India" with ITLOS. In its final submission before ITLOS, India requested ITLOS to "reject the submissions made by the Republic of Italy in its Request for the prescription of provisional measures and [to] refuse prescription of any provisional measure[s] in the present case".[4]

10. On 10 and 11 August 2015, a hearing on provisional measures was held at the headquarters of ITLOS in Hamburg, Germany.

11. On 24 August 2015, ITLOS rendered an Order in which it prescribed 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.[5]

12. In addition, ITLOS decided:

> Italy and India shall each submit to the Tribunal initial report referred to in paragraph 138 not later than 24 September 2015, and *authorizes* the President, after that date, to request such information from the Parties as he may consider appropriate.[6]

13. Both Parties submitted their reports within the time limit stipulated by ITLOS. Italy informed ITLOS that the Italian Public Prosecutor had decided to stay the investigation into the "Enrica Lexie" incident and refrain from commencing any other connected investigation during the pendency of the Annex VII Arbitral Proceedings.[7] India informed ITLOS that the Supreme Court of India (hereinafter the "Supreme Court") had ordered that proceedings with regard to the incident that were pending in Indian courts be "stayed/deferred […] till further orders".[8]

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3 *The "Enrica Lexie" Incident* (Italy v. India), ITLOS, Provisional Measures, Order of 24 August 2015, para. 29 (**Annex IT-35**).

4 *The "Enrica Lexie" Incident* (Italy v. India), ITLOS, Provisional Measures, Order of 24 August 2015, para. 30 (**Annex IT-35**).

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

6 *The "Enrica Lexie" Incident* (Italy v. India), ITLOS, Provisional Measures, Order of 24 August 2015, para. 141 (**Annex IT-35**) [emphasis in original].

7 Report of the Italian Republic pursuant to paragraph 141(2) of the ITLOS Order and Article 95(1) of the Rules of the Tribunal, 23 September 2015 (**Annex IT-37**).

8 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, p. 2 (**Annex IT-36**).

C. CONSTITUTION OF THE ARBITRAL TRIBUNAL AND NOTIFICATION OF AGENTS AND COUNSEL

14. In its Notification and Statement of Claim, Italy appointed Professor Francesco Francioni as arbitrator pursuant to Annex VII, Article 3, subparagraph (b), to the Convention.[9]

15. By *note verbale* dated 24 July 2015, India appointed H.E. Judge Patibandla Chandrasekhara Rao as arbitrator pursuant to Annex VII, Article 3, subparagraph (c), to the Convention.

16. Pursuant to Italy's request dated 8 September 2015, having consulted the Parties on 30 September 2015 during a meeting in Hamburg, the President of ITLOS appointed H.E. Judge Jin-Hyun Paik and H.E. Judge Patrick Robinson as arbitrators, and H.E. Judge Vladmir Golitsyn as arbitrator and President of the Arbitral Tribunal pursuant to Annex VII, Article 3, subparagraphs (d) and (e), to the Convention.

17. By letter dated 9 October 2015, the President of the Arbitral Tribunal informed the Secretary-General of the PCA that the Parties had agreed that the PCA should act as Registry in the present Arbitration. By letter of 12 October 2015, the Secretary-General of the PCA confirmed that the PCA was prepared to act in this capacity.

18. Italy appointed the following Agent and nominated the following counsel to receive communications for the present proceedings:

Agent
H.E. Minister Plenipotentiary Francesco Azzarello
Ministry of Foreign Affairs and International Cooperation, Italy

Counsel
Sir Daniel Bethlehem KCMG QC, Member of the Bar of England and Wales; 20 Essex Street Chambers
Dr. Ben Juratowitch QC, Solicitor Advocate, England and Wales; Solicitor of the Supreme Court of Queensland; Partner, Freshfields Bruckhaus Deringer

19. India appointed the following Agent and nominated the following counsel to receive communications for the present proceedings:

Agent
Dr. Neeru Chadha
Former Additional Secretary and Legal Adviser
Ministry of External Affairs, India

Co-Agent
H.E. Mr. J.S. Mukul

[9] Italy's Notification and Statement of Claim, para. 3.

Ambassador of India to the Netherlands

Deputy Agent
Dr. Vishnu Dutt Sharma
Director and Head (Legal and Treaties)
Ministry of External Affairs, India

Counsel
Professor Alain Pellet, Emeritus Professor, University Paris Nanterre; Former Chairman of International Law Commission; Member of the Institut de Droit International
Mr. Rodman Bundy, Member of the New York Bar; former avocat à la Cour d'appel de Paris; Partner, Eversheds Harry Elias LLP, Singapore

20. On 7 August 2017, India informed the Arbitral Tribunal of the following appointments in place of Dr. Chadha, Mr. Mukul, and Dr. Sharma as Agent, Co-Agent, and Deputy Agent, respectively:

Agent
Dr. Vishnu Dutt Sharma
Additional Secretary (Legal and Treaties) (as of 19 December 2018)
Joint Secretary (Legal and Treaties) (until 18 December 2018)
Ministry of External Affairs, India

Co-Agent
H.E. Mr. Venu Rajamony
Ambassador of India to the Netherlands

Deputy Agent
Dr. Luther M. Rangreji
Director (Legal and Treaties)
Ministry of External Affairs, India

21. By letter dated 12 October 2018, the Arbitral Tribunal informed the Parties that H.E. Judge Patibandla Chandrasekhara Rao had passed away on 11 October 2018. The Arbitral Tribunal invited India to appoint a substitute arbitrator pursuant to Article 6 of the Rules of Procedure for the Arbitration adopted by the Arbitral Tribunal, dated 19 January 2016 (as amended) (hereinafter the "Rules of Procedure").

22. By letter dated 26 November 2018, India conveyed to the Arbitral Tribunal, Italy, and the Registry the appointment of Dr. Pemmaraju Sreenivasa Rao as arbitrator pursuant to Annex VII, Article 3, subparagraph (f), to the Convention, and Article 6 of the Rules of Procedure.

23. By letter dated 7 June 2019, India informed the Arbitral Tribunal that it appointed Mr. G. Balasubramanian, Joint Secretary (Europe West), Ministry of External Affairs, as Agent in place of Dr. Vishnu Dutt Sharma.

24. By letter dated 23 April 2020, India informed the Arbitral Tribunal that it appointed Mr. Sandeep Arya, Joint Secretary (Europe West), Ministry of External Affairs, as Agent in place of Mr. G. Balasubramanian.

D. ADOPTION OF THE RULES OF PROCEDURE

25. On 18 January 2016, a first procedural meeting with the Parties was held at the headquarters of the PCA at the Peace Palace in The Hague, the Netherlands. At that meeting, the procedure to be followed in the Arbitration, including the procedural timetable, were considered.

26. On 19 January 2016, taking account of the discussion at the first procedural meeting, the Arbitral Tribunal, pursuant to Annex VII, Article 5, to the Convention, adopted its Rules of Procedure.[10] On the same date, the Arbitral Tribunal adopted Procedural Order No. 1 concerning the procedural timetable for provisional measures.[11]

E. PROCEEDINGS BEFORE THE ARBITRAL TRIBUNAL ON PROVISIONAL MEASURES

27. On 11 December 2015, Italy submitted to the Arbitral Tribunal a "Request for the Prescription of Provisional Measures under Article 290, Paragraph 1, of the United Nations Convention on the Law of the Sea" (hereinafter "Italy's Request for the Prescription of Provisional Measures").

28. On 26 February 2016, India filed the "Written Observations of the Republic of India on the Request of the Italian Republic for the Prescription of Provisional Measures under Article 290, paragraph 1, of the United Nations Convention on the Law of the Sea" (hereinafter "India's Written Observations on Italy's Request for the Prescription of Provisional Measures").

29. On 30 and 31 March 2016, a hearing on provisional measures was held at the headquarters of the PCA at the Peace Palace in The Hague, the Netherlands.

30. On 29 April 2016, the Arbitral Tribunal, having considered the Parties' oral and written pleadings and the Parties' responses to questions posed by the Arbitral Tribunal during the hearing, delivered its Order on the Request for the Prescription of Provisional Measures (hereinafter the "Provisional Measures Order"), unanimously prescribing the following provisional measures:

> (a) Italy and India shall cooperate, including in proceedings before the Supreme Court of India, to achieve a relaxation of the bail conditions of Sergeant Girone so as to give

[10] Rules of Procedure for the Arbitration adopted by the Arbitral Tribunal, dated 19 January 2016 (as amended).

[11] Procedural Order No. 1 (Procedural Timetable for Provisional Measures), adopted by the Arbitral Tribunal on 19 January 2016.

effect to the concept of considerations of humanity, so that Sergeant Girone, while remaining under the authority of the Supreme Court of India, may return to Italy during the present Annex VII arbitration.

(b) The Arbitral Tribunal confirms Italy's obligation to return Sergeant Girone to India in case the Arbitral Tribunal finds that India has jurisdiction over him in respect of the "Enrica Lexie" incident.

(c) The Arbitral Tribunal decides that Italy and India each shall report to the Arbitral Tribunal on compliance with these provisional measures, and authorizes the President to seek information from the Parties if no such report is submitted within three months from the date of this Order and thereafter as he may consider appropriate.[12]

31. On 26 May 2016, on the application of Italy pursuant to the Provisional Measures Order, the Supreme Court of India ordered that "Sergeant Girone while remaining under the authority of the Supreme Court of India is permitted to return to Italy during the Annex VII arbitration" subject to conditions prescribed by the Supreme Court.[13]

32. On 27 July 2016, Italy filed the "Report of the Government of the Italian Republic on Compliance with the Provisional Measures Order of 29 April 2016", indicating:

> Following completion of the necessary requirements and formalities as prescribed by the Supreme Court's Order, Sergeant Girone departed India on 27 May 2016, surrendering his passport on doing so, arriving in Italy on 28 May 2016. In compliance with the prescribed bail conditions, Sergeant Girone reported to the Comando Provinciale Carabinieri in Bari on Wednesday, 1 June 2016.[14]

33. On the same date, India filed the "Report of the Republic of India on Compliance with the Provisional Measures Order of the Arbitral Tribunal dated 29 April 2016 concerning the 'Enrica Lexie' Incident (The Italian Republic v. Republic of India – PCA Case No. 2015-28)", indicating that, "[p]ursuant to the Order of the Supreme Court, Sergeant Girone after fulfilling the necessary formalities left India on 27th May 2016 and reached Italy on 28th May 2016".[15]

F. PROCEEDINGS BEFORE THE ARBITRAL TRIBUNAL ON JURISDICTION AND MERITS

1. Revision of the Rules of Procedure

34. On 7 September 2016, Italy requested an extension of the time limit for the submission of Italy's Memorial as originally set out in Article 9 of the Rules of Procedure, from 16 September to 30 September 2016. On 8 September 2016, India confirmed that it had no objection to Italy's

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12 Order, Request for the Prescription of Provisional Measures of 29 April 2016, para. 132.

13 *Massimilano Latorre and Ors v. Union of India and Ors* (For relaxation of bail conditions of Sergeant Major Salvatore Girone and office report), Order of 26 May 2016.

14 Report of the Government of the Italian Republic on Compliance with the Provisional Measures Order of 29 April 2016, 27 July 2016, para. 7.

15 Report of the Government of the Italian Republic on Compliance with the Provisional Measures Order of 29 April 2016, 27 July 2016, para. 7.

request. On 9 September 2016, the Arbitral Tribunal adopted Procedural Order No. 2, granting Italy's request and extending the subsequent time limits accordingly.[16]

35. By letter dated 19 May 2017, Italy submitted to the Arbitral Tribunal a proposal as to the procedural calendar for further written pleadings in respect of India's counter-claims. By letter dated 23 May 2017, India confirmed its agreement with Italy's proposal. On 1 June 2017, the Arbitral Tribunal adopted Procedural Order No. 3, ordering that the calendar for the submission of written pleadings set out in Article 9 of the Rules of Procedure, as amended by Procedural Order No. 2, be maintained with further amendments to account for India's counter-claims.[17]

36. By letter dated 6 February 2018, Italy requested the Arbitral Tribunal to extend the time limit for the filing of its Rejoinder on Jurisdiction and India's Counter-Claim from 16 February 2018 to 9 March 2018 due to the disclosure by India on 5 February 2018 "of 66 witness statements and 133 additional documents that were the subject of a disclosure request by Italy". By letter dated 8 February 2018, India confirmed that it had no objection to Italy's request. On 12 February 2018, the Arbitral Tribunal adopted Procedural Order No. 4, granting the extension requested by Italy.[18]

37. By letter dated 30 April 2019, Italy proposed a modification of Article 23, paragraphs 2 and 3, of the Rules of Procedure on the basis of discussions between the Parties. On the same date, India confirmed its concurrence with Italy's proposed modification. On 16 May 2019, the Tribunal issued Procedural Order No. 7, amending the Rules of Procedure in accordance with the modification proposed by the Parties.

2. Written Pleadings

38. On 30 September 2016, Italy submitted its Memorial (hereinafter "Italy's Memorial"), with an expert report prepared by Justice Deepak Verma on Indian law annexed to the Memorial.

39. On 14 April 2017, India submitted its Counter-Memorial (hereinafter "India's Counter-Memorial"). In its Counter-Memorial, in addition to responding to Italy's Memorial, India also presented counter-claims.

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16 Procedural Order No. 2 (Extension of the Due Dates for Written Submissions), adopted by the Arbitral Tribunal on 9 September 2016.

17 Procedural Order No. 3 (Procedural Calendar for Pleadings in respect of India's Counter-Claim), adopted by the Arbitral Tribunal on 1 June 2017.

18 Procedural Order No. 4 (Amendments to the Procedural Calendar), adopted by the Arbitral Tribunal on 12 February 2018.

40. On 11 August 2017, Italy submitted its "Reply on the Merits – Counter-Memorial on Jurisdiction – Counter-Memorial on India's Counter-Claims" (hereinafter "Italy's Reply"), with a second expert report prepared by Justice Deepak Verma on Indian law annexed to the Reply.

41. On 15 December 2017, India submitted its "Rejoinder on the Merits – Reply on Jurisdiction – Reply to Italy's Counter on India's Counter-Claims" (hereinafter "India's Rejoinder").

42. On 9 March 2018, Italy submitted its "Rejoinder on Jurisdiction and on India's Counter-Claims" (hereinafter "Italy's Rejoinder").

3. Preparation of Hearing on Jurisdiction and Merits

43. By letter dated 1 December 2018, the Arbitral Tribunal requested the Parties to consult with each other and to submit a joint proposal regarding the dates of the hearing. On 4 January 2018, the Parties were invited to submit a joint proposal by 19 January 2018.

44. By letter dated 19 January 2018, Italy submitted to the Arbitral Tribunal a proposal in respect of dates and a schedule for the hearing, which India on the same date confirmed as representing the Parties' "joint proposal".

45. By letter of 1 February 2018, the Arbitral Tribunal confirmed the hearing dates and schedule set out in Italy's letter dated 19 January 2018.

46. By letter of 8 June 2018, the Arbitral Tribunal informed the Parties of the names of persons whose testimony the Arbitral Tribunal "presently regards as particularly significant", and invited the Parties to inform it by 22 June 2018 "whether they intend to request leave from the Tribunal to present or call these persons as witnesses at the hearing pursuant to Article 13, paragraphs 3 and 4, of the Rules of Procedure".

47. By letter of 22 June 2018, Italy submitted its comments, concluding that "it could not properly seek leave from the Tribunal to procure the oral testimony of some or all of those whose Statements have been exhibited as part of the written record". Italy indicated that this was because first, the statements were provided "for a materially different purpose, in materially different circumstances, with the Statements in question being subject to and governed by principles of domestic criminal law"; second, adducing such oral testimony would present considerable practical challenges, as "[n]either Party has presented any of the putative 'witnesses', in the sense of taking responsibility for them and for their evidence"; and, third, there was "an insurmountable obstacle" to the calling as witnesses in the present proceedings of persons whose statements were

produced for purposes of criminal investigation in Italy or India, which would raise significant issues going to the due process rights of the defence of the Marines.

48. By letter of the same date, India submitted its comments, stating that it intended to request "the Tribunal's leave for presenting witnesses", and requesting that "the witnesses identified in the Letter from the Italian side be called and made available for testimony/examination, with further request of allowing, if the need be, to call additional witnesses from the Italian side".

49. By letter dated 6 July 2018, India submitted additional comments in response to Italy's comments of 22 June 2018, stating that it did "not consider that any of [Italy's] concerns are well-founded". India argued that "the Arbitral Tribunal is fully entitled to request the oral testimony of the individuals who have been identified in the Secretariat's letter of 8 June", and disagreed with Italy's proposal that "the Arbitral Tribunal identify the precise issues on which it would like oral testimony and request the Parties to produce new, sworn and supported witness statements". India also took the view that there was no risk that the calling of witnesses would taint criminal proceedings against the Marines.

50. By letter dated 18 July 2018, Italy responded to India's comments of 6 July 2018, arguing, first, that "[s]tatements taken by or made to the Indian Police and other Indian criminal investigation authorities as part of a criminal investigation have a special status under Indian criminal law", which testimony in the present arbitration would not enjoy, and, second, that "the Indian provenance of these Statements holds the remarkable prospect, if witness testimony is adduced, of India endeavouring, through cross-examination, to impeach the evidence of witnesses whose Statements India has itself recorded as part of its own criminal investigation processes".

51. By letter dated 26 July 2018, India reacted to Italy's comments of 18 July 2018, pointing out that "under Article 12 of the Rules of Procedure, each Party has the burden of proving the facts it relies on, and that the Tribunal is empowered to determine the admissibility, relevance, materiality and weight of the evidence adduced". It also asserted that "[t]his obviously extends to assessing the probative value of the witness statements that each Party has submitted, an exercise that would undoubtedly benefit by hearing the testimony of certain of these individuals at the hearing". It added that "[m]oreover, Article 23(2) of the Rules of Procedure enables the Tribunal, after consultation with the Parties, to make such arrangements as may be necessary for the protection of information and the maintenance of confidentiality for parts of the oral hearings".

52. On 30 July 2018, the Arbitral Tribunal, taking into account the Parties' views, and having regard to Annex VII, Article 6, to UNCLOS, adopted Procedural Order No. 5. The Tribunal observed that it was empowered to call witnesses and hear their evidence at the hearing, should it deem so

appropriate, and noted that the Parties had "acknowledged the Arbitral Tribunal's authority to that effect". The Arbitral Tribunal stated that, on the basis of statements adduced by the Parties with their written pleadings, it had determined that the following persons would be called as witnesses of the Arbitral Tribunal (hereinafter "Tribunal Witnesses") to give evidence at the hearing: (i) Mr. Umberto Vitelli, on 15 February 2012, Master of the "Enrica Lexie" (hereinafter "Captain Vitelli"); (ii) Mr. Carlo Noviello, on 15 February 2012, Master Supernumerary of the "Enrica Lexie" (hereinafter "Captain Noviello"); (iii) Mr. Fredy J., on 15 February 2012, captain and owner of the "St. Antony" (hereinafter "Captain Fredy"); (iv) Deputy Inspector General (hereinafter "DIG") [redacted], on 15 February 2012, Commandant and Staff Observer at Coast Guard Air Enclave at Kochi (hereinafter "DIG [redacted]"); and (v) Commandant [redacted], on 15 February 2012, Assistant Commandant and Boarding Officer of the Indian Coast Guard Ship (hereinafter "ICGS") "Lakshmibai" (hereinafter "Commandant [redacted]"). In the Arbitral Tribunal's view, the oral testimony of these persons could "assist it in further clarifying the events that have given rise to the present arbitration conducted pursuant to Annex VII to UNCLOS".

53. The Arbitral Tribunal clarified that its decision to call Tribunal Witnesses was "without prejudice to the Parties' rights pursuant to Article 13, paragraphs 3 and 4, of the Rules of Procedure to call witnesses of their own". In addition, noting Italy's concern that the statements in question "were not 'provided' specifically to the Arbitral Tribunal", it concluded that this did not exclude that they might "form the basis of the examination of witnesses called by the Arbitral Tribunal". The Tribunal stated that it would welcome receiving from the Tribunal Witnesses, "a short supplemental statement setting out their recollection of the events of 15 February 2012 for purposes of the present proceedings".

54. In the Order, the Arbitral Tribunal also gave directions as to the examination of Tribunal Witnesses at the hearing, and amended the hearing schedule to accommodate the examination of Tribunal Witnesses. Finally, the Arbitral Tribunal invited the Parties to consult with each other in respect of the implementation of the Procedural Order, in particular, in respect of contacting and transmitting the Tribunal Witnesses; examination of the Tribunal Witnesses; and the confidentiality arrangements that may be necessary at the hearing in respect of witness testimony.

55. By letter dated 31 August 2018, the Parties reported to the Tribunal on the results of their consultations pursuant to Procedural Order No. 5 in respect of the implementation of the Order. In the letter, the Parties presented their joint views as to the detailed procedure for calling and examining Tribunal Witnesses at the hearing. The Parties also informed the Tribunal that they disagreed as to whether witness testimony should take place in confidential session, and whether

the Parties should be precluded from using the witness testimony for any purpose in connection with post-Award criminal proceedings.

56. On 14 September 2018, the Arbitral Tribunal, taking into account the Parties' views, adopted Procedural Order No. 6 addressing the modalities of making contact with Tribunal Witnesses before the hearing, examination of the Witnesses at the hearing, and the confidentiality arrangements to be adopted. The Arbitral Tribunal confirmed that, in accordance with the Parties' agreement, Italy would make initial contact with Captain Vitelli and Captain Noviello, and India would make initial contact with DIG [redacted], Commandant [redacted], and Captain Fredy, "to transmit to these individuals the Tribunal's request to testify at the hearing as Tribunal witnesses". The Arbitral Tribunal directed the Parties that, following that initial correspondence, any contact with the Tribunal Witnesses in respect of their attendance of the hearing should occur through the Registry. The Arbitral Tribunal also directed that the Parties should not discuss with the Tribunal Witnesses the positions espoused by Italy or India in the present arbitration in respect of questions of fact or law. The Arbitral Tribunal finally determined the sequence of examination of the Tribunal Witnesses.

57. With respect to confidentiality arrangements, the Arbitral Tribunal directed that "the portion of the hearing during which witnesses are examined shall not be open to the public". Regarding the confidentiality of the transcripts of portions of the hearing dedicated to witness examination, the Arbitral Tribunal resolved to make a determination in this regard following the completion of the hearing.

58. By letter dated 27 September 2018, the Arbitral Tribunal informed the Parties that the hearing, which was scheduled to take place in autumn 2018, had been postponed. By letter dated 26 October 2018, the Arbitral Tribunal requested the Parties to keep in reserve the period from 8 July 2019 to 20 July 2019 as tentative dates for the hearing. On 30 November 2018, the Arbitral Tribunal confirmed these dates.

59. As noted in paragraph 37 above, in light of subsequent communications from the Parties, the Arbitral Tribunal, by Procedural Order No. 7 dated 16 May 2019, amended Article 23, paragraphs 2 and 3, of the Rules of Procedural concerning the transparency regime for the hearing. On the same date, the Tribunal issued Procedural Order No. 8, confirming that the hearing would take place from 8 July 2019 to 20 July 2019.

4. Hearing on Jurisdiction and Merits

60. The Hearing on Jurisdiction and Merits took place from 8 to 20 July 2019 (hereinafter the "Hearing") at the headquarters of the PCA at the Peace Palace in The Hague, the Netherlands. In accordance with Procedural Order No. 7, the Hearing was not generally open to the public. The opening statements presented by the agents for the Parties, however, were webcast live on the Internet and published on the PCA case repository after the Hearing.

61. The following were present at the Hearing:

Arbitral Tribunal

H.E. Judge Vladimir Golitsyn (President)

H.E. Judge Jin-Hyun Paik

H.E. Judge Patrick L. Robinson

Professor Francesco Francioni

Dr. Pemmaraju Sreenivasa Rao

Italy

H.E. Minister Plenipotentiary Francesco Azzarello
Director, National Authority for Armament Licensing and Controls-UAMA
Ministry of Foreign Affairs and International Cooperation

as Agent;

Lieutenant Commander Alessandro Crocetta
Ministry of Defence of the Italian Republic

as Advisor;

Sir Daniel Bethlehem KCMG QC
Member of the Bar of England and Wales; Twenty Essex Chambers

Dr. Paolo Busco
Member of the Rome Bar and Registered EU Lawyer with the Bar of England and Wales; Twenty Essex Chambers

Dr. Ida Caracciolo
Professor of International Law, University of Campania "Luigi Vanvitelli"; Member of the Rome Bar

Dr. Ben Juratowitch QC
Solicitor Advocate, England and Wales; Solicitor of the Supreme Court of Queensland; Partner, Freshfields Bruckhaus Deringer, Paris

Mr. Sudhansu Swaroop QC
Member of the Bar of England and Wales; Twenty Essex Chambers

Professor Guglielmo Verdirame QC

Professor of International Law, King's College, London; Member of the Bar of England and Wales; Twenty Essex Chambers

Dr. Philippa Webb
Reader in Public International Law, King's College, London; Member of the New York Bar and Member of the Bar of England and Wales; Twenty Essex Chambers

Sir Michael Wood KCMG
Member of the International Law Commission; Member of the Bar of England and Wales; Twenty Essex Chambers

as Counsel and Advocates;

Mr. Suhail Dutt
Senior Advocate, Member of the Delhi Bar

Ms. Callista Harris
Solicitor admitted in New South Wales, Australia

Mr. Kevin Lee
Advocate of the Supreme Court of Singapore; Member of the Bar of England and Wales

Dr. Daniel Müller
Member of the Paris Bar; Associate, Freshfields Bruckhaus Deringer, Paris

Dr. Mauro Politi
Professor of International Law, University of Trento; former Member of the United Nations Human Rights Committee

Dr. Attila Tanzi
Professor of International Law, University of Bologna; Associate Member, 3VB Chambers, London

Mr. Diljeet Titus
Advocate, Titus & Co Advocates; Member of the Delhi Bar, India

as *Counsel*;

Ms. Francesca Lionetti
Freshfields Bruckhaus Deringer, Paris

as Legal Assistant.

India

Mr. G. Balasubramanian
Joint Secretary (Europe West), Ministry of External Affairs, Government of India

as Agent;

H.E. Mr. Venu Rajamony
Ambassador of India in The Hague, the Netherlands

as Co-Agent;

Mrs. Uma Sekhar
Joint Secretary, Legal and Treaties Division, Ministry of External Affairs, Government of India

as Co-Agent;

Dr. Luther M. Rangreji
Counsellor (Legal), Embassy of India, The Hague

as Deputy Agent;

Mr. Donny Michael
Deputy Inspector General, Indian Coast Guard, Government of India

Dr. Sanjay Kumar
Under Secretary, Europe West Division, Ministry of External Affairs, Government of India

Mr. S. Senthil
Legal Officer, Legal and Treaties Division, Ministry of External Affairs, Government of India

Mr. P. Vikraman
Deputy Superintendent of Police, National Investigation Agency, Government of India

as Advisors;

Professor Alain Pellet
Emeritus Professor, University Paris Nanterre; Former Chairman of International Law Commission; Member of the Institut de Droit International

Mr. Rodman R. Bundy
Member of the New York Bar; former avocat à la Cour d'appel de Paris; Partner, Eversheds Harry Elias LLP, Singapore

Dr. Vishnu Dutt Sharma
Senior Counsel & Additional Secretary (Retd), Ministry of External Affairs, Government of India

Mr. Benjamin Samson
Centre de droit international de Nanterre (CEDIN), University Paris Nanterre

Mr. Alvin Yap
Advocate and Solicitor of the Supreme Court of Singapore; Eversheds Harry Elias LLP, Singapore

as Counsel and Advocates;

Mr. Ludovic Legrand
Centre de droit international de Nanterre (CEDIN), University Paris Nanterre; Advisor in International Law

Ms. Héloïse Bajer-Pellet
Member of the Paris Bar

Ms. Joyce Ng
Advocate and Solicitor of the Supreme Court of Singapore; Eversheds Harry Elias LLP, Singapore

as Counsel.

Tribunal Witnesses

Captain Umberto Vitelli
(Formerly) Master of the "Enrica Lexie"

Captain Carlo Noviello
(Formerly) Master Supernumerary of the "Enrica Lexie"

Captain Fredy John Bosco
(Formerly) Captain and Owner of the "St. Antony"

DIG [redacted]
(Formerly) Commandant and Staff Observer at Coast Guard Air Enclave Kochi

Commandant [redacted]
(Formerly) Assistant Commandant and Boarding Officer of the ICGS "Lakshmibai"

Permanent Court of Arbitration

Dr. Dirk Pulkowski
Registrar

Ms. Christel Y. Tham
Legal Counsel

Ms. Susan Kimani
Legal Counsel

Ms. Willemijn van Banning
Case Manager

Court Reporter

Mr. Trevor McGowan

Interpreters

Ms. Daniela Ascoli
Ms. Marzia Sebasiani

English - Italian

Ms. Rohini Thevananth
Mr. Navaratnam Thevananth

English - Tamil

62. On 8 July 2019, the agents for both Parties delivered brief opening statements. The opening statements were followed by the first round of oral argument of Italy from 8 through 10 July 2019.

63. India presented its first round of oral argument from 11 through 13 July 2019.

64. On 15 July 2019, the Tribunal heard the witness testimonies of Captain Vitelli, Captain Noviello, and Captain Fredy. Captain Vitelli and Captain Noviello gave their witness testimonies in Italian, while Captain Fredy gave his testimony in Tamil. The testimonies were simultaneously interpreted into English.

65. On 16 July 2019, the Tribunal heard the witness testimonies of DIG [redacted] and Commandant [redacted]. The witnesses gave their testimonies in English.

66. The witness testimonies were followed by a second round of oral argument and closing statements of the Parties, which were delivered on 18 and 20 July 2019, respectively.

II. THE PARTIES' SUBMISSIONS

67. The Parties, in their written and oral pleadings, have made the following submissions to the Arbitral Tribunal.

A. SUBMISSIONS IN THE PARTIES' WRITTEN PLEADINGS

1. Submissions of Italy

68. In its Memorial, Italy requests the Arbitral Tribunal to adjudge and declare that:

> (a) By the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976, and Ministry of Home Affairs Notification No. S.O. 671(E) dated 27 August 1981, India has acted and is acting in a manner that is incompatible with UNCLOS with regard to Articles 33(1), 56(1), 56(2), 58(2), 87(1)(a) and/or 89.
>
> (b) By directing the *Enrica Lexie* to change course and proceed into India's territorial sea, India violated Italy's freedom of navigation, in breach of UNCLOS Article 87(1)(a).
>
> (c) By interdicting the *Enrica Lexie* and escorting her to Kochi, India violated Italy's exclusive jurisdiction over the *Enrica Lexie*, in breach of UNCLOS Article 92.
>
> (d) India violated, and continues to violate, Italy's exclusive right to institute penal or disciplinary proceedings against the Marines, in breach of UNCLOS Article 97(1).
>
> (e) By ordering the detention of the *Enrica Lexie* between February and May 2012, and investigating those on board, India violated the prohibition contained in UNCLOS Article 97(3).
>
> (f) The assertion and continued exercise of criminal jurisdiction by India over Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone is in violation

of India's obligation to respect the immunity of the Marines under UNCLOS Articles 2(3), 56(2), 58(2) and 100 as Italian State officials exercising official functions.

(g) By failing to cooperate in the repression of piracy, India violated UNCLOS Article 100, read with UNCLOS Article 300.

(h) India's assertion of jurisdiction in the present case was and is contrary to UNCLOS.[19]

69. Italy also requests the Arbitral Tribunal to order, in addition or in the alternative, that:

(a) India must cease all wrongful acts that have caused and continue to cause any of the continuing breaches of UNCLOS in paragraphs 1(a), (d), (f), (g) and (h), above. It shall, in particular, cease to apply the provisions of the 1976 Maritime Zones Act and the 1981 Notification insofar as they are incompatible with UNCLOS. It shall also cease to exercise any form of criminal jurisdiction over the Marines, including measures of restraint and legal proceedings in India.

(b) India must make full reparation for the breaches of UNCLOS set out in paragraphs 1(a) to (h), above, and re-establish the situation that existed before its wrongful acts. India must, in particular, terminate all criminal proceedings (including measures of restraint) in respect of Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone in connection with the "Enrica Lexie" Incident.

(c) India must pay compensation for the non-material damage suffered by Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone as a result of India's unlawful exercise of jurisdiction over them, and the material damage suffered in consequence of the detention of the *Enrica Lexie*.[20]

70. In its Reply and Rejoinder, Italy also requests the Arbitral Tribunal:

(1) To dismiss India's objections to the jurisdiction of the Tribunal with respect to Italy's Claims 1(a), 1(f), and 1(h); and

(2) To dismiss India's counter-claims in their entirety and all requests consequential on them.[21]

2. Submissions of India

71. In its Counter-Memorial, with the *caveat* that it reserves the right to amend or supplement its Submissions, India requests the Arbitral Tribunal to:

(1) adjudge and declare that it has no jurisdiction with respect to Italy's Claims 1(a), 1(f) and 1(h), and/ or to dismiss and reject those Claims; and

(2) dismiss and reject all other requests and submissions of Italy.[22]

72. Regarding its counter-claims, India requests the Arbitral Tribunal to adjudge and declare that:

(3) India's counter-claims are admissible; and

By firing at the St Antony and killing two Indian fishermen on board, Italy:

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19 Italy's Memorial, p. 188.

20 Italy's Memorial, p. 189.

21 Italy's Reply, para. 11.3; Italy's Rejoinder, para. 6.6.

22 India's Counter-Memorial, p. 125.

(4) violated India's sovereign rights under Article 56 of UNCLOS;

(5) breached its obligation to have due regard to India's rights in its EEZ under Article 58(3) of UNCLOS;

(6) violated India's freedom and right of navigation under Articles 87 and 90 of UNCLOS; and

(7) infringed India's right to have its EEZ reserved for peaceful purposes under Article 88 of UNCLOS.

Consequently, India reserves the right to request that the Tribunal order that:

(8) Italy make full reparation for its breaches of Article 56, 58(3), 87, 88 and 90 of UNCLOS.[23]

73. In its Rejoinder, with the *caveat* that it reserves the right to amend or supplement its submissions, India requests the Arbitral Tribunal to:

(1) adjudge and declare that it has no jurisdiction with respect to Italy's Claims 1(a), 1(f) and 1(h), and to dismiss and reject those Claims; and

(2) dismiss and reject all other requests and submissions of Italy.[24]

74. Regarding its counter-claims, India also requests the Arbitral Tribunal to adjudge and declare that:

(3) India's counter-claims are admissible; and that,

By firing at the St Antony and killing two Indian fishermen on board, Italy:

(4) violated India's sovereign rights under Article 56 of UNCLOS;

(5) breached its obligation to have due regard to India's rights in its EEZ under Article 58(3) of UNCLOS;

(6) violated India's freedom and right of navigation under Articles 87 and 90 of UNCLOS; and

(7) infringed India's right to have its EEZ reserved for peaceful purposes under Article 88 of UNCLOS.

Consequently, the Republic of India requests the Tribunal to order that:

(8) Italy make full reparation for its breaches of Article 56, 58(3), 87, 88 and 90 of UNCLOS.[25]

B. FINAL SUBMISSIONS AT THE CLOSE OF THE HEARING

1. Submissions of Italy

75. At the close of the Hearing, Italy made the following final submissions:

[23] India's Counter-Memorial, p. 125.

[24] India's Rejoinder, p. 131.

[25] India's Rejoinder, p. 131.

(1) Italy respectfully requests the Tribunal to dismiss all of India's objections to the jurisdiction of the Tribunal and the admissibility of ltaly's claims.

(2) Italy further requests the Tribunal to adjudge and declare that:

(a) By maintaining certain provisions of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976, and by maintaining Ministry of Home Affairs Notification No. S.O. 671(E) dated 27 August 1981, India has acted and is acting in a manner that is incompatible with Articles 33(1), 56(1), 56(2), 58(2), 87(1)(a) and/or 89 of UNCLOS.

(b) By directing and inducing the *Enrica Lexie* to change course and proceed into India's territorial sea through a ruse, as well as by interdicting the *Enrica Lexie* and escorting her to Kochi, India violated Italy's freedom of navigation, in breach of UNCLOS Article 87(1)(a), and Italy's exclusive jurisdiction over the *Enrica Lexie*, in breach of Article 92 of UNCLOS.

(c) By directing and inducing the *Enrica Lexie* to change course and proceed into India's territorial sea through a ruse, India abused its right to seek Italy's cooperation in the repression of piracy, in breach of Article 300 read in conjunction with Article 100 of UNCLOS.

(d) By instituting criminal proceedings against the Marines, India violated and continues to violate Italy's exclusive right to institute penal or disciplinary proceedings against the Marines, in breach of Article 97(1) of UNCLOS.

(e) By ordering the detention of the *Enrica Lexie* between February and May 2012, and investigating those on board, India violated the prohibition against the arrest or detention of a ship by a State other than the flag State in breach of Article 97(3) of UNCLOS.

(f) By asserting and continuing to exercise its criminal jurisdiction over Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone, India is in violation of its obligation to respect the immunity of the Marines as Italian State officials exercising official functions, in breach of Articles 2(3), 56(2), 58(2) and 100 of UNCLOS.

(g) By failing to cooperate in the repression of piracy, India violated UNCLOS Article 100.

(h) India's assertion of jurisdiction in the present case was and is contrary to UNCLOS.

(3) In consequence of the preceding, Italy respectfully requests that the Tribunal order, in addition or in the alternative, that:

(a) India must cease all wrongful acts that have caused and continue to cause any of the continuing breaches of UNCLOS. It shall, in particular, cease to apply the provisions of the 1976 Maritime Zones Act and the 1981 Notification insofar as they are incompatible with UNCLOS. It shall also cease to exercise any form of criminal jurisdiction over the Marines, including measures of restraint and legal proceedings in India.

(b) India must make full reparation for the breaches of UNCLOS set out in paragraphs 2 (a) to (h), above, and re-establish the situation that existed before its wrongful acts. India must, in particular, terminate all criminal proceedings (including measures of restraint) in respect of Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone in connection with the *Enrica Lexie* Incident.

(c) India must pay compensation for the non-material damage suffered by Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone as a result of India's unlawful exercise of jurisdiction over them, and the material damage suffered in consequence of the detention of the *Enrica Lexie*.

(4) In addition, Italy also respectfully requests the Tribunal to dismiss India's counterclaims in their entirety and all requests consequential on them.

2. Submissions of India

76. At the close of the Hearing, India made the following final submissions:

> For the reasons developed in its Counter-Memorial and in its Rejoinder, and set out by its representatives during the oral proceedings, the Republic of India respectfully requests the Tribunal to:
>
> (1) Adjudge and declare that it has no jurisdiction with respect to the case submitted to it by Italy;
>
> (1.a) In the alternative, adjudge and declare that it has no jurisdiction with respect to Italy's Claims 2(a), 2(f), 2(h), and 3(a) and, in the further alternative, to dismiss and reject those Claims; and
>
> (2) Dismiss and reject all other requests and submissions of ltaly.
>
> As to its counter-claims, the Republic of lndia respectfully requests the Tribunal to adjudge and declare that:
>
> (3) India's counter-claims are admissible; and that,
>
> By firing at the St Antony and killing two Indian fishermen on board, Italy:
>
> (4) Violated India's sovereign rights under Article 56 of UNCLOS;
>
> (5) Breached its obligation to have due regard to India's rights in its EEZ under Article 58(3) of UNCLOS;
>
> (6) Violated India's freedom and right of navigation under Articles 87 and 90 of UNCLOS; and
>
> (7) Infringed India's right to have its EEZ reserved for peaceful purposes under Article 88 of UNCLOS.
>
> Consequently, the Republic of India requests the Tribunal to order that:
>
> (8) Italy make full reparation for its breaches of Article 56, 58(3), 87, 88 and 90 of UNCLOS.

III. FACTUAL BACKGROUND

77. The Arbitral Tribunal will now summarise the factual background of the case to provide context to the subsequent discussion. Many of the facts giving rise to the present Arbitration are undisputed between the Parties, as is evident from concurrent factual statements made by the Parties in their pleadings or statements made by one Party that are not contested by the other Party.

78. In outlining the factual background, the Arbitral Tribunal also restates selected documentary evidence and excerpts of testimony given before the Arbitral Tribunal at the Hearing. The Arbitral Tribunal will summarise the Parties' positions in respect of disputed facts in Parts V and VI.

A. THE VOYAGE OF THE "ENRICA LEXIE" IN FEBRUARY 2012

79. The "Enrica Lexie" was an Italian-flagged oil tanker, owned by Dolphin Tanker SRL, a company incorporated in Milan, Italy, and operated by Fratelli D'Amato SpA of Naples, Italy. The port of registry of the "Enrica Lexie" was Naples.[26]

80. The "Enrica Lexie" had an overall length of 243.8 metres, a moulded breadth of 42 metres,[27] a draught[28] of 14.822 metres and a keel-to-mast height of 49 metres.[29] Its height from sea level to the bridge when unloaded was 26 metres.[30] Its maximum speed was 14 knots.[31]

81. On 4 February 2012, the "Enrica Lexie" departed Singapore after stopping there for bunkering.[32] It had no cargo on board. On 12 February 2012, a six-member Vessel Protection Detachment (hereinafter "VPD") boarded the "Enrica Lexie" at Galle, Sri Lanka. The six members of the VPD, all Italian nationals, were Chief Master Sergeant Massimiliano Latorre, Sergeant Salvatore Girone, Sergeant Renato Voglino, Corporal Massimo Andronico, Lance Corporal Antonio Fontana, and Lance Corporal Alessandro Conte.[33] Sergeant Latorre commanded the VPD.

82. The presence of the six members of the Italian Marines on board the "Enrica Lexie" was regulated by Law Decree No. 107 of 12 July 2011, of the Italian Republic[34] (hereinafter "Italian Law on VPDs"). Article 5(1) of the Italian Law on VPDs provided that "the Ministry of Defence may enter into framework agreements with private Italian ship-owners […] related to the protection of

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26 Italy's Memorial, paras 4.4-4.5, *referring to* Characteristics and description of the "Enrica Lexie" (**Annex IT-217**); Hearing Transcript, 8 July 2019, 148:11-16.

27 Italy's Memorial, para. 4.6. Italy explains that the moulded breadth is the maximum breadth measured inside the vessel's plating, usually measured amidships.

28 Italy explains that the "draught" is the distance from the bottom of the keel to the waterline.

29 Italy's Memorial, para. 4.6, *referring to* Characteristics and description of the "Enrica Lexie" (**Annex IT-217**).

30 Italy's Memorial, para. 4.6, *referring to* Description of the "Enrica Lexie" prepared by R. Jayaraj, Circle Inspector of Police, Coastal Police Station, Neendakara, Kollam, 26 February 2012 (**Annex IT-149**).

31 Italy's Memorial, para. 4.6, *referring to* Letter from the Mercantile Marine Department of the Ministry of Shipping of India to the Commissioner of Police, Kochi, 23 March 2012, attaching "Interim Report into the Marine Casualty of Death of Two Fishermen off Kochi due to Firing by M.T. Enrica Lexie, Flag Italy, on 15.02.2012", 12 March 2012, p. 2 (**Annex IT-161**). *See also* Hearing Transcript, 8 July 2019, 148:17-149:1.

32 Italy's Memorial, para. 4.7, *referring to* Letter from the Mercantile Marine Department of the Ministry of Shipping of India to the Commissioner of Police, Kochi, 23 March 2012, attaching "Interim Report into the Marine Casualty of Death of Two Fishermen off Kochi due to Firing by M.T. Enrica Lexie, Flag Italy, on 15.02.2012", 12 March 2012, p. 3 (**Annex IT-161**).

33 Italy's Memorial, para. 4.7, *referring to* Log Book of the Master of the "Enrica Lexie", p. 1 (**Annex IT-14**).

34 Law Decree No. 107 of 12 July 2011, of the Italian Republic: Extension (of international missions of the Armed Forces and Police available for implementing Resolutions 1970 (2011) and 1973 (2011) adopted by the Security Council of the United Nations and intervention by way of cooperation in the development and support of peace and stabilisation processes). Urgent anti-piracy measures (11GO148).

ships flying the Italian flag in transit in international maritime spaces at risk of piracy".[35] Accordingly, the role of the VPDs on board the vessel was to protect the safe navigation of the vessel.[36] The expenses of the VPDs, according to Article 5(1), were borne by the ship owners. These expenses however "did not constitute the salary of the marines, nor fees to the Ministry of Defence for the services rendered by the marines to shipowners".[37]

83. Article 5(6bis) of the Italian Law on VPDs amended the Italian Military Code to include amongst the competences of the Italian Navy "safeguarding and protection of national interests and maritime sea-lines beyond the outer limit of the territorial sea, including as regards the fight against piracy".[38] Flowing from this, under Article 5(2), VPDs were serving members of the Italian Navy or other Italian Armed Forces who operated in conformity with the directives and the rules of engagement issued by the Italian Ministry of Defence.[39]

84. In June 2015, Italy repealed the provisions that allowed Italian ship owners to request protection from VPDs, following the decline in the number of piracy attacks.[40]

85. The Master of the "Enrica Lexie" was Captain Umberto Vitelli, joined by Master Supernumerary Captain Carlo Noviello. Captain Noviello had more than 30 years of experience as a mariner.[41] Captain Noviello had been asked to join the "Enrica Lexie" so that the command of the vessel would meet the requirements of oil companies for experience.[42] Other relevant crew aboard were "Second Officer Sahil Gupta, Chief Mate and Ship Security Officer James Mandley Samson Victor, and Able Seamen Ayyaz Yusuf Kumandan and Narendrakumar Fulbaria".[43]

86. On 14 February 2012, the "Enrica Lexie" left Galle and was destined for Port Said, Egypt.[44]

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35 Italy's Memorial, para. 3.14, *referring to* Law Decree No. 107 of 12 July 2011, of the Italian Republic (**Annex IT-91**). *See also* Hearing Transcript, 8 July 2019, 131:12-132:2.

36 Hearing Transcript, 8 July 2019, 132:6-7.

37 Hearing Transcript, 8 July 2019, 132:17-24.

38 Law Decree No. 107 of 12 July 2011, of the Italian Republic (**Annex IT-91**).

39 Law Decree No. 107 of 12 July 2011, of the Italian Republic (**Annex IT-91**).

40 Italy's Memorial, para. 3.10, *referring to* Italian Law Decree no. 7, 18 February 2015, converted by Law no. 43, 17 April 2015, Article 15 (**Annex IT-207**). *See also* Hearing Transcript, 8 July 2019, 127:21-24.

41 Italy's Memorial, para. 4.8, *referring to* Statement of Carlo Noviello, 28 February 2012 (**Annex IT-151**).

42 Italy's Memorial, para. 4.8, *referring to* Declaration of Carlo Noviello, 24 February 2012 (**Annex IT-148**). *See also* Hearing Transcript, 8 July 2019, 149:14-150:7; Hearing Transcript, 15 July 2019, 104:7-21.

43 Italy's Memorial, para. 4.9, *referring to* Crew List of the "Enrica Lexie", p. 1 (**Annex IT-218**). *See also* Hearing Transcript, 8 July 2019, 150:15-18.

44 Italy's Memorial, para. 4.10, *referring to* Log Book of the Master of the "Enrica Lexie", p. 2 (**Annex IT-14**); Italy's Reply, para. 4.13.

B. CHRONOLOGICAL ACCOUNT OF THE EVENTS THAT LED TO THE INCIDENT

1. Events as Seen from the "Enrica Lexie"

87. On 15 February 2012, at 15:45 Ship Mean Time (hereinafter "SMT") (16:15 Indian Standard Time (hereinafter "IST")),[45] the "Enrica Lexie" was approximately 20 nautical miles from Alleppey (Alappuzha), India, navigating at a speed of 12 knots.[46] At around that time, Captain Vitelli was seated at the computer position on the bridge corresponding with the charterer and shipowner.[47] Second Officer Sahil Gupta monitored the controls under the supervision of Captain Noviello.[48]

88. Captain Noviello testified that the "Enrica Lexie" had veered off course by 8 degrees to starboard.[49] Second Officer Gupta therefore steered the "Enrica Lexie" 8 degrees to port to return to the original course.[50]

89. Towards the end of Mr. Gupta's four-hour watch duty lasting from 12:00 SMT/12:30 IST to 16:00 SMT/16:30 IST, an "unidentified craft" appeared on the radar screen at a distance of approximately 2.8 nautical miles from the "Enrica Lexie".[51] The craft was on the starboard side of the ship.[52] Once the craft was spotted, Second Officer Gupta steered an additional 2 degrees to

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45 IST is 30 minutes ahead of the local time on the "Enrica Lexie" – SMT. *See* India's Counter-Memorial, 14 April 2017, para. 2.11. In its pleadings, Italy refers to the time of the events of 15 February 2012 occurring at sea in SMT, while India refers to them in IST. Unless otherwise indicated, in Sections B and C, the Arbitral Tribunal will chronologically recount events in both SMT and IST, while in Sections D and E, since the "Enrica Lexie" was no longer at sea, events will be recounted in IST only.

46 Italy's Memorial, para. 4.13, *referring to* Declaration of Carlo Noviello, 19 February 2012 (**Annex IT-138)**; Log Book of the Master of the "Enrica Lexie", p. 2 (**Annex IT-14**); Additional Statement of Umberto Vitelli, 27 February 2012 (**Annex IT-150**).

47 Hearing Transcript, 15 July 2019, 26:25-27:3.

48 Hearing Transcript, 15 July 2019, 27:13-15, 105:12-20.

49 Hearing Transcript, 20 July 2019, 4:22-5:16; Hearing Transcript, 20 July 2019, 5:1-16; Hearing Transcript, 15 July 2019, 123:18-124:5.

50 Hearing Transcript, 15 July 2019, 123:18-124:24.

51 Italy's Memorial, para. 4.13, *referring to* Log Book of the Master of the "Enrica Lexie", p. 2 (**Annex IT-14**); Declaration of Carlo Noviello, 19 February 2012 (**Annex IT-138**); Summary Investigation Report by Division Admiral Alessandro Piroli entitled "Attempted Pirate Attack against Merchant Vessel Enrica Lexie – 15 February 2012. Death of Indian Citizens", dated 11 May 2012 (hereinafter the "Piroli Report") (Confidential Annex), p. 2-14 (**Annex IT-233**). *See also* Italy's Reply, para. 4.13(1); India's Rejoinder, para. 4.16; (Confidential Annex) (**Annex IT-261**); Hearing Transcript, 8 July 2019, 154:10-15; Hearing Transcript, 11 July 2019, 66:23-67:1; Hearing Transcript, 15 July 2019, 27:8-15; 105:12-24.

52 India's Counter-Memorial, para. 2.19 *referring to* Piroli Report (Confidential Annex), pp 2-15-2-19 (**Annex IT-233**).

port.[53] Captain Noviello further testified that "in the meanwhile the helm had been switched to manual steering to allow for evasive manoeuvers".[54]

90. Captain Noviello informed Sergeant Girone, the VPD member on duty on the bridge at the time, of the craft on the radar. Captain Noviello and Sergeant Girone, together with Sergeant Latorre, Mr. Gupta, and Mr. Fulbaria monitored the craft through binoculars.[55]

91. The entry made in the Log Book maintained by Captain Vitelli (hereinafter the "Log Book") reads that the craft "seemed to be a fishing boat".[56] In a declaration made four days after the incident by Captain Noviello, he stated that the craft "appeared to be a fishing boat about 12 meters in length".[57] In addition, Sergeant Latorre stated in the context of a naval investigation in India a few days after the incident that the craft:

> was of a faded blue colour, small dimensions (less than 10 meters), with a small superstructure (wheel-house) set to the fore, white. The wheel-house had openings fitted with glass/plexiglass… [V]arious tires had been placed along the skiff as makeshift bumpers. An awning propped on two struts joined the wheel-house to the aft.[58]

92. According to Captain Noviello, when the small craft was between 1 and 1.5 nautical miles away, the "Enrica Lexie" attempted to establish contact by way of a call on channel 16 of the VHF communication system, to no avail.[59]

93. According to Sergeant Latorre's written statements, at approximately 16:00 SMT/16:30 IST, he donned his personal protection equipment, activated radio communication with other members of the VPD, and positioned himself on the starboard wing of the bridge.[60] Sergeant Girone and Lance

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53 Hearing Transcript, 15 July 2019, 123:18-124:18; Hearing Transcript, 20 July 2019, 4:22-5:16; 5:1-16. *See also* Hearing Transcript, 18 July 2019, 135:20-21, *referring to* Hearing Transcript, 15 July 2019, 124:14-18; Statement of Sahil Gupta, 19 February 2012 (**Annex IT-140**).

54 (Confidential Annex) (**Annex IT-238**). *See also* Hearing Transcript, 15 July 2019, 32:3-8; Statement of Umberto Vitelli (**Annex IT-216**); Italy's Memorial, para. 4.14; Italy's Reply, para. 4.14.

55 Italy's Memorial, para. 4.15, *referring to* (Confidential Annex) (**Annex IT-236**); (Confidential Annex) (**Annex IT-237**); (Confidential Annex) (**Annex IT-240**); Declaration of Carlo Noviello, 19 February 2012 (**Annex IT-138**); (Confidential Annex) (**Annex IT-238**); Hearing Transcript, 15 July 2019, 107:21-108:20.

56 Italy's Memorial, para. 4.16, *referring to* Log Book of the Master of the "Enrica Lexie", p. 2 (**Annex IT-14**). *See also* India's Counter-Memorial, para. 2.25, and Annex to Chapter 2, p. 33.

57 Declaration of Carlo Noviello, 19 February 2012 (**Annex IT-138**). *See also* Italy's Memorial, para. 4.16.

58 (Confidential Annex), p. 2 (**Annex IT-236**).

59 Hearing Transcript, 18 July 2019, 36:17-20; 130:1-16, *referring to* Hearing Transcript, 15 July 2019, 111:10-24; 149:21-22.

60 Italy's Memorial, para 4.18, *referring to* (Confidential Annex) (**Annex IT-240**); (Confidential Annex) (**Annex IT-236**).

Corporal Fontana (the VPD member who was about to replace Sergeant Girone on the command bridge) also wore their protection equipment.[61]

94. Sergeant Latorre states that, when the craft was approximately 800 metres from the "Enrica Lexie", he "implemented various and continued visual signals", including flashing a search light, "in order to warn the craft".[62] He also waved his weapon, in order "to signal the presence of military personnel onboard".[63] According to Sergeant Girone, "[t]his caused no alteration in the craft's course, which continued to clearly head toward our vessel, with a 30° approach angle to starboard, relative to our stern".[64] Sergeant Girone joined Sergeant Latorre in showing his weapon by holding it above his head,[65] while Lance Corporal Fontana, "continued to monitor the approaching craft on the navigation radar".[66]

95. Further, according to Sergeant Latorre, when the craft was at a distance of approximately 500 metres, he and Sergeant Girone each fired four rounds of a mix of tracer and ordinary bullets.[67]

96. The small craft maintained its course and speed, approaching the "Enrica Lexie".[68] Sergeant Girone claims that, when it was at a distance of 300 metres, he saw through his binoculars that "at least two members of the crew were equipped with long-barrel rifles slung over their shoulders, with a posture clearly aimed at boarding [the "Enrica Lexie"]".[69] Captain Noviello also testified that he saw two men aboard the small vessel with "a black belt across their shoulders

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61 Italy's Memorial, para 4.18, *referring to* (Confidential Annex) (**Annex IT-236**). *See also* (Confidential Annex) (**Annex IT-237**).

62 Italy's Memorial, para. 4.18, *referring to* (Confidential Annex), p. 1 (**Annex IT-236**); Statement of Carlo Noviello, 19 February 2012 (**Annex IT-142**); Declaration of Carlo Noviello, 19 February 2012 (**Annex IT-138**); Log Book of the Master of the "Enrica Lexie" (**Annex IT-14**). *See also* India's Counter-Memorial para. 2.22 and Annex to Chapter 2, p. 32; Italy's Reply, para. 4.13(4); Hearing Transcript, 8 July 2019, 156:1-5; Hearing Transcript, 15 July 2019, 110:11-24.

63 (Confidential Annex) (**Annex IT-236**).

64 (Confidential Annex) (**Annex IT-237**).

65 Italy's Memorial, para. 4.19, *referring to* (Confidential Annex) (**Annex IT-236**); (Confidential Annex) (**Annex IT-237**); Declaration of Carlo Noviello, 19 February 2012 (**Annex IT-138**); Log Book of the Master of the "Enrica Lexie", p. 2 (**Annex IT-14**).

66 (Confidential Annex) (**Annex IT-236**).

67 Italy's Memorial, para. 4.21, *referring to* (Confidential Annex) (**Annex IT-236**); (Confidential Annex) (**Annex IT-237**); India's Counter-Memorial, para. 2.23 and Annex to Chapter 2, p. 32, *referring to* Piroli Report (Confidential Annex), p. 2-6 (**Annex IT-233**). *See also* Italy's Reply, para. 4.13(5); Hearing Transcript, 8 July 2019, 156:10-11; Hearing Transcript, 18 July 2019, 129:8-10; Hearing Transcript, 8 July 20190, 16: 2-4.

68 Italy's Memorial, para. 4.23, *referring to* (Confidential Annex) (**Annex IT-236**); India's Counter-Memorial, para. 2.20; India's Rejoinder, para. 4.25. *See also* Hearing Transcript, 11 July 2019, 69:24-70:1; Hearing Transcript, 18 July 2019, 129:12-13.

69 (Confidential Annex), p. 2 (**Annex IT-237**)

[…] like the ones that hunters use to go hunting".[70] In his statement before the Deputy Public Prosecutor of Rome in 2012, Captain Noviello stated that "the boat had a dozen fenders on the outside" which made him wonder "how come they have the fenders on when sailing so far out".[71] He further notes that "since I could not see any fishing net or fish containers, I didn't understand why such a small boat was 20 miles from the coast".[72]

97. When the craft was at a distance of 300 metres from the "Enrica Lexie", Sergeant Latorre fired four rounds of a mix of tracer and ordinary bullets.[73]

98. According to Captain Vitelli, at 16:00 SMT/16:30 IST, while he was "sending routine mid-day messages to the charterer and ship owner […] at the computer on the bridge",[74] he heard shouting on the starboard side.[75] Captain Vitelli stated that he "rushed to the control panel to ensure that the ship is on hand steering",[76] and that he "saw a vessel that looked like a fishing boat at 80 to 100 metres, as if it wanted to collide".[77] Captain Vitelli also "heard shots and saw a large amount of water rise up".[78]

99. Captain Vitelli "sounded the general emergency alarm by bell, by foghorn and announced" three times on the public address system: "We are under pirate attack. This is not a drill".[79] He sent the "Enrica Lexie" crew into the engine room, known as the citadel, for shelter,[80] and warned the

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70 Hearing Transcript, 15 July 2019, 125:10-14.

71 (Confidential Annex), p. 1 (**Annex IT-261**). *See also* Hearing Transcript, 15 July 2019, 125:17-20.

72 Hearing Transcript, 15 July 2019, 125:15-17; Hearing Transcript, 18 July 2019, 131:11-19.

73 Italy's Memorial, para. 4.23, *referring to* (Confidential Annex) (**Annex IT-236**); (Confidential Annex) (**Annex IT-237**); India's Counter-Memorial, para. 2.26 and Annex to Chapter 2, p. 32. *See also* Italy's Reply, para. 4.13(6); Hearing Transcript, 8 July 2019, 157:9-11; Hearing Transcript, 18 July 2019, 129:8-12; Hearing Transcript, 20 July 2019, 16:2-5.

74 (Confidential Annex), p. 1 (**Annex IT-262**); Declaration of Umberto Vitelli, 19 February 2012 (**Annex IT-141**).

75 Statement of Witness in connection with the NIA investigation, Statement of Mr. Vitelli Umberto, Master of "Enrica Lexie", 9 August 2013, p. 42 (**Annex IN-28**); Declaration of Umberto Vitelli, 19 February 2012 (**Annex IT-141**); (Confidential Annex), p. 1 (**Annex IT-262**); Statement of Umberto Vitelli (**Annex IT-216**).

76 Statement of Witness in connection with the NIA investigation, Statement of Mr. Vitelli Umberto, Master of "Enrica Lexie", 9 August 2013, p. 42 (**Annex IN-28**); Declaration of Umberto Vitelli, 19 February 2012 (**Annex IT-141**); Hearing Transcript, 15 July 2019, 28:19-20.

77 Hearing Transcript, 15 July 2019, 28:24-25; Declaration of Umberto Vitelli, 19 February 2012 (**Annex IT-141**); Statement of Umberto Vitelli (**Annex IT-216**).

78 (Confidential Annex), p. 1 (**Annex IT-262**). *See also* Hearing Transcript, 15 July 2019, 30:15-21.

79 Italy's Memorial, para. 4.21, *referring to* Declaration of Umberto Vitelli, 19 February 2012 (**Annex IT-141**); Italy's Reply, para. 4.19. *See also* Hearing Transcript, 8 July 2019, 156:11-18; Hearing Transcript, 15 July 2019, 29:15-18; 30:8-10; 32:18-19.

80 Italy's Memorial, para. 4.22, *referring to* Log Book of the Master of the "Enrica Lexie", p. 2 (**Annex IT-14**); Declaration of Umberto Vitelli, 19 February 2012 (**Annex IT-141**). *See also* Hearing Transcript, 15 July 2019, 22:10-16.

crew on the bridge "not to go near the glass windows".[81] The "Enrica Lexie" crew withdrew into the citadel, and only the VPD marines, Captain Vitelli, Captain Noviello, Mr. Victor (SSO), and Mr. Kumandan (Sailor Helmsman) remained on the bridge.[82]

100. Captain Vitelli increased the speed of the "Enrica Lexie" from 12 to 14 knots, the maximum speed of the vessel.[83] More precisely, Captain Vitelli states in this regard:

> I increased the speed to maximum power. I increased the speed before pressing SSAS. Boat was very near to midship. If I turned the ship to starboard side it will be very near to boat or collide. If I moved the ship to the portside definitely collide. Therefore I increased the speed at straight line. Before the incident the speed was 12 knots (Nautical mile per hour) and I increased it to 14 knots.[84]

101. When the craft, which continued to approach the "Enrica Lexie", was at a distance of approximately 80-100 metres from the "Enrica Lexie", Sergeant Latorre and Sergeant Girone, each fired four further rounds of a mix of tracer and ordinary bullets.[85] Following this third burst of shots, the small craft, which was then approximately 30 metres from the "Enrica Lexie", changed its course away from the "Enrica Lexie".[86]

102. At 16:23 SMT/16:53 IST, Captain Vitelli sent a Ship Security Alarm System (hereinafter "SSAS") message, communicating the "nature of distress" as a "piracy/armed attack".[87] The "Enrica Lexie" was positioned at 09º 20.54' N 075º 59.31' E. Its course was 331º, and its speed was 14 knots.[88]

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81 Declaration of Umberto Vitelli, 19 February 2012 (**Annex IT-141**); Hearing Transcript, 15 July 2019, 31:12-15; 38:1-13.

82 Italy's Memorial, para. 4.22, *referring to* Log Book of the Master of the "Enrica Lexie", p. 2 (**Annex IT-14**). *See also* Italy's Reply, paras 4.14, 4.19; Hearing Transcript, 8 July 2019, 157:3-8.

83 Italy's Memorial, para. 4.20, *referring to* Additional Statement of Umberto Vitelli, 27 February 2012 (**Annex IT-150**); India's Counter-Memorial, para. 2.17. *See also* Hearing Transcript, 8 July 2019, 156:5-8; Hearing Transcript, 15 July 2019, 37:5-8.

84 Additional Statement of Umberto Vitelli, 27 February 2012 (**Annex IT-150**).

85 Italy's Memorial, para. 4.24, *referring to* (Confidential Annex) (**Annex IT-236**); (Confidential Annex) (**Annex IT-237**); India's Counter-Memorial, para. 2.27 and Annex to Chapter 2, p. 33; Italy's Reply, para. 4.13(7). *See also* India's Rejoinder, paras 4.21-4.22; Hearing Transcript, 8 July 2019, 157:11-13; Hearing Transcript, 18 July 2019, 129:8-12; Hearing Transcript, 20 July 2019, 16:2-6.

86 Italy's Memorial, paras 4.25-4.26, *referring to* Action Report from Massimiliano Latorre to the Commander in Chief of the Naval Squadron (CINCNAV), 19:30 (IST - 0.5 hours), 15 February 2012 (**Annex IT-108**); (Confidential Annex) (**Annex IT-236**). *See also* India's Counter-Memorial, para. 2.33 *referring to* (Confidential Annex) (**Annex IT-261**) and Annex to Chapter 2, p. 33; Italy's Reply, paras 4.13(8), 4.16; Hearing Transcript, 8 July 2019, 158: 11-13; Hearing Transcript, 15 July 2019, 113:16-26.

87 Italy's Memorial, para. 4.28, *referring to* Ship Security Alarm System Message sent out by the "Enrica Lexie" on 15 February 2012 (**Annex IT-3**); India's Counter-Memorial, para. 2.33 and Annex to Chapter 2, p. 33. *See also* Italy's Reply, paras 4.13(10), 4.16; Hearing Transcript, 8 July 2019, 70:4-8; Hearing Transcript, 15 July 2019, 41:5-6.

88 Italy's Memorial, para. 4.28, *referring to* Ship Security Alarm System Message sent out by the "Enrica Lexie" on 15 February 2012 (**Annex IT-3**); India's Counter-Memorial, para. 2.33 and Annex to Chapter 2,

103. As will be described in more detail in Section C below, Captain Vitelli maintained the "Enrica Lexie" on alert and on manual steering for one hour following the incident, originally staying left of the ship's charted course to avoid a "high-traffic, a high-density area for fishing boats", before returning to the vessel's original course once the alert ended.[89]

104. At 16:30 SMT/17:00 IST, Captain Vitelli considered the situation as "under control". Later, at 17:00 SMT/17:30 IST, Captain Vitelli ended the alert, and Sergeant Latorre "declared the incident closed". The "Enrica Lexie" crew left the citadel.[90]

2. Events as Seen from the "St. Antony"

105. While the "Enrica Lexie" was navigating off the coast of Alleppey (Alappuzha), India, on 15 February 2012, a fishing boat named the "St. Antony" was also navigating off the coast of India, in more or less the same area.[91] The "St. Antony"[92] had an overall length of 13.72 metres, "weighing about 7.5 to 8 tons including its net and other accessories", and had a 106 horsepower engine.[93] It was owned by Captain Fredy, an Indian national from the State of Tamil Nadu.[94] The boat was registered in the State of Tamil Nadu under Registration Number TN/15/MFB/208[95] but apparently flew no visible Indian flag.[96]

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p. 33. *See also* Italy's Reply, paras 4.13(10), 4.16; Hearing Transcript, 8 July 2019, 70:4-8; Hearing Transcript, 15 July 2019, 41:5-6.

89 Hearing Transcript, 15 July 2019, 39:18-25.

90 Italy's Memorial, para. 4.30, *referring to* E-mail from the Master of the "Enrica Lexie" to Fratelli D'Amato SpA, 13:47 (CET), 15 February 2012 (**Annex IT-111**); Log Book of the Master of the "Enrica Lexie" (**Annex IT-14**); (Confidential Annex), p. 3 (**Annex IT-236**); India's Counter-Memorial, para. 2.34 and Annex to Chapter 2, p. 33. *See also* Italy's Reply, para. 4.13(12); Hearing Transcript, 15 July 2019, 43:11-16.

91 *See* First Information Statement relating to First Information Report no. 2 of 2012, Kerala Police, 15 February 2012, para. 2 (**Annex IT-110**); Affidavit of Fredy J., 27 April 2012, para. 1 (**Annex IT-168**).

92 It appears that there was another boat, also known as the "St. Antony", that was owned by a Mr. Prabhu. *See* First Information Statement relating to First Information Report no. 2 of 2012, Kerala Police, 15 February 2012, para. 2 (**Annex IT-110**).

93 Affidavit of Fredy J., 27 April 2012 (**Annex IT-168**); Additional Statement of Shri Freddy s/o John Bosco, owner of the "St. Antony" (**Annex IN-39**).

94 Affidavit of Fredy J., 27 April 2012 (**Annex IT-168**).

95 India's Rejoinder, para. 5.30 *referring to* Certificate of Registration for the "St. Antony" issued by the Office of the Assistant Director of Fisheries, Extension & Training, Colachel, Kanyakumari (West) under the Tamil Nadu Marine Fishing Regulation Act, 1983 (**Annex IT-267**).

96 Italy's Reply, paras 5.5, 5.22-5.24 *citing Republic of Italy & Ors v. Union of India & Ors*, Supreme Court of India, Judgment of 18 January 2013, Judgment of Kabir CJ, para. 93 and see para. 29 (**Annex IT-19**); Letter from the Mercantile Marine Department of the Ministry of Shipping of India to the Commissioner of Police, Kochi, 23 March 2012, attaching "Interim Report into the Marine Casualty of Death of Two Fishermen off Kochi due to Firing by M.T. *Enrica Lexie*, Flag Italy, on 15.02.2012", 12 March 2012, p. 4 (**Annex IT-161**); India's Rejoinder, paras 5.26, 5.29.

106. In addition to Captain Fredy, ten other persons were on the boat as crew members: Mr. Killary, Mr. Francis, Mr. Johnson, Mr. Kinseriyan, Mr. Clemence, Mr. Muthappan, Mr. Martin, Mr. Michael, Mr. Valentine Jelastine and Mr. Ajeesh Pinku.[97] On the same day, as will be described below, the Indian Coast Guard would identify the "St. Antony" as the small craft involved in the shooting incident with the "Enrica Lexie".[98]

107. In a statement given on the day of the incident, Captain Fredy states that, "while we were proceeding on a distance of 40 Nautical miles, the time was 04.30 PM when we reached west of Kayamkulara. All others barring Jelastin and Pinku were asleep at that time. It was Jelastin who took the helm. Pinku was at the bow".[99]

108. In an affidavit sworn on 27 April 2012, Captain Fredy states:

> My boat was in the waters for 8 days and I and my workers were fishing in Indian waters. I and my workers after a long night of fishing were in deep sleep, except for two people, who were supposed to be awake. On 15.2.2012 at about 4.30 pm, I got up from deep sleep after hearing noise of firing.[100]

109. According to Captain Fredy's testimony at the Hearing, he had been steering until 16:00 SMT/16:30 IST, at which point, "Jelastine replace[d] [him] from the steering and ask[ed] [him] to sleep".[101] Mr. Jelastine did not have a licence to drive the boat.[102] Captain Fredy adds that "it was 4.10 when [he] lay down".[103] Captain Fredy further states:

> It was exactly in five minutes. I was not yet in deep sleep, I had just then lay down. I had told [Jelastine] before lying down, "If anything happens, please call me". The VHF sound also I put in high volume and then only lay down. When I got up and saw – I heard the noise and then only I got up. When I got up and saw, Jelastine was bleeding from ears and eyes.[104]

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97 First Information Statement relating to First Information Report no. 2 of 2012, Kerala Police, 15 February 2012, para. 2 (**Annex IT-110**).

98 India, in this Arbitration, adopts this conclusion (India's Counter Memorial, para. 2.1), and Italy does not materially challenge it (Italy's Reply, para. 4.13: "an incident occurred that involved the *Enrica Lexie* and the *St Antony*"). The Marines, however, appear to contest that the small boat that approached the "Enrica Lexie" was in fact the "St. Antony" (Italy's Memorial, para. 1.4. *See also* Declaration of Massimiliano Latorre, 18 Feb 2012 (**Annex IT-136**); (Confidential Annex) (**Annex IT-236**)).

99 First Information Statement relating to First Information Report no. 2 of 2012, Kerala Police, 15 February 2012 (**Annex IT-110**), para. 2. *See also* Hearing Transcript, 15 July 2019, 149:14-15; Hearing Transcript, 20 July 2019, 17:2-9.

100 Affidavit of Fredy J., 27 April 2012, para. 1 (**Annex IT-168**).

101 Hearing Transcript, 15 July 2019, 149:13-16.

102 Hearing Transcript, 15 July 2019, 167:13-15.

103 Hearing Transcript, 15 July 2019, 149:16-22.

104 Hearing Transcript, 15 July 2019, 149:18-24.

110. Captain Fredy states that "[b]ullets were being shot into the boat" and that the "firing was done from the ship, which passed us by the right side, heading to the north-west".[105] In his statement on the day of the incident, Captain Fredy stated that "[n]o alarm sounded or mi[c] announcement made or a warning shot fired, nothing of the sort was done before firing bullets".[106] In his affidavit sworn of 27 April 2012, Captain Fredy stated that he "saw/heard continuous firing in air, blowing of horns, siren and flashing of lights".[107] In his testimony at the Hearing, Captain Fredy distanced himself from the affidavit of 27 April 2012 and affirmed that no sirens or alarms were sounded or warning shots fired.[108]

111. According to Captain Fredy's testimony, none of the persons on the "St. Antony" was carrying arms.[109] At the Hearing, when the Arbitral Tribunal asked Captain Fredy: "what kind of visible equipment was the St. Antony carrying on 15th February",[110] he replied: "[a] small knife to cut the fish".[111]

112. According to Captain Fredy, two crew members of the "St. Antony", Mr. Jelastine and Mr. Pinku, were hit and killed by bullets.[112] Captain Fredy explains that he "was suddenly aroused from [sleep] to see that Jelastin was bleeding from his nose and ear" and that "[b]ullets were being shot into the boat at that time".[113] Captain Fredy states that he then ordered the other crew members aboard the "St. Antony" to "[l]ie down wherever you are, the ship people are shooting at us".[114] At the same time, Captain Fredy describes that "Pinku, who was onboard the stern, was heard howling 'amme'," and that "[b]lood was oozing out from the right side of his chest".[115] He adds

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105 First Information Statement relating to First Information Report no. 2 of 2012, Kerala Police, 15 February 2012 (**Annex IT-110**), para. 2. *See also* Hearing Transcript, 15 July 2019, 150:5-7; Hearing Transcript, 20 July 2019, 17:13-16.

106 First Information Statement relating to First Information Report no. 2 of 2012, Kerala Police, 15 February 2012 (**Annex IT-110**), para. 2. *See also* Hearing Transcript, 15 July 2019, 153:17-19.

107 Affidavit of Fredy J., 27 April 2012, para. 1 (**Annex IT-168**).

108 Hearing Transcript, 15 July 2019, 153:17-19; 165:6-166:5.

109 Hearing Transcript, 15 July 2019, 168:25-169:2.

110 Hearing Transcript, 15 July 2019, 163:25-164:1.

111 Hearing Transcript, 15 July 2019, 164:3.

112 Affidavit of Fredy J., 27 April 2012 (**Annex IT-168**), *referred to in* Italy's Memorial, para. 4.27. *See also* India's Counter-Memorial, paras 2.28, 2.30; First Information Statement relating to First Information Report no. 2 of 2012, Kerala Police, 15 February 2012 (**Annex IT-110**), para. 2; Hearing Transcript, 15 July 2019, 150:9-15; 150:26-151:4.

113 First Information Statement relating to First Information Report no. 2 of 2012, Kerala Police, 15 February 2012 (**Annex IT-110**), para. 2. *See also* Hearing Transcript, 15 July 2019, 149:22-24.

114 Hearing Transcript, 15 July 2019, 150:7-8.

115 First Information Statement relating to First Information Report no. 2 of 2012, Kerala Police, 15 February 2012 (**Annex IT-110**), para. 2.

that "[t]here was a little inflammation on the right side of the lower limb of Jelastin[e]", but that he "did not examine how deep Jelastin's wounds were, out of fear and apprehension".[116]

113. Captain Fredy adds that "[t]he firing had continued approximately for two minutes", when the ship was approximately 200 meters away from the "St. Antony", and that "[o]n firing, gas leaked out from the cylinders, which were kept atop the boat and in the wheel house, as the firing broke the hose of the same".[117]

114. Captain Fredy testified that he then took over the steering,[118] and "abruptly helmed the boat away".[119] He steered the "St. Antony" at high speed, and only when he "realized [the bullets] were not hitting the boat" but rather "falling into water" did he slow the boat to "find out what had happened to the two people who were shot".[120]

115. After slowing down, Captain Fredy explains, he "checked Jelastine first, [and] when [he] held Jelastine['s] hand and saw, he had died".[121] Then, Captain Fredy states that he went to see Mr. Pinku "at the back [and found that] he was still alive, he three times took deep breath, "amma" he told and then he died".[122]

116. According to Captain Fredy's affidavit, "had [he] not intervened, there was a risk of collision between the said [b]oat and the other vessel".[123] In his testimony before the Arbitral Tribunal, however, Captain Fredy stated that the reason he steered away was not because the "St. Antony" and the "Enrica Lexie" would have "moved closer together", but because "there would have been more casualties".[124]

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116 First Information Statement relating to First Information Report no. 2 of 2012, Kerala Police, 15 February 2012 (**Annex IT-110**), para. 2.

117 First Information Statement relating to First Information Report no. 2 of 2012, Kerala Police, 15 February 2012 (**Annex IT-110**), para. 2. *See also* Affidavit of Fredy J., 27 April 2012, para. 1 (**Annex IT-168**); Hearing Transcript, 15 July 2019, 157:8-11.

118 Hearing Transcript, 15 July 2019, 150:9-10.

119 First Information Statement relating to First Information Report no. 2 of 2012, Kerala Police, 15 February 2012 (**Annex IT-110**), para. 2. *See also* Hearing Transcript, 15 July 2019, 150:16-17; 161:24-26; Hearing Transcript, 18 July 2019, 149: 17-20.

120 Hearing Transcript, 15 July 2019, 150:16-25.

121 Hearing Transcript, 15 July 2019, 150:26-151:1.

122 Hearing Transcript, 15 July 2019, 151:2-4.

123 Affidavit of Fredy J., 27 April 2012, para. 1 (**Annex IT-168**).

124 Hearing Transcript, 15 July 2019, 162:7-11.

117. After slowing down, Captain Fredy informed other boats through VHF that "[t]here was firing on our boat".[125] He also informed other persons, including his brother-in-law, and asked them to report the matter to the police.[126]

C. CHRONOLOGICAL ACCOUNT OF THE IMMEDIATE AFTERMATH OF THE INCIDENT

118. The Arbitral Tribunal will now set out the chronology of events occurring in the aftermath of the shooting incident. Some of these events, and in particular the circumstances causing the "Enrica Lexie" to change course to head to Kochi, are disputed between the Parties. The Parties' positions in this regard are summarised in detail in Part V, Section V.B.1(a) below.

1. Events Prior to the "Enrica Lexie"'s Change of Course towards Kochi

119. After the craft headed towards the open sea, Captain Noviello called the Company Security Officer (hereinafter "CSO") of the company that operated the "Enrica Lexie", Fratelli D'Amato SpA.[127]

120. At 16:23 SMT/16:53 IST, Captain Vitelli sent an SSAS message, communicating the "nature of distress" as a "piracy/armed attack".[128]

121. At 16:24 SMT/16:54 IST, the CSO of the operating company of the "Enrica Lexie" reported the incident to the Operations Centre of the Italian Port Captaincy Headquarters and to the Italian Ministry of Foreign Affairs.[129]

122. At 16:28 SMT/16:58 IST, by telephone, Sergeant Latorre "reported the attempted attack by suspect pirates" to the Commander in Chief of the Naval Squadron, Operational Headquarters of the Italian Navy (hereinafter "CINCNAV").[130]

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125 Hearing Transcript, 15 July 2019, 151:5-8.

126 Hearing Transcript, 15 July 2019, 151:5-152:5.

127 Italy's Memorial, para. 4.28, *referring to* (Confidential Annex) (**Annex IT-261**). *See also* Hearing Transcript, 12 July 2019, 5:12-16.

128 Italy's Memorial, para. 4.28, *referring to* Ship Security Alarm System Message sent out by the "Enrica Lexie" on 15 February 2012 (**Annex IT-3**); India's Counter-Memorial, para. 2.33 and Annex to Chapter 2, p. 33. *See also* Italy's Reply, paras 4.13(10), 4.16; Hearing Transcript, 8 July 2019, 70:4-8; Hearing Transcript, 15 July 2019, 41:5-6.

129 Italy's Memorial, para. 4.29, *referring to* (Confidential Annex) (**Annex IT-247**); (Confidential Annex) (**Annex IT-261**).

130 India's Counter-Memorial, para. 2.33 and Annex to Chapter 2, p. 33, *referring to* Piroli Report (Confidential Annex), p. 2-8 (**Annex IT-233**); Hearing Transcript, 12 July 2019, 5:16-20.

123. At 16:30 SMT/17:00 IST, Captain Vitelli considered the situation to be "under control".

124. Subsequently, at 16:43 SMT/17:13 IST, CINCNAV informed the United Kingdom Marine Trade Operations (hereinafter "UKMTO") by e-mail that "Italian merchant vessel Enrica LEXIE in PSN 09°20N – 075°59E has been approached by a boat with 5 armed suspect pirates".[131]

125. At 17:00 SMT/17:30 IST, Captain Vitelli ended the alert, and Sergeant Latorre "declared the incident closed". The "Enrica Lexie" crew left the citadel.[132] At this point, "once the alarm time was over", the "Enrica Lexie" resumed its intended journey.[133] At the same time, CINCNAV reported the incident involving the "Enrica Lexie" to various officials "including the Office of the Chief of Staff of the Italian Navy (MARISTAT)".[134]

126. At an unspecified time, Captain Fredy called the owner of another boat, also named the "St. Antony", to inform him of the incident and the deaths of two of his boat's crew members, Mr. Pinku and Mr. Jelastine.[135] Thereafter, Captain Fredy contacted his brother-in-law by VHF, directing him to alert the police that there had been a fatal shooting upon his boat.[136] He further described the ship that had fired at the "St. Antony" and gave its general course coordinates, stating that "there is a ship moving towards north, black colour ship, on the back side it is written Napoli" and that "in four hours, the ship will cross Kochi".[137] At 17:00 SMT/17:30 IST, the "death of two fishermen following firing from a ship" was reported to the Coastal Police Station, Neendakara, and the Coastal Police Station, Fort Kochi.[138]

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131 Hearing Transcript, 12 July 2019, 6:9-13, *referring to* Piroli Report (Confidential Annex), p. 2-9 (**Annex IT-233**).

132 Italy's Memorial, para. 4.30, *referring to* E-mail from the Master of the "Enrica Lexie" to Fratelli D'Amato SpA, 13:47 (CET), 15 February 2012 (**Annex IT-111**); Log Book of the Master of the "Enrica Lexie" (**Annex IT-14**); (Confidential Annex), p. 3 (**Annex IT-236**); India's Counter-Memorial, para. 2.34 and Annex to Chapter 2, p. 33. *See also* Italy's Reply, para. 4.13(12).

133 Italy's Memorial, para. 4.31, *referring to* Additional Statement of Umberto Vitelli, 2 March 2012, p. 93 (**Annex IT-157**). *See also* India's Counter-Memorial, para. 2.34; Italy's Reply, paras 4.13(14), 4.29; Hearing Transcript, 9 July 2019, 1:15-17; 4:26-5:1; Hearing Transcript, 15 July 2019, 43:25-44:1.

134 Italy's Memorial, para. 4.32, *citing* Commander in Chief of the Naval Squadron (CINCNAV) Flash Report no. 07/2012, 13:00 (CET), 15 February 2012 (**Annex IT-109**). *See also* Hearing Transcript, 8 July 2019, 73:13-16; 74:17-75:16; Hearing Transcript, 12 July 2019, 6:13-17.

135 Italy's Memorial, para. 4.33, *referring to* First Information Statement relating to First Information Report no. 2 of 2012, Kerala Police, 15 February 2012 (**Annex IT-110**). *See also* Hearing Transcript, 15 July 2019, 151:5-18.

136 Hearing Transcript, 15 July 2019, 151:20-24.

137 Hearing Transcript, 15 July 2019, 152:10-15.

138 Italy's Memorial, paras 4.34-4.35, *referring to* General Diary Extract of Coastal Police Station, Neendakara, Kollam, 15 February 2012 (**Annex IT-113)**; General Diary Abstract of Coastal Police Station, Fort Kochi, Ernakulam, 15 February 2012 (**Annex IT-114**). *See also* Italy's Reply, para. 4.29; Hearing Transcript, 9 July 2019, 5:6-8; Hearing Transcript, 12 July 2019, 7:22-25.

127. At 17:10 SMT/17:40 IST, the Coastal Police Station, Neendakara, informed Coast Guard District HQ 4, Kochi, of a "firing by merchant vessel on fishing boat Saint Antony" at "1630" at position "190 Kochi Lt 45 NM (09 deg 16 min N 076 deg 02 min E)".[139] Coast Guard District HQ 4 then passed on the information to the Maritime Rescue Coordination Centre (hereinafter "MRCC") Mumbai.[140]

128. At 17:20 SMT/17:50 IST, Coast Guard District HQ 4 informed DIG [redacted] of the Coast Guard Air Enclave at Kochi (hereinafter "CGAE"), who flew the Dornier aircraft stationed at Indian Naval Ship (hereinafter "INS") "Garuda", to "stand by ready for a launch".[141] The Coast Guard District HQ 4 also informed Commandant [redacted] aboard ICGS "Lakshmibai", and the ICGS "Samar", which was already at sea, of the incident and instructed them to "stand by".[142]

129. At 17:40 SMT/18:10 IST, the Coast Guard District HQ 4 informed DIG [redacted] "that a fishing boat was fired by a merchant vessel at sea" and directed him to "conduct search for suspected vessel between Kollam and Kadungalloor".[143] The ICGS "Samar" "was diverted to proceed with best speed to areas of incident".[144] According to the Boarding Officer's Report, the "ICGS Samar was directed to divert from area patrol and proceed with maxspeed to reach area and render assistance for apprehension of suspect vessel".[145]

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139 Italy's Memorial, para. 4.36, *citing* Boarding Officer's Report MV "Enrica Lexie", 16-17 February 2012, para. 1 (**Annex IT-9)**. *See also* Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 177 (**Annex IT-131**); Hearing Transcript, 9 July 2019, 5:8-9.

140 Italy's Memorial, para. 4.36, *referring to* Statement of K. Suresh, Adhikari, Coast Guard District HQ 4, Kochi, 18 February 2012 (**Annex IT-132**). *See also* Hearing Transcript, 12 July 2019, 8: 3-7.

141 Italy's Memorial, para. 4.39 *citing* Statement by Commandant [redacted], Coast Guard Air Enclave Kochi, 19 February 2012, p. 1 (**Annex IT-7**); India's Counter-Memorial, para. 2.35. *See also* Hearing Transcript, 16 July 2019, 15:21-24.

142 Italy's Memorial, para. 4.37, *referring to* Boarding Officer's Report MV "Enrica Lexie", 16-17 February 2012, para. 2 (**Annex IT-9**); India's Counter-Memorial, para. 2.35. *See also* Hearing Transcript, 9 July 2019, 5:9-10; Hearing Transcript, 16 July 2019, 133:14-20; 134:13-19.

143 Italy's Memorial, para. 4.59, *referring to* Statement by Commandant [redacted], Coast Guard Air Enclave Kochi, 19 February 2012, p. 1 (**Annex IT-7**). *See also* Italy's Reply, para. 4.44; Boarding Officer's Report MV "Enrica Lexie", 16-17 February 2012, para. 2 (**Annex IT-9**). *See also* Hearing Transcript, 16 July 2019, 16:10-14; 16:17-21.

144 Hearing Transcript, 9 July 2019, 5:11-13, *referring to* Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 175 (**Annex IT-131**).

145 Boarding Officer's Report MV "Enrica Lexie", 16-17 February 2012, para. 1 (**Annex IT-9**). *See also* Hearing Transcript, 16 July 2019, 137:6-20.

130. At 17:47 SMT/18:17 IST, by e-mail, Captain Vitelli reported the incident to Fratelli D'Amato SpA, to the nearest Italian naval vessel in the area (the "Grecale"), to UKMTO, and to the Maritime Security Centre – Horn of Africa (hereinafter "MSCHOA").[146]

131. At approximately 18:30 SMT/19:00 IST, MRCC Mumbai communicated with the "Enrica Lexie" by telephone and spoke to Captain Noviello and Mr. Gupta. The Log Book records in this regard:

> After the event, at approximately 1830 hrs, we were contacted by phone by Bombay MRCC Command and, through 2nd Officer Sahil GUPTA, told us that they had been informed about the suspect pirate attack and, as a result, had seized two crafts. Having enquired about our course and speed, they asked me to change course and head toward Cochin (India) to take stock of events and bear witness. I asked for, and received, a written message. At 1915 hrs we changed course, heading toward Cochin.[147]

132. At 18:30 SMT/19:00 IST, the copy of the SSAS message issued by the "Enrica Lexie" as well as the vessel's technical description were communicated by MRCC Rome to the Presidency of the Council of Ministers of Italy, the Ministry of Transport, the Ministry of Foreign Affairs, the Ministry of Interior, and the Office of the Rome Public Prosecutor. As noted above, the message indicated the "nature of distress" as "[p]iracy/armed attack".[148]

133. By 18:40 SMT/19:10 IST, MRCC Mumbai, using the "AIS [Automatic Identification System] and LRIT [long-range identification and tracking]", had indicated that the "Enrica Lexie" was the "suspected vessel" and found that the "Enrica Lexie" was at position "243 Kochi Lt 37 [nautical] miles, about 34 [nautical] miles" from the position of the incident.[149]

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146 Italy's Memorial, para. 4.31, *referring to* E-mail from the Master of the "Enrica Lexie" to Fratelli D'Amato SpA, 13:47 (CET), 15 February 2012 (**Annex IT-111**). *See also* Hearing Transcript, 9 July 2019, 5:14-20; Hearing Transcript, 12 July 2019, 6:19-23, *referring to* Piroli Report (Confidential Annex), p. 2-10 (**Annex IT-233**).

147 Log Book of the Master of the "Enrica Lexie", p. 2 (**Annex IT-14**). *See also* Italy's Memorial, para. 4.60 *citing* Declaration of Sahil Gupta, 15 February 2012 (**Annex IT-118**); India's Counter-Memorial, paras 2.36-2.37 and p. 33, Annex to Chapter 2; Italy's Reply, para. 4.30; Hearing Transcript, 9 July 2019, 5:21-6:3; Hearing Transcript, 12 July 2019, 9:3-11; 9:23-10:13; Hearing Transcript, 15 July 2019, 44:17-45:20; Hearing Transcript, 18 July 2019, 159:21-160:12; Hearing Transcript, 20 July 2019, 27:8-12.

148 Italy's Memorial, para. 4.40, *referring to* Communication from MRCC Rome to the Presidency of the Council of Ministers of Italy and various Ministries, 14:30 (CET), 15 February 2012 (**Annex IT-107**). *See also* India's Counter-Memorial, para. 2.35, and p. 33, Annex to Chapter 2; Hearing Transcript, 9 July 2019, 6:4-7.

149 Italy's Memorial, para. 4.38, *referring to* National Maritime Search and Rescue Board, Report, 4 June 2012, p. 11 (**Annex IT-6**); Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 175 (**Annex IT-131**). *See also* Hearing Transcript, 9 July 2019, 6:8-11; Hearing Transcript, 12 July 2019, 8:18-26.

134. At 18:50 SMT/19:20 IST, the CGAE received "the name and type of vessel involved in the firing" from Coast Guard District HQ 4.[150]

135. At 19:00 SMT/19:30 IST, Sergeant Latorre called CINCNAV regarding the "request for collaboration" that MRCC Mumbai had submitted via telephone to the Master of the "Enrica Lexie".[151] At 19:05 SMT/19:35 IST, Captain Vitelli also communicated by telephone with CINCNAV.[152]

136. At 19:05 SMT/19:35 IST, from INS "Garuda", DIG [redacted] and two other crew members took off on the Indian Coast Guard Dornier aircraft CG760 for "sea-air coordinated search".[153] At the same time, Commandant [redacted] of ICGS "Lakshmibai" received directions to sail "with dispatch" and "interrogate/identify all the merchant vessels in the area" in search of the vessel involved in the firing.[154] INS "Kabra" also sailed out.[155]

2. The "Enrica Lexie"'s Change of Course

137. The Log Book records that, "at 1915 hrs we changed course, heading toward Cochin".[156]

138. At 19:15 SMT/19:45 IST, Captain Vitelli received a VHF call from the CGAE aboard the Dornier aircraft requesting his "route and speed" and confirming whether the "Enrica Lexie" was heading to Kochi.[157] In DIG [redacted] statements, he asserts that during this phone call, he "directed" the "Enrica Lexie" to amend course further so as to proceed to Kochi.[158]

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150 Italy's Memorial, para. 4.62, *referring to* Statement by Commandant [redacted], Coast Guard Air Enclave Kochi, 19 February 2012, p. 1 (**Annex IT-7**). *See also* Hearing Transcript, 16 July 2019, 16:25-17:8.

151 India's Rejoinder para. 4.51; Hearing Transcript, 12 July 2019, 11:22-12:1, *referring to* Piroli Report (Confidential Annex), p. 2-11 (**Annex IT-233**).

152 India's Rejoinder para. 4.52; Hearing Transcript, 12 July 2019, 12:9-14, *referring to* Piroli Report (Confidential Annex), p. 2-11 (**Annex IT-233**).

153 Italy's Memorial, para. 4.63, *referring to* Statement by Commandant [redacted], Coast Guard Air Enclave Kochi, 19 February 2012, p. 1 (**Annex IT-7**); National Maritime Search and Rescue Board, Report, 4 June 2012, p. 11 (**Annex IT-6**). *See also* Italy's Reply, para. 4.31.

154 Italy's Memorial, para. 4.64, *referring to* Statement of [redacted], Assistant Commandant, Coast Guard District HQ 4, Kochi, 18 February 2012, p. 46 (**Annex IT-134**). *See also* Hearing Transcript, 9 July 2019, 7:2-4; Hearing Transcript, 16 July 2019, 89:16-90:1; 90:14-24.

155 Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 175 (**Annex IT-131**); Statement of K. Suresh, Adhikari, Coast Guard District HQ 4, Kochi, 18 February 2012 (**Annex IT-132**). *See also* Hearing Transcript, 9 July 2019, 7:2-4.

156 Log Book of the Master of the "Enrica Lexie", p. 2 (**Annex IT-14**). *See also* Statement of Umberto Vitelli (**Annex IT-216**); Hearing Transcript, 12 July 2019, 16:21-22.

157 (Confidential Annex), p. 3 (**Annex IT-262**).

158 Statement by Commandant [redacted], Coast Guard Air Enclave Kochi, 19 February 2012, p. 78 (**Annex IT-7**); Statement of Witness in connection with the NIA investigation, Statement of Commandant [redacted]

139. DIG [redacted] reports that the "Enrica Lexie'"s charted course was "supposed to be 345" but at this point, the vessel was instead "doing a east-northeasterly course… [at] about 040".[159] Captain Vitelli states, "at the moment [that the CGAE called] I was changing route".[160] However, Captain Vitelli avers that while, indeed, the "Enrica Lexie" was turning, it was not yet navigating directly for Kochi; rather, the ship directed course toward a point "across from Kochi; that is to say, when the course with respect to the port of Kochi was on the side of the ship".[161]

140. At 19:20 SMT/19:50 IST, the Indian Coast Guard Dornier aircraft located and arrived above the "Enrica Lexie" at 09° 51.6' N 075° 37.5' E, "beyond India's territorial sea".[162] The Dornier aircraft "encircled" and "contacted" the "Enrica Lexie" over VHF in channels 16 and 10.[163]

141. At 19:20 SMT/19:50 IST, four Indian policemen "reported [to] DHQ-4 for embarking onboard" the ICGS "Lakshmibai" in advance of setting sail.[164] According to the testimony of Commandant [redacted], prior to setting sail, the ICGS "Lakshmibai" was "not aware of the name of the ship" and had no orders to intercept any specific vessel.[165] Rather, the ICGS "Lakshmibai" was under general orders to interrogate vessels at sea. According to Commandant [redacted], police officers were brought on board because there had been a "firing incident", which made it a "police matter, not a Coast Guard matter".[166] At 19:30 SMT/20:00 IST, the ICGS "Lakshmibai" set sail out of Kochi, and approximately fifteen minutes thereafter, conducted mock "boarding drills" which lasted around two to three minutes.[167]

[redacted], Coast Guard, 750 Squadron, Coast Guard Air Station, Daman, 19 September 2013, p. 37 (**Annex IT-279**). *See also* Hearing Transcript, 18 July 2019, 163:15-164:1.

159 Hearing Transcript, 16 July 2019, 55:22-56:4.

160 India's Rejoinder, para. 4.54, *referring to* (Confidential Annex), p. 3 (**Annex IT-262**). *See also* Hearing Transcript, 15 July 2019, 46:12-47:5; 78:6-12; Hearing Transcript, 18 July 2019, 163: 11-15.

161 Hearing Transcript, 15 July 2019, 92:7-12. *See also* Hearing Transcript, 18 July 2019, 163:2-4.

162 Italy's Memorial, para. 4.65, *referring to* Statement by Commandant [redacted], Coast Guard Air Enclave Kochi, 19 February 2012 (**Annex IT-7**); Boarding Officer's Report MV "Enrica Lexie", 16-17 February 2012, para. 4 (**Annex IT-9**); India's Counter-Memorial, para. 2.41 and Annex to Chapter 2, p. 34; Italy's Reply, para. 4.3(4), *referring to* Statement of Witness in connection with the NIA investigation, Statement of Shri N.V. Rama Rao, Commandant, Coast Guard, Officer In-Charge, MRCC Mumbai, 16 July 2013, p. 129 (**Annex IT-277**); National Maritime Search and Rescue Board, Report, 4 June 2012, p. 11 (**Annex IT-6**). *See also* Hearing Transcript, 9 July 2019, 6:12-15.

163 Italy's Memorial, para. 4.66, *referring to* Statement by Commandant [redacted], Coast Guard Air Enclave Kochi, 19 February 2012, p. 2 (**Annex IT-7**).

164 Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 175 (**Annex IT-131**). *See also* Hearing Transcript, 16 July 2019, 104:6-12.

165 Hearing Transcript, 16 July 2019, 98:25-3; Hearing Transcript, 20 July 2019, 39:5-41:1.

166 Hearing Transcript, 20 July 2019, 41:15-24. *See also* Hearing Transcript, 16 July 2019, 96:18-22.

167 Italy's Memorial, para. 4.67, *referring to* Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 175 (**Annex IT-131**). *See also* Hearing Transcript, 16 July 2019, 94:13-26.

142. At 19:30 SMT/20:00 IST, Sergeant Latorre sent an Action Report to CINCNAV, the Italian Ministry of Defence, and the Office of the Chief of Staff of the Italian Navy, "informing them of the incident with the craft and the measures taken by the VPD in response".[168] At the same time, Italy's Interforce Operations High Command issued a Flash Report to "recipients including the Office of the President of the Italian Republic, the Ministry of Foreign Affairs, and several offices of the Ministry of Defence" regarding the shooting incident.[169]

143. At 19:45 SMT/20:15 IST, the "Enrica Lexie" responded to radio calls from the ICGS "Lakshmibai", repeating the direction given by the CGAE that the "Enrica Lexie" should continue on to Kochi.[170]

144. By approximately 20:00 SMT/20:30 IST, the "Enrica Lexie" arrived at the point across from Kochi (a true course of 79°) and, at that point, proceeded to turn towards the port of Kochi.[171]

145. At around that time, the following message from MRCC Mumbai was received by the "Enrica Lexie":

> Dear Master […] Refer to telecon todate at around 1330 hrs UTC [Coordinated Universal Time] with MCC Mumbai, duty controller, understand there has been a piracy incident/firing incident by your vessel on a suspicious skiffs at around 1600 hrs LT off allepey in position 09 16 N, 076 02 E. You are requested to head for Kochi and establish communication with Indian Coast Guard, VHF 16 and telephone 91 482 2217164 and 2218969 for further deposition/clarification. Request ETA Kochi. Regards, MRCC Mumbai[172]

146. As set out in Part V, Section B.1 below, Italy and India disagree as to whether the message from MRCC Mumbai was received before or after the "Enrica Lexie" had changed course.

147. Captain Vitelli forwarded the message to MSCHOA and UKMTO, with a copy to Fratelli D'Amato SpA. In the covering e-mail, Captain Vitelli noted: "[p]lease be advised that with reference to the below message from MRCC Mumbai we have altered course and are now

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168 Italy's Memorial, para. 4.41, *referring to* Action Report from Massimiliano Latorre to the Commander in Chief of the Naval Squadron (CINCNAV), 19:30 (IST - 0.5 hours), 15 February 2012 (**Annex IT-108**).

169 Italy's Memorial, para. 4.42, *referring to* Interforce Operations High Command Flash Report no. 016/SO to the Presidency of the Republic of Italy and various Ministries, 15:30 (CET), 15 February 2012 (**Annex IT-115**).

170 Italy's Memorial, para. 4.68, *referring to* Statement of [redacted], Assistant Commandant, Coast Guard District HQ 4, Kochi, 18 February 2012, p. 46 (**Annex IT-134**); Statement of Witness in connection with the NIA investigation, Statement of Deputy Commandant [redacted], Coast Guard, 745 Squadron, Coast Guard Regional Headquarters, Andaman and Nicobar Islands, 19 September 2013, p. 32 (**Annex IT-278**). *See also* Hearing Transcript, 16 July 2019: 110:12-16.

171 Hearing Transcript, 20 July 2019, 34:13-21, *referring to* Log Book of the Master of the "Enrica Lexie" (**Annex IT-14**).

172 Italy's Memorial, para. 4.69, *referring to* E-mail from MRCC Mumbai to Master of the "Enrica Lexie", 15 February 2012 (**Annex IT-8**); E-mail from MRCC Mumbai to the Master of the "Enrica Lexie", 16:10 (CET), 15 February 2012 (**Annex IT-123**).

proceeding towards Cochin. We will revert when we resume the voyage".[173] At 20:40 SMT/21:10 IST, MRCC Rome sent a copy of the report received from Captain Vitelli to the Presidency of the Council of Ministers of Italy, the Ministry of Transport, the Ministry of Foreign Affairs, the Ministry of Interior, and the Office of the Rome Public Prosecutor.[174]

3. Arrival of the "Enrica Lexie" at Kochi Anchorage

148. From the first point of contact with the "Enrica Lexie" until the ship arrived and anchored at Kochi anchorage, the Dornier aircraft remained in communication with and in the vicinity of the "Enrica Lexie". According to DIG [redacted]: "We contacted them continuously over VHF. The ship altered the course towards Kochi and we shadowed it to Kochi anchorage till 22.30 hrs".[175] At approximately 21:00 SMT/21:30 IST, ICGS "Lakshmibai" arrived at the location of the "Enrica Lexie" and sailed alongside it to the "outer anchorage of Kochi".[176]

149. The "Enrica Lexie" arrived at Kochi anchorage at 21:18 SMT/21:48 IST and began to drop anchor at that time, at position 09º 56.0' N 076º 04.1' E, "within India's territorial sea".[177] The "Enrica

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173 Hearing Transcript, 12 July 2019, 14:25-15:1; 15:18-23, *referring to* Piroli Report (Confidential Annex), p. 2-12 (**Annex IT-233**); E-mail from the Shipmaster of the "Enrica Lexie" to MSCHOA and UKMTO dated 15 February 2012 at 19:47 IST (**Annex IN-36**). *See also* E-mail from the Master of the "Enrica Lexie" to MSCHOA and UKMTO, 16:18 (CET), 15 February 2012 (**Annex IT-120**). The time stamp on Annex IT-120 is different from the one in Annex IN-36.

174 Italy's Memorial, para. 4.43, *referring to* Communication from MRCC Rome to the Presidency of the Council of Ministers of Italy and various Ministries, 16:40 (CET), 15 February 2012 (**Annex IT-116**).

175 Italy's Memorial, para. 4.66, *referring to* Statement by Commandant [redacted], Coast Guard Air Enclave Kochi, 19 February 2012, p. 2 (**Annex IT-7**); Statement filed on behalf of the Coast Guard, Kochi, 28 February 2012, para. 6 (**Annex IT-152**). *See also* India's Rejoinder, para. 4.62; Hearing Transcript, 15 July 2019, 52:3-25; 93:11-26; Hearing Transcript, 16 July 2019, 6:10-19; 19:14-20:16; Hearing Transcript, 18 July 2019, 167:12-16.

176 Italy's Memorial, para. 4.71, *referring to* Statement of [redacted], Assistant Commandant, Coast Guard District HQ 4, Kochi, 18 February 2012, pp 1-2 (**Annex IT-134**). *See also* India's Counter-Memorial, para. 2.42; Italy's Reply, paras 4.54-4.55, 4.59; India's Rejoinder, para. 4.62; Hearing Transcript, 9 July 2019, 7:13-15; Hearing Transcript, 18 July 2019, 168:3-15; Hearing Transcript, 20 July 2019, 42:15-16; 43:5-13.

177 Italy's Memorial, para. 4.72, *referring to* Log Book of the Master of the "Enrica Lexie", p. 2 (**Annex IT-14**); Extract from the "Enrica Lexie" Log Book for 15 February 2012 (**Annex IT-121**); Statement of Umberto Vitelli (**Annex IT-216**). *See also* Italy's Reply, para. 4.32.

Lexie" finished anchoring at 22:05 SMT/22:35 IST, 4.5 nautical miles off the shore of Kochi, at position 09º 56.19' N 076º 07.06' E.[178] ICGS "Samar" also reached the area that night.[179]

150. Captain Noviello testified that the Indian Coast Guard assured the "Enrica Lexie" through VHF immediately prior to mooring that they would not "waste more than six hours' time".[180] According to him, however, the Coast Guard failed to board the "Enrica Lexie" that night, stating that the sea was too rough.[181]

151. The Dornier aircraft remained above the "Enrica Lexie" until 22:45 SMT/23:15 IST.[182] At 23:09 SMT/23:39 IST, Captain Vitelli informed MRCC Mumbai by e-mail that the "Enrica Lexie" had instructions to resume its voyage "not later than 06:00 on 16 February 2012". In response, MRCC Mumbai requested that the "Enrica Lexie" "be in the anchored position" until the completion of the investigation by Indian authorities of "the firing incident".[183]

152. At 22:45 SMT/23:15 IST, once the "St. Antony" had reached the shore at Kollam, Captain Fredy informed the Kerala Police (District of Kollam, Coastal Police Station, Neendakara) of the firing "in the vicinity of the ["St. Antony"]" and "the deaths of two fishermen aboard the vessel, Mr. Pink[u] and Mr. Jelastine, at between approximately 31 and 33 nautical miles north-west of Neendakara".[184]

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178 Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 175 (**Annex IT-131**); Statement by Commandant [redacted], Coast Guard Air Enclave Kochi, 19 February 2012, p. 2 (**Annex IT-7**); Statement of [redacted], Assistant Commandant, Coast Guard District HQ 4, Kochi, 18 February 2012, p. 2 (**Annex IT-134**); Boarding Officer's Report MV "Enrica Lexie", 16-17 February 2012, para. 6 (**Annex IT-9**); Statement of Witness in connection with the NIA investigation, Statement of Deputy Commandant [redacted], Coast Guard, 745 Squadron, Coast Guard Regional Headquarters, Andaman and Nicobar Islands, 19 September 2013, p. 33 (**Annex IT-278**). *See also* Hearing Transcript, 20 July 2019, 43:23-25; Hearing Transcript, 18 July 2019, 171:19-22; Hearing Transcript, 16 July 2019, 79:22-80:3.

179 Italy's Memorial, para. 4.72, *referring to* Boarding Officer's Report MV "Enrica Lexie", 16-17 February 2012, para. 5 (**Annex IT-9**); India's Counter-Memorial, para. 2.43 and Annex to Chapter 2, p. 34. *See also* Hearing Transcript, 16 July 2019, 148:6-22. After the "Enrica Lexie"'s anchorage at Kochi, from 16 February 2012, Italy in its pleadings refers to events in IST, although it explains that the "Enrica Lexie" did not adjust its clocks to IST until 01:00 IST on 17 February 2012. *See* Italy's Memorial, para. 4.75, n. 295.

180 Hearing Transcript, 15 July 2019, 117:14-17.

181 Hearing Transcript, 15 July 2019, 117:18-23.

182 Italy's Memorial, para. 4.74, *referring to* Statement by Commandant [redacted], Coast Guard Air Enclave Kochi, 19 February 2012, p. 2 (**Annex IT-7**).

183 Italy's Memorial, paras 4.75, 4.77, *referring to* E-mail from the Master of the "Enrica Lexie" to MRCC Mumbai, 23:39 (IST), 15 February 2012, and E-mail from MRCC Mumbai to the Master of the "Enrica Lexie", 21:14 (CET), 15 February 2012 (**Annex IT-122**).

184 Italy's Memorial, para. 4.45, *referring to* First Information Statement relating to First Information Report no. 2 of 2012, Kerala Police, 15 February 2012 (**Annex IT-110**); First Information Report no. 2 of 2012, Kerala Police, 15 February 2012 (**Annex IT-117**).

153. The "Enrica Lexie" was monitored for the rest of the night by Coast Guard patrols. At 12:50 SMT/1:20 IST, the Chairman of the Cochin Port Trust received a fax from the Coast Guard District HQ 4 instructing that the "Enrica Lexie should not be permitted to leave Kochi Anchorage without permission of State Police/Coast Guard".[185]

154. The next day, on 16 February 2012, Italy and India, respectively, commenced investigations and subsequently initiated proceedings in relation to the "Enrica Lexie" incident. The Indian investigation and proceedings are set out in Section D below, followed by the Italian investigation and proceedings in Section E.

D. THE INDIAN INVESTIGATION AND PROCEEDINGS

1. Investigations within the Kochi Anchorage Position

155. On 15 February 2012, through the registration of a First Information Report at the Coastal Police Station in Neendakara, Kollam, the Kerala Police initiated investigation into a complaint by the owner and captain of the "St. Antony" concerning the killing of two Indian fishermen. The First Information Report referred to Section 302 of the Indian Penal Code, which addresses the crime of murder.[186]

156. On 16 February 2012, at 9:30 IST, the ICGS "Lakshmibai" was instructed to board the "Enrica Lexie" with a "boarding party" constituted of Commandant [redacted], 36 police officers, including the assistant commissioner of police, and three commandos (hereinafter the "Boarding Party").[187]

157. Between 10:30 and 11:30 IST,[188] the Boarding Party boarded the "Enrica Lexie" and commenced their investigation. According to the testimony of Commandant [redacted], the Boarding Party

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185 Italy's Memorial, para. 4.76, *referring to* Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 175 (**Annex IT-131**). *See also* Italy's Reply, paras 4.61-4.62; Hearing Transcript, 16 July 2019, 145:21-146:7.

186 Italy's Memorial, paras 6.20-6.21, *referring to* First Information Report no. 2 of 2012, Kerala Police, 15 February 2012 (**Annex IT-117**).

187 Boarding Officer's Report MV "Enrica Lexie", 16-17 February 2012, para. 6 (**Annex IT-9**); Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 175 (**Annex IT-131**). *See also* Hearing Transcript, 16 July 2019, 152:10-20.

188 The exact time of boarding is uncertain. *See* Italy's Memorial, para. 4.79, *referring to* Boarding Officer's Report MV "Enrica Lexie", 16-17 February 2012, p. 129 (**Annex IT-9**) (stating that the boarding occurred at about 10:30 IST); Log Book of the Master of the "Enrica Lexie", p. 3 (**Annex IT-14**) (stating that the boarding took place at around 10:45 SMT). *See also* Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 175 (**Annex IT-131**) (stating that the boarding occurred at 11:28 IST); Commandant [redacted] testimony in Hearing Transcript, 16 July 2019, 154:24-155:1 (stating that the boarding took place "by" 11:30 IST).

boarded the "Enrica Lexie" unarmed, except for a gunnery sailor.[189] He also testifies that at approximately one hour later, another police officer boarded the "Enrica Lexie" armed with a pistol.[190]

158. According to the Log Book, the Coast Guard asserted that the incident came "under the jurisdiction of their territorial waters".[191] Further, the Coast Guard "informed [those on the "Enrica Lexie"] that they were under investigation for the murder of the two fishermen".[192] Captain Vitelli and Sergeant Latorre declined to provide details of the incident "until the Italian Consul General arrived from Mumbai".[193]

159. According to the testimony of Commandant [redacted], he engaged in a ten to fifteen minute discussion with the Marines attempting to convince them to come inside the harbour for investigation.[194] Sergeant Latorre indicated that the VPD is "exclusively answerable to Italian Judicial Authorities" and that the Italian authorities were investigating the incident.[195] Sergeant Latorre submitted to the Boarding Party a written statement that the Marines aboard the ship were answerable solely to Italian judicial authorities.[196] The document contains the following language:

> Please be informed that on board of this Vessel there is a duly appointed Protection Detachment acting as Law Enforcement Detachment. The Detachment belongs to Italian Navy and is exclusively answerable to Italian Judicial Authorities.
>
> Under International Law, the detachment is afforded with judicial immunities as internationally recognized in respect of military forces in transit. The presence of the detachment under Indian Jurisdiction is solely due to the diversion of the vessel.
>
> The events occurred which the Indian Authorities are investigating are currently investigated by Italian authorities which are the sole competent judicial authorities under article 97 of the United Nations Convention on the High Seas.
>
> The weapons and the witnesses material to the investigations are under exclusive Italian judicial authority.

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189 Hearing Transcript, 16 July 2019, 168:8-169:-8; 170:8-13.

190 Hearing Transcript, 16 July 2019, 169:21-170:3.

191 Log Book of the Master of the "Enrica Lexie", p. 3 (**Annex IT-14**).

192 Italy's Memorial, para. 4.81, *referring to* "Coast Guard, fishermen made a smart move", The Times of India (Electronic Edition), 18 February 2012 (**Annex IT-39**).

193 Log Book of the Master of the "Enrica Lexie", p. 3 (**Annex IT-14**); Boarding Officer's Report MV "Enrica Lexie", 16-17 February 2012, para. 9 (**Annex IT-9**).

194 Hearing Transcript, 16 July 2019, 160:10-15.

195 Italy's Memorial, para. 4.82, *referring to* Boarding Officer's Report MV "Enrica Lexie", 16-17 February 2012, paras 10-11 (**Annex IT-9**); Statement of Massimiliano Latorre addressed to the Indian authorities, 16 February 2012 (**Annex IT-124**).

196 Statement of Massimiliano Latorre addressed to the Indian authorities, 16 February 2012 (**Annex IT-124**). *See also* Boarding Officer's Report MV "Enrica Lexie", 16-17 February 2012, para. 9 (**Annex IT-9**); Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 175 (**Annex IT-131**); Hearing Transcript, 16 July 2019, 162:11-165:15.

> I'm not authorized to provide any information on ongoing investigations nor to hand over any evidence nor surrender any component of the detachment without authorization of the Italian Authorities.[197]

160. However, upon further "interrogation" by the Boarding Party, Captain Vitelli submitted the crew list, the Last Port clearance, Seamen books of the crew, and the identification cards of the Italian marines.[198] An accounting of the weapons aboard the ship was also taken by the Boarding Party, and, according to the Boarding Officer's Report, "[c]ontinuous pressure was maintained on the crew and master to furnish details of the weapons and surrender them".[199]

161. According to Captain Vitelli, the Kerala Police seized and copied the Voyage Data Recorder ("VDR") hard disk.[200]

162. According to the inspection/detention memorandum completed by Commandant [redacted], by 11:30 IST, Commandant [redacted] had "formally detained" the "Enrica Lexie".[201] At 17:32 IST, the Indian Ministry of External Affairs sent a facsimile message to Commandant [redacted] with instructions to bar the "Enrica Lexie" from leaving the Kochi anchorage and to bring the ship into port.[202]

163. Soon thereafter, at 18:18 IST, Consul of Italy Giampaolo Cutillo arrived at the "Enrica Lexie", and negotiations between the Boarding Party and the crew and Marines began. During these negotiations, the Indian authorities invited the "Enrica Lexie" to come into port. Following the meeting, Captain Vitelli indicated that the "Enrica Lexie" intended to stay moored where it was. However, the Log Book indicates that it was "made clear that the invitation" to enter Kochi port "is actually an order".[203] The Italian authorities advised the Master, crew, and VPD of the "Enrica Lexie" to cooperate with the Indian agencies in the investigation.[204] It is Italy's position that the

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197 Statement of Massimiliano Latorre addressed to the Indian authorities, 16 February 2012 (**Annex IT-124**).

198 Hearing Transcript, 16 July 2019, 166:12-167:5. *See also* Boarding Officer's Report MV "Enrica Lexie", 16-17 February 2012, para. 10 (**Annex IT-9**).

199 Hearing Transcript, 16 July 2019, 167:9-24. *See also* Boarding Officer's Report MV "Enrica Lexie", 16-17 February 2012, paras 10-11 (**Annex IT-9**).

200 Hearing Transcript, 18 July 2019, 137:8-12; Hearing Transcript, 20 July 2019, 23:11-19, *referring to* (Confidential Annex), p. 4 (**Annex IT-262**). *See also* Statement of Witness in connection with the NIA investigation, Statement of Mr. Vitelli Umberto, Master of "Enrica Lexie", 9 August 2013, pp 46-47 (**Annex IN-28**); Statement of Witness in connection with the NIA Investigation, Statement of Shri Victor James Mandley Samson, p. 50 (**Annex IN-31**).

201 Inspection/Detention Memo for Boarding Officer, 16 February 2012 (**Annex IT-285**). *See also* Hearing Transcript, 16 July 2019, 157:18-22.

202 Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 176 (**Annex IT-131)**; Hearing Transcript, 16 July 2019, 172:10-173:1.

203 Boarding Officer's Report MV "Enrica Lexie", 16-17 February 2012, para. 11 (**Annex IT-9**); Log Book of the Master of the "Enrica Lexie", p. 3 (**Annex IT-14**).

204 Italy's Memorial, paras 4.86, 4.88, *referring to* Log Book of the Master of the "Enrica Lexie", p. 3 (**Annex IT-14**); Boarding Officer's Report MV "Enrica Lexie", 16-17 February 2012, para. 2 (**Annex IT-9**).

VPD Marines, therefore, "could not 'freely accept or decline' to enter into India's territorial sea or to be brought into its internal waters and land territory".[205]

2. Investigations within Kochi Port and Indian Land Territory

164. After declining several times the Indian authorities' request that it enter the port of Kochi, the "Enrica Lexie" eventually entered the port, "weighed anchor" at 22:35 IST, and subsequently, with the help of an Indian pilot, navigated to Kochi Oil Terminal.[206] At approximately 1:40 IST on 17 February 2012, the "Enrica Lexie" "came alongside" Kochi Oil Terminal.[207] Subsequently, at 3:30 IST, the Indian Coast Guard and the Boarding Party, after waiting for the arrival of a vehicle from the base, disembarked from the "Enrica Lexie".[208]

165. The Indian authorities took the following documents from the "Enrica Lexie":

> (1) Ship Particulars of M.T. ENRICA LEXIE (IMO No: 9489297) – 2 sheets; (2) Crew List (24 Persons) – 1 sheet; (3) Crew List of Security Persons) [6 persons] – 1 sheet; (4) Drawn-to-scale of midship section – 1 sheet; (5) Notice for Crew in Connection with Company Security officer – 1 sheet; and (6) Notice for crew in connection with Designated Person ashore – 1 sheet.[209]

166. On 18 February 2012, Captain Vitelli and Sergeant Latorre each signed on board the "Enrica Lexie" a statement that they did "not recognize the photo published by the media of the vessel 'M/P St. Antony' as the boat with which [they] had dealings on 15 Feb 2012".[210] Similarly, in his testimony, Captain Noviello questioned whether the "St. Antony" was the craft encountered by the "Enrica Lexie".[211]

167. On the morning of 19 February 2012, the Indian police disembarked Captain Vitelli for questioning, which did not result in any details of the incident of 15 February 2012 being provided

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205 Hearing Transcript, 18 July 2019, 118:10-13.

206 Italy's Memorial, paras 4.89-4.90, *referring to* Log Book of the Master of the "Enrica Lexie", p. 3 (**Annex IT-14**); Boarding Officer's Report MV "Enrica Lexie", 16-17 February 2012, para. 12 (**Annex IT-9**).

207 Italy's Memorial, para. 4.90, *referring to* Boarding Officer's Report MV "Enrica Lexie", 16-17 February 2012, para. 12 (**Annex IT-9**); Log Book of the Master of the "Enrica Lexie", p. 3 (**Annex IT-14**); Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 176 (**Annex IT-131**). *See also* Hearing Transcript, 16 July 2019, 173:13-16.

208 Italy's Memorial, para. 4.90, *referring to* Boarding Officer's Report MV "Enrica Lexie", 16-17 February 2012, para. 12 (**Annex IT-9**). *See also* Hearing Transcript, 16 July 2019, 174:1-8.

209 Italy's Memorial, para. 4.94, *referring to* Inventory of documents seized, prepared by R. Jayaraj, Circle Inspector of Police, Coastal Police Station, Kollam, 17 February 2012 (**Annex IT-129**).

210 Italy's Memorial, para. 4.97, *referring to* Declaration of Umberto Vitelli, 18 February 2012 (**Annex IT-135**); Declaration of Massimiliano Latorre, 18 February 2012 (**Annex IT-136**).

211 Hearing Transcript, 15 July 2019, 135:14-25.

by the Captain.[212] At 10:15 IST, the Indian Mercantile Marine Department,[213] boarded the "Enrica Lexie" to commence its investigations. R. Jayaraj, of the Coastal Police Station in Neendakara, Kollam, prepared an inventory listing documents produced by Captain Vitelli and seized by Indian police, namely:

> (1) port clearance certificate; (2) certain pages of the Enrica Lexie log book; (3) pages from the bell book; (4) oil loading and unloading details; (5) email dated 15 February 2012; (6) English version of "Protocol of Agreement between Ministry of Defence, Naval Staff and Italian Shipowner's Confederation"; and (7) pages from the passage planning of the Enrica Lexie.[214]

168. At 16:00 IST on the same day, the Kerala Police escorted the Marines from the "Enrica Lexie" and arrested them at Wellington Island, Kochi Oil Terminal Berth, "on an allegation of murder".[215] India contends that it was only at the point of their arrest, and not before, that the Marines claimed for the first time that their "asserted immunities were violated".[216] In the Log Book, Captain Vitelli recorded the following regarding the arrest:

> Upon request of W.O. Class 1 Massimiliano Latorre the following statement, issued before the Kerala State Police authorities tasked with forcibly taking him ashore, is put on record: "I am a member of the Italian Armed Forces, subject exclusively to National jurisdiction in compliance with the principle of Immunity of Military Forces in Transit. I consider this coercive attempt at excluding Italian jurisdiction illegal".[217]

169. Several Indian policemen remained aboard the "Enrica Lexie", undertaking their investigation, including investigations by a "ballistic expert" and the preparation of a "seizure memo".[218]

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212 Italy's Memorial, para. 4.99, *referring to* (Confidential Annex) (**Annex IT-248**).

213 The mandate of the Indian Mercantile Marine Department is "to administer the various Merchant Shipping Laws" and rules including those relating to safety of ships and life at sea, inquiries into shipping casualties and wrecks, Global Maritime Distress and Safety Systems, and navigational aids. *See* Italy's Memorial, para. 4.100, *citing* Mercantile Marine Department, Mumbai, website <http://www.dgshipping.gov.in/Content/mumbai.aspx> (**Annex IT-232)**.

214 Italy's Memorial, para. 4.100, *referring to* Inventory of documents seized by the Indian police, prepared by R. Jayaraj, Circle Inspector of Police, Coastal Police Station, Neendakara, Kollam, 19 February 2012 (**Annex IT-143**).

215 Italy's Memorial, paras 4.101, 6.22, *referring to* Remand Report in Crime 02/2012 U/S 302 IPC, Coastal Police Station, Neendakara, Kollam, 20 February 2012, p. 28 (**Annex IT-144**); Log Book of the Master of the "Enrica Lexie" (**Annex IT-14**); Affidavit of R. Jayaraj, Circle Inspector of Police, Coastal Police Station, Neendakara, Kollam, 1 March 2012, para. 16 (**Annex IT-153**); Kerala Charge Sheet, 18 May 2012, pp 1, 9 (**Annex IT-171**).

216 Hearing Transcript, 20 July 2019, 59:23-60:2; 60:10-15.

217 Italy's Memorial, para 4.102, *citing* Log Book of the Master of the "Enrica Lexie", p. 4 (**Annex IT-14**).

218 Italy's Memorial, paras 4.102-4.103, *referring to* Log Book of the Master of the "Enrica Lexie", p. 4 (**Annex IT-14**); (Confidential Annex) (**Annex IT-248**). *See also* Kerala Charge Sheet, 18 May 2012 (**Annex IT-171**); Hearing Transcript, 10 July 2019, 49:20-25.

170. On 20 February 2012, the "Enrica Lexie" moved from Kochi Oil Terminal to a mooring position in Indian internal waters, approximately 6.2 nautical miles from Kochi, with approximately fifteen Indian policemen remaining on board.[219]

3. India's Judicial Process in Relation to the Marines

171. On 21 February 2012, "a search warrant was sought" to permit a search of the "Enrica Lexie", which was conducted on 25 February 2012 in the presence of officials of the Italian Government.[220]

172. On 2 May 2012, the Supreme Court of India ordered that "the Government of Kerala and its authorities shall allow the ["Enrica Lexie"] to commence her voyage".[221] The "Enrica Lexie" "[sailed] out of Indian waters" on 5 May 2012.[222]

(a) Conditions of Detention of the Marines

173. On 1 March 2012, the Marines sought to challenge the conditions of their detention with the Chief Judicial Magistrate in Kollam on grounds of safety concerns and their immunity as "military personnel of a Sovereign country performing state functions of protecting the interest of vessels of Italy flying Italian flags as agents and representatives of State".[223] On 5 March 2012, following a subsequent application by the Marines, the Chief Judicial Magistrate ordered that the Marines be transferred to "judicial custody" in the Central Prison and separated from other prisoners.[224]

174. On 9 May 2012, the Supreme Court of India gave leave for the Marines to apply for bail. The bail application was rejected by the Chief Judicial Magistrate in Kollam on 11 May 2012.[225]

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219 Italy's Memorial, para. 4.103, *referring to* (Confidential Annex) (**Annex IT-248**).

220 Kerala Charge Sheet, 18 May 2012 (**Annex IT-171**); Hearing Transcript, 10 July 2019, 50:13-15.

221 Italy's Memorial, para. 4.104, *citing M.T. Enrica Lexie and Another v. Doramma and Others* (2012) 6 SCC 760, p. 769, para. 29 (**Annex IT-181**).

222 Italy's Memorial, para. 4.104, *referring to* "Italian ship allowed to leave Kochi on execution of bond", The Hindu, 6 May 2012 (**Annex IT-169**). *See also* Italy's Reply, para. 4.64.

223 Italy's Memorial, para. 6.25, *citing* Application for Directions filed on behalf of Massimiliano Latorre and Salvatore Girone before the Chief Judicial Magistrate, Kollam, 1 March 2012, p. 4 (**Annex IT-155**).

224 Italy's Memorial, para. 6.25, *referring to* Application for Directions filed on behalf of Massimiliano Latorre and Salvatore Girone before the Chief Judicial Magistrate, Kollam, 5 March 2012 (**Annex IT-158**); Order of the Chief Judicial Magistrate, Kollam, 5 March 2012 (**Annex IT-159**).

225 Italy's Memorial, para. 6.28, *referring to* Order of the Supreme Court of India, 9 May 2012, para. 10 (**Annex IT-170**); Order of the Sessions Judge, Kollam, 19 May 2012, p. 8 (**Annex IT-172**).

175. On 18 May 2012, the Kerala Police concluded their investigation and "filed in court a 'Final Report' (or 'Charge Sheet') against the Marines", including the crime of murder under Indian law.[226]

176. On 19 May 2012, the Court of the Sessions Judge, Kollam, rejected another bail application by the Marines stating that, as the investigation by the Kerala Police had been completed and the Charge Sheet filed, the "proper remedy" was to expedite the trial.[227]

177. The Marines were detained in custody until 30 May 2012, when they were granted bail by the High Court of Kerala which contained the conditions that the Marines:[228]

> (1) surrender their passports; (2) remain within "the territorial limits of the City Police Commissioner, Kochi", except to attend Court in Kollam; (3) "stay in a building within a distance of 10 kms from the office of the City Police Commissioner, Kochi"; and (4) appear before the "City Police Commissioner, Kochi" every day between 10:00 and 11:00.[229]

178. The Marines remained in Kerala, save for a two-week period in December 2012 and January 2013 when they returned to Italy. Following the Supreme Court Judgment of 18 January 2013, which found that the Union of India, rather than the State of Kerala, had jurisdiction over the Marines, they moved to Delhi.[230]

(b) **Writ Petitions Filed by the Marines**

179. On 22 February 2012, Italy and the Marines filed Writ Petition 4542 of 2012 in the High Court of Kerala, contending that "India did not have jurisdiction under its own domestic law; that Italy had exclusive jurisdiction under UNCLOS; and that in any event, under international law, the Marines had immunity from Indian criminal jurisdiction".[231] Subsequently, on 19 April 2012, Italy and the Marines filed Writ Petition 135 of 2012 in the Supreme Court of India, contending that the dispute in question was "between two sovereign States" and seeking a declaration that (i) any action by India in relation to the "alleged incident under any Indian law was illegal"; (ii) "the continued detention of the two Marines […] was illegal"; and (iii) India will "take all steps as

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226 Italy's Memorial, para. 6.26, *referring to* Kerala Charge Sheet, 18 May 2012 (**Annex IT-171**).

227 Italy's Memorial, para. 6.28, *citing* Order of the Sessions Judge, Kollam, 19 May 2012, p. 8 (**Annex IT-172**).

228 Italy's Memorial, para. 6.24.

229 Italy's Memorial, para. 6.29, *referring to* Order of the High Court of Kerala, 30 May 2012, para. 7 (**Annex IT-173**).

230 Italy's Memorial, para. 6.30, *referring to* Order of the High Court of Kerala, 20 December 2012 (**Annex IN-3**); *Republic of Italy & Ors v. Union of India & Ors*, Supreme Court of India, Judgment of 18 January 2013, Judgment of Kabir CJ, paras 100-103 (**Annex IT-19**).

231 Italy's Memorial, para. 6.31, *referring to* Writ Petition No. 4542 of 2012, 22 February 2012 (**Annex IT-15**); India's Counter-Memorial, para. 3.21.

may be necessary to secure custody of the two Marines and transfer them to the Italian Republic".[232]

180. On 29 May 2012, the High Court of Kerala dismissed Writ Petition 4542 of 2012, finding that India and the Kerala authorities had jurisdiction on the basis that, even though the incident occurred outside India's territorial waters and within India's contiguous zone, the Notification of the Ministry of Home Affairs of the Republic of India, No. S.O. 671(E), dated 27 August 1981 (hereinafter the "1981 Notification") made the Indian Penal Code and the Indian Code of Criminal Procedure "applicable to the entirety of India's exclusive economic zone". It also held that this conclusion was "not incompatible with the provisions of [the Convention]".[233] The Court stated:

> In this case there was no 'entry' by the Italian Marines to the territory of India, but a merciless attack of gunshots at fishermen, while passing through the CZ/EEZ of India, bre[a]ching all established guidelines and norms, and without any cause. It can be treated only as a case of brutal murder and can in no way be masqueraded as a discharge of the sovereign function.[234]

181. On 11 July 2012, Italy and the Marines filed an appeal through a Special Leave Petition 20370 of 2012 to the Supreme Court against the decision of the High Court of Kerala. The appeal was joined with Writ Petition 135 of 2012.[235]

182. On 18 January 2013, the Supreme Court delivered its judgment, in which it, *inter alia*, found that the Union of India, as opposed to the State of Kerala, "had federal criminal jurisdiction over the Marines", ordered that a "Special Court" be established to try the Marines, and stated that the question of jurisdiction could be "re-agitated" before the Special Court.[236] Italy notes that the Supreme Court "left Article 100 of UNCLOS unaddressed, with the possibility that Italy's assertion of flag-state jurisdiction rights may be vindicated through Article 100".[237]

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232 Italy's Memorial, para. 6.32, *citing* Writ Petition No. 135 of 2012, 19 April 2012 (**Annex IT-16**); India's Counter-Memorial, para. 3.21.

233 Italy's Memorial, paras 6.33-6.34, *citing* Judgment of the High Court of Kerala, 29 May 2012, paras 18-33 (**Annex IT-17)**.

234 Italy's Memorial, para. 6.35, *citing* Judgment of the High Court of Kerala, 29 May 2012, para. 48 (**Annex IT-17**).

235 Italy's Memorial, para. 6.36, *referring to* Special Leave Petition 20370 of 2012, 11 July 2012 (**Annex IT-18**); India's Counter-Memorial, para. 3.21.

236 Italy's Memorial, para. 6.39, *citing Republic of Italy & Ors v. Union of India & Ors*, Supreme Court of India, Judgment of 18 January 2013, Judgment of Kabir CJ, paras 100-103 (**Annex IT-19**); India's Counter-Memorial, para. 3.22.

237 Hearing Transcript, 18 July 2019, 231:24-232:3.

183. Subsequent to its judgment, the Supreme Court ordered that the Marines be moved to Delhi subject to similar bail conditions as those required by the High Court of Kerala.[238]

184. On 1 April 2013, the investigation and prosecution of the case against the Marines was entrusted by the Indian Ministry of Home Affairs to the National Investigation Agency of India (hereinafter the "NIA"). Such investigation would, as the NIA indicated, cover offences under the Indian Penal Code as well as offences under Section 3 of the Suppression of Unlawful Acts Against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002 (hereinafter the "SUA"). On 15 April 2013, the Ministry of Home Affairs identified "the Court of Additional Sessions Judge-01, Patiala House, New Delhi" as the "Special Designated Court" to try the Marines.[239] In September 2013, the NIA took statements from the crew members of the "Enrica Lexie" regarding the incident.[240]

185. On 13 January 2014, the Marines filed an application in the Supreme Court contesting "India's attempt to invoke the provisions of SUA".[241] On 24 February 2014, N.S. Bisht, Under Secretary in the Ministry of Home Affairs, provided the opinion of the Law Ministry that "the provisions of the SUA Act are not attracted to this case" and stated that "appropriate steps will be taken to ensure that the charge sheet reflects this opinion",[242] which was recorded in an Order of the same date by the Supreme Court.[243]

186. On 6 March 2014, the Marines filed a Writ Petition under Article 32 of the Constitution of India before the Supreme Court challenging the jurisdiction of the NIA under Indian law, the legality of the Special Court, and the jurisdiction of India, as well as reasserting their immunity.[244] Following this, by Order dated 28 March 2014, the Supreme Court placed the Special Court's

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238 Italy's Memorial, para. 6.57, *referring to Republic of Italy & Ors v. Union of India & Ors*, Supreme Court of India, Judgment of 18 January 2013, pp 2-4 (**Annex IT-19**).

239 Italy's Memorial, paras 6.59-6.60, *referring to* Order of the Ministry of Home Affairs of India of 1 April 2013 (**Annex IT-190**); Indian Suppression of Unlawful Acts Against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002, Section 3 (**Annex IT-71**); Notification of the Ministry of Home Affairs of India of 15 April 2013 (**Annex IT-44**).

240 Hearing Transcript, 18 July 2019, 127:23-128:5.

241 Italy's Memorial, para. 6.64 *referring to* Application for Directions, 13 January 2014, p. 4 (**Annex IT-51**); India's Counter-Memorial, para. 3.27.

242 Italy's Memorial, para. 6.65, *citing* Application for Directions, 13 January 2014, p. 4 (**Annex IT-51**); Affidavit of N.S. Bisht, Under Secretary, Ministry of Home Affairs of India, 24 February 2014, paras 2-3 (**Annex IT-54**).

243 Italy's Memorial, para. 6.67, *referring to* Order of the Supreme Court of India of 24 February 2014 (**Annex IT-55**).

244 Italy's Memorial, paras 6.68-6.69, *referring to* Writ Petition No. 236 of 2014 under Article 32 of the Constitution of India, 6 March 2014 (**Annex IT-56**); India's Counter-Memorial, para. 3.28.

proceedings in abeyance. The period of adjournment was later extended by subsequent Orders.[245] The Writ Petition was not finally decided.[246]

(c) **Bail Conditions of the Marines**

187. On 22 February 2013, the Supreme Court of India allowed both Marines to travel to Italy for a four-week period to enable them to vote in the European Union elections.[247]

188. On 5 September 2014, Sergeant Latorre applied for permission to travel to Italy for medical reasons. On 12 September 2014, the Supreme Court granted him permission to return for a three-month period. On 9 December 2014, he applied for an extension, which the Supreme Court granted at a hearing on 14 January 2015, and then at further hearings on 9 April 2015, 13 July 2015, 13 January 2016, and 26 April 2016.[248] After the hearing on 26 April 2016, the Supreme Court extended Sergeant Latorre's time in Italy to 30 September 2016.[249]

189. On 7 September 2016, Sergeant Latorre applied to the Supreme Court of India to remain in Italy on bail. A hearing was scheduled before the Supreme Court on 28 September 2016 to address this application.[250] Sergeant Latorre was allowed to remain in Italy during the present Arbitration to undergo rehabilitation, treatment, and therapy following a brain stroke and heart surgery.[251]

190. On 9 December 2014, Sergeant Girone made an application to the Supreme Court to be allowed to return to Italy.[252] He later withdrew the application.[253]

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245 India's Counter-Memorial, para. 3.29; Italy's Memorial, para. 6.71, *referring to* Order of the Supreme Court of India of 28 March 2014 (**Annex IT-57**); Order of the Special Designated Court of 31 March 2014 (**Annex IT-58**).

246 Italy's Memorial, para. 6.72; India's Counter-Memorial, para. 3.30.

247 Italy's Memorial, para. 6.74, *referring to* Order of the Supreme Court of India of 22 February 2013 (**Annex IT-48**).

248 Italy's Memorial, para. 6.75, *referring to* (Confidential Annex) (**Annex IT-21**); (Confidential Annex) (**Annex IT-23**); Supreme Court of India Order of 9 April 2015 granting a further extension to Sergeant Latorre (**Annex IT-31**); Order of the Supreme Court of India of 13 July 2015 (**Annex IT-41**); Order of the Supreme Court of India, 13 January 2016 (**Annex IN-5**); Order of the Supreme Court of India, 26 April 2016 (**Annex IT-213**).

249 Order of the Supreme Court of India, 26 April 2016 (**Annex IT-213**).

250 Italy's Memorial, para. 6.75.

251 Italy's Request for the Prescription of Provisional Measures, paras 48-49.

252 Italy's Memorial, para. 6.76, *referring to* (Confidential Annex) (**Annex IT-22**).

253 "Supreme Court disallows Italian marines' plea", DNA India, 16 December 2014 (**Annex IT-42**). *See* Italy's Memorial, para. 6.76.

191. Following the issuance by ITLOS of an Order on Provisional Measures (*see* Part I, Section B), the Supreme Court and Special Court respectively, on 26 and 28 August 2015, ordered that the relevant proceedings be stayed.[254]

192. On 7 December 2015, Ambassador Enzo Angeloni, Ambassador of Italy in India, submitted an affidavit to the Supreme Court of India on behalf of Italy, concerning the developments in this Arbitration.[255]

193. Following the rendering by the Arbitral Tribunal on 29 April 2016 of the Provisional Measures Order,[256] the Supreme Court ordered on 26 May 2016 that "Sergeant Girone while remaining under the authority of the Supreme Court of India is permitted to return to Italy during the Annex VII arbitration" subject to conditions prescribed by the Supreme Court (*see* Part I, Section E).[257] Sergeant Girone returned to Italy on 28 May 2016 and remained in Italy during the present Arbitration.[258]

E. THE ITALIAN INVESTIGATION AND PROCEEDINGS

194. Italy contends that following receipt by CINCNAV of the initial reports[259] from Sergeant Latorre, CINCNAV issued two "flash reports"[260] to the Interforce High Command, and Italy began exercising its jurisdiction over the "Enrica Lexie" and the Marines with respect to the "Enrica Lexie" incident.[261] "[W]ithin hours"[262] thereafter, pursuant to Decree no. 90/2010 of the President of the Italian Republic, a "summary investigation" was initiated by the Italian Navy for the

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254 Italy's Memorial, para. 6.77, *referring to* Order of the Supreme Court of India of 26 August 2015 (**Annex IT-37(c)**); Order of the Supreme Court of India of 2 September 2015 (**Annex IT-37(d)**); Order of the Special Designated Court of 25 August 2015 (**Annex IT-37(b)**).

255 Italy's Memorial, para. 6.78, *referring to* Additional Affidavit of Ambassador E. Angeloni, Ambassador of Italy in India, 7 December 2015 (**Annex IT-43**).

256 Order, Request for the Prescription of Provisional Measures of 29 April 2016, para. 132. *See* Part I, Section E.

257 *See* Order of the Supreme Court of India, 26 May 2016 (**Annex IT-214**).

258 Report of the Republic of India on Compliance with the Provisional Measures Order of the Arbitral Tribunal dated 29 April 2016 concerning the *"Enrica Lexie" Incident (The Italian Republic v. Republic of India-PCA Case No. 2015-28)*, para. 7; Report of the Government of the Italian Republic on Compliance with the Provisional Measures Order of 29 April 2016, para. 7.

259 Action Report from Massimiliano Latorre to the Commander in Chief of the Naval Squadron (CINCNAV), 19:30 (IST - 0.5 hours), 15 February 2012 (**Annex IT-108**).

260 Commander in Chief of the Naval Squadron (CINCNAV) Flash Report no. 07/2012, 13:00 (CET), 15 February 2012 (**Annex IT-109**); Interforce Operations High Command Flash Report no. 016/SO to the Presidency of the Republic of Italy and various Ministries, 15:30 (CET), 15 February 2012 (**Annex IT-115**).

261 Hearing Transcript, 8 July 2019, 202:19-203:12.

262 Hearing Transcript, 8 July 2019, 200:18-21.

purpose of collecting relevant information and evidence.[263] The administrative aspect of the investigations was undertaken by the Italian Ministry of Defence, while the Rome Public Prosecutor and the Rome Military Prosecutor executed investigations at the judicial level.[264]

1. The Piroli Report

195. On 17 February 2012, Division Admiral Alessandro Piroli, Chief III Division GP (General Planning) – Navy Staff, was appointed as Investigating Officer. His investigation took place both in Kochi, between 18 February and 8 March 2012, and in Italy, in the subsequent two months.[265] It is Italy's position that Admiral Piroli's investigation "was not constrained or shaped" by the reports to CINCNAV, which described the incident with reference to a pirate attack.[266] The objectives of his investigation were

> to collect information relating to the incident and its causes; to review existing documents and statements made by those involved in the incident; to verify the technical and operational reference framework as well as the juridical one (Italian law and international law); to inspect the vessels and other evidence relating to the incident, including the weapons and ammunition assigned to the VPD team on board the Enrica Lexie, along with the ship logs; and to acquire statements from those involved and relevant photographic and other evidence.[267]

196. Subsequently, he produced the results of his investigation in a Summary Investigation Report entitled "Attempted Pirate Attack against Merchant Vessel Enrica Lexie – 15 February 2012. Death of Indian Citizens", dated 11 May 2012 (hereinafter the "Piroli Report"), and submitted it to the Italian Government.[268]

197. In issuing the Piroli Report, Admiral Piroli was instructed to therein "highlight considerations concerning objective and subjective causes that originated the incident; also to assess whether technical and organisational corrective measures may possibly be adopted in order to prevent similar circumstances from occurring again; and to 'contribute, where possible, to clarify the

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263 Italy's Memorial, para. 5.4, *referring to* Decree no. 90 of the President of the Italian Republic, 15 March 2010, Consolidated text of the Regulations in the Field of Military Organisation (**Annex IT-80**). This Decree provides for "summary investigations" to be conducted following an event that involves the administration of Defence.

264 Hearing Transcript, 8 July 2019, 200:21-26.

265 Hearing Transcript, 8 July 2019, 206:12-20.

266 Hearing Transcript, 18 July 2019, 7:22-8:4.

267 Italy's Memorial, paras 5.6-5.7. *See also* Hearing Transcript, 8 July 2019, 206:21-207:6.

268 Italy's Memorial, paras 5.8-5.9, explaining that the contents of the Piroli Report are confidential, given their potential relevance to ongoing criminal proceedings in Italy. The Piroli Report is reproduced as a confidential Annex to Italy's Memorial (Piroli Report (Confidential Annex) (**Annex IT-233**)), in accordance with Article 23(2) of the Tribunal's Rules of Procedure. The Piroli Report has not been provided to Sergeant Latorre or Sergeant Girone.

responsibilities, if any, of VPD personnel concerning the incident'."[269] The findings of the Piroli Report were expressed in the form of "preliminary conclusions", which were based on the limited evidence available at the time. Before setting out the conclusions, as a matter of general considerations, the Report observes:

> It is therefore evident that events can be clarified only when further evidence will be made available by Indian authorities and when judicial proceedings will be finalized. Assessments made in this document are based on information acquired from vessel documentation, statements by involved personnel and investigations conducted in *loco*. That is why said assessments must be considered as guidelines to develop assumptions and conjectures, waiting for further details regarding the other party to be provided […]. Only then we will be able to give a precise assessment of statements made by the other party, since such statements are crucial to decide, on the one hand, whether the respondents are innocent (lack of correspondence between bullet calibres) or, on the other hand, whether they were actually involved in in the event (correlation between bullet calibres, involved weapons), considering the discriminating factor linked to the fishing boat having been used only for fishing or also for armed robbery purposes.[270]

198. With these caveats in mind, the Piroli Report presents *inter alia* the following preliminary conclusions.

199. The deployment of VPD Latorre on the "Enrica Lexie" was in accordance with Italian national legislation to counter piracy attacks.[271] The incident "took place in the high seas, well outside Indian territorial waters […] within the high piracy risk area".[272]

200. While the VPD were informed of an approaching suspicious craft, which was "sailing on a near-collision course" with the "Enrica Lexie", the latter

> did not facilitate the implementation of further coordination actions with the VPD and did not seek to implement all possible passive measures of protection against pirate attacks. In particular, the ship did not change her course and speed to give way to the craft that had the right of way, or to move away and be in a safe position (given her higher speed) from a piracy/armed robbery threat.[273]

Accordingly, Captain Vitelli and the VPD "did not do their best to enhance closer cooperation opportunities between the parties involved in the action".[274]

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269 Hearing Transcript, 8 July 2019, 207:9-16, *citing* Piroli Report (Confidential Annex), p. 1-6 (**Annex IT-233**).

270 Piroli Report (Confidential Annex), p. 4-13 (**Annex IT-233**).

271 Piroli Report (Confidential Annex), p. 4-14, para. 1 (**Annex IT-233**).

272 Piroli Report (Confidential Annex), p. 4-14, para. 2 (**Annex IT-233**).

273 Piroli Report (Confidential Annex), p. 4-14, para. 3 (**Annex IT-233**).

274 Piroli Report (Confidential Annex), p. 4-14, para. 4 (**Annex IT-233**).

201. The "approaching manoeuver" of the craft, and its failure to change speed or course despite the visual and sound warnings and warning shots from the VPD "had been perceived as a threat against the ship and its crew".[275]

202. Taking into account the statements of the VPDs, their "tactical decisions" were "quick, effective and appropriate in connection with the incident and the assigned mission".[276]

203. Finally, according to the Piroli Report, the way in which the "Enrica Lexie" was diverted subsequent to the incident

> indicate[s] lack of good faith by the Indian authorities, who knew the content of their communications to the ship were untrue, and that they hadn't tried to contact Italian governmental authorities in order to request *flag state consent* for the diversion to an Indian port of an Italian- flagged vessel transiting in the high seas.[277]

2. Criminal Proceedings by the Rome Military Prosecutor and the Rome Public Prosecutor

204. On 15 February 2012, pursuant to Article 347(1) of the Italian Code of Criminal Procedure, the Special Operations Group, Anti-Crime Unit, of the Carabinieri of Rome (hereinafter the "Special Operations Group of the Carabinieri")[278] reported the incident as "a piracy attack against an Italian-flagged merchant vessel" to the Rome Public Prosecutor. The Rome Public Prosecutor was thereby informed of the presence of a VPD, comprising members of the Italian Navy, on board the vessel.[279]

205. On 16 February 2012, Sergeant Latorre sent a criminal offence report under Article 331(1) of the Italian Code of Criminal Procedure to the Rome Public Prosecutor, accompanied by supporting documentation including photographs and statements from both the crew and the VPD marines.[280] The Rome Public Prosecutor opened criminal proceedings "against persons unknown for the offences of piracy and suspicion of piracy under Article 1135 of the Italian Code of Navigation,

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275 Piroli Report (Confidential Annex), p. 4-14, para. 5 (**Annex IT-233**).

276 Piroli Report (Confidential Annex), p. 4-15, para. 6 (**Annex IT-233**).

277 Piroli Report (Confidential Annex), p. 4-15, para. 7 (**Annex IT-233**) [emphasis in original].

278 In Italian, the full title is "Raggruppamento operativo speciale, Unità anti crimine, dei Carabinieri". *See* Italy's Memorial, para. 5.25, n. 371.

279 Italy's Memorial, para. 5.25, *referring to* Italian Code of Criminal Procedure, Article 347(1) (**Annex IT-224**).

280 Italy's Memorial, para. 5.26, *referring to* Italian Code of Criminal Procedure, Article 331(1) (**Annex IT-224**). *See also* Hearing Transcript, 8 July 2019, 213:1-3.

and Article 56 of the Italian Penal Code, committed in the Indian Ocean, at around 30 nautical miles off the Indian coast".[281]

206. On 17 February 2012, the Rome Military Prosecutor also opened a criminal case against unknown military personnel "for the military criminal offences under Articles 120 and 47(2)-(4) of the Italian Peacetime Military Penal Code, and Article 165 of the Italian Wartime Military Penal Code in relation to Article 185 of the same Code".[282] The Rome Military Prosecutor requested the Special Operations Group of the Carabinieri to conduct a preliminary investigation concerning the incident.[283]

207. On 19 February 2012, in accordance with orders from the Rome Military Prosecutor, Captain Vitelli seized VPD marine Lance Corporal Conte's camera, with which he had taken photographs of the incident. [284] On 20 February 2012, the Rome Military Prosecutor ordered the seizure of two assault rifles AR SC 70/90, serial numbers respectively 07386 and 45479H, together with the loader and leftover ammunition for each rifle.[285] The next day, the Rome Military Prosecutor suspended the seizure until such a point as the "Enrica Lexie" would be released from the custody of the Indian authorities, and appointed Captain Vitelli as guardian of the evidence.[286]

208. On 20 February 2012, the Special Operations Group of the Carabinieri sent an assessment of the incident to the Rome Military Prosecutor, based on the report of Sergeant Latorre, and communicated the fact that the Rome Public Prosecutor had instituted criminal proceedings.[287]

209. On 22 February 2012, the Rome Military Prosecutor ordered that charges be amended, to be "against Sergeant Latorre and Sergeant Girone for the offences of aggravated failure to obey orders, of violence resulting in murder of private individuals during military operations abroad, and of dispersion of military equipment (bullets)" in connection with the "Enrica Lexie" incident.[288] On the same day, the Rome Public Prosecutor registered the Marines as "suspects for

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281 Italy's Memorial, para. 5.27, *referring to* Italian Code of Navigation, Article 1135 (**Annex IT-225**); Italian Penal Code, Article 56 (**Annex IT-223**).

282 Italy's Memorial, para. 5.29, referring to Italian Peacetime Military Penal Code, Articles 47(2)-(4) and 120 (**Annex IT-227**); Italian Wartime Military Penal Code, Articles 165 and 185 (**Annex IT-226**).

283 Italy's Memorial, para. 5.31, *referring to* (Confidential Annex) (**Annex IT-243**).

284 Italy's Memorial, para. 5.32, *referring to* (Confidential Annex) (**Annex IT-246**); (Confidential Annex) (**Annex IT-245**). *See also* Hearing Transcript, 8 July 2019, 216:9-17.

285 (Confidential Annex) (**Annex IT-244**).

286 Italy's Memorial, para. 5.35, *referring to* (Confidential Annex) (**Annex IT-252**); Italian Code of Criminal Procedure, Article 253 (**Annex IT-224**). *See also* Hearing Transcript, 8 July 2019, 217:14-218:2.

287 Italy's Memorial, para. 5.36, *referring to* (Confidential Annex) (**Annex IT-249**).

288 Italy's Memorial, para. 5.37, *referring to* Italian Peacetime Military Penal Code, Article 125 (**Annex IT-227**); Italian Wartime Military Penal Code, Articles 165(3) and 185 (**Annex IT-226**); Italian Peacetime

the offence of murder and complicity in murder against unknown persons committed on the high seas in the Indian Ocean".[289]

3. Consolidation of Italian Criminal Proceedings under the Rome Public Prosecutor

210. On 23 February 2012, the Rome Military Prosecutor relinquished jurisdiction over the incident in favour of the Rome Public Prosecutor, who thereafter continued the preliminary investigation.[290]

211. On 15 March 2012, through "letters rogatory" to the Indian Government, the Rome Public Prosecutor stated that "[it] was investigating the Marines in relation to the death of two Indian fishermen, Mr. Jelastine and Mr. Pink, based on the alleged crime of murder under Article 575 of the Italian Penal Code". [291] The letters also asserted that the Rome Public Prosecutor had jurisdiction over the matter,[292] requested that the Indian authorities provide certain documents and evidence,[293] and communicated "the need for the Italian authorities to examine Sergeant Latorre and Sergeant Girone, Captain Vitelli, and other persons aboard the *Enrica Lexie* and the *St Antony*."[294]

212. On 9 May 2012, the Rome Public Prosecutor examined four members of the VPD who, on the same day, had returned to Italy: Sergeant Voglino, Corporal Andronico, Lance Corporal Fontana, and Lance Corporal Conte.[295] During the examination, the Special Operations Group of the Carabinieri seized Corporal Andronico's laptop.[296] Subsequently, Captain Vitelli, Captain Noviello, and Pio Schiano Lomoriello, managing director of Fratelli D'Amato SpA, appeared for examination.[297]

Military Penal Code, Article 169 (**Annex IT-227**). *See also* Hearing Transcript, 8 July 2019, 218:14-219:4.

289 Italy's Memorial, para. 5.38, *referring to* Italian Penal Code, Articles 110 and 575 (**Annex IT-223**); (Confidential Annex) (**Annex IT-255**). *See also* Hearing Transcript, 8 July 2019, 219:5-13.

290 Italy's Memorial, paras 5.39-5.40.

291 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, p. 2 **(Annex IT-38**); Hearing Transcript, 8 July 2019, 209:11-17.

292 Italy's Memorial, paras 5.46-5.47, *referring to* Italian Penal Code, Article 577(2) (**Annex IT-223**).

293 Italy's Memorial, paras 5.48-5.49.

294 Italy's Memorial, para. 5.50.

295 Hearing Transcript, 8 July 2019, 220:22-221:4.

296 Italy's Memorial, para. 5.42, *referring to* (Confidential Annex) (**Annex IT-258**); (Confidential Annex) (**Annex IT-263**).

297 Italy's Memorial, para. 5.43, *referring to* (Confidential Annex) (**Annex IT-259**); (Confidential Annex) (**Annex IT-260**); (Confidential Annex) (**Annex IT-261**); (Confidential Annex) (**Annex IT-262**); (Confidential Annex) (**Annex IT-264**).

213. On 3 January 2013, the Marines made voluntary declarations regarding the "Enrica Lexie" incident before the Rome Public Prosecutor. They were informed that "they were under investigation for offences under Articles 110 and 575 of the Italian Penal Code for the crimes of murder and complicity in murder".[298]

214. On 17 September 2012 and 11 January 2013, the Indian Ministry of External Affairs sent *notes verbales* referring to "the possibility of allowing Italian representatives to participate in the interrogation by India of the two accused and during the deposition of the Ship's master and maritime personnel" and requesting the names of these representatives.[299]

215. On 13 March 2013 and 19 April 2013, the Rome Public Prosecutor sent further "letters rogatory", repeating earlier requests for documents and evidence, but did not receive a response.[300]

216. The Italian criminal proceedings are currently stayed in accordance with the ITLOS Order on Provisional Measures.[301]

IV. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

217. This Arbitral Tribunal was constituted in accordance with Article 287, paragraphs 1, 3, and 5, of the Convention and Annex VII to the Convention. In accordance with Articles 286, 287, paragraph 1, and 288, paragraph 1, of the Convention, the Arbitral Tribunal, so constituted, has jurisdiction over any dispute concerning the interpretation or application of the Convention.

A. IDENTIFICATION OF THE DISPUTE FOR THE PURPOSE OF ASCERTAINING WHETHER THE ARBITRAL TRIBUNAL HAS JURISDICTION OVER THE DISPUTE

218. In its Provisional Measures Order, the Arbitral Tribunal concluded that *prima facie* it had jurisdiction over the dispute.[302] The Arbitral Tribunal considered that, as Italy had alleged the violation by India of various rights conferred upon Italy under the provisions of the Convention,

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298 Italy's Memorial, para. 5.44.

299 Italy's Memorial, para. 5.51, *referring to Note Verbale* T-4417/17/2012 from India to Italy, 17 September 2012 (**Annex IT-177**); *Note Verbale* T-4417/17/2012 from India to Italy, 11 January 2013 (**Annex IT-183**) [Internal citations omitted]. *See also* Hearing Transcript, 8 July 2019, 226:1-11.

300 Italy's Memorial, para. 5.52, *referring to* Letter from the Office of the Public Prosecutor at the Court of Rome to the Competent Judicial Authority of India, 19 March 2013 (**Annex IT-187**); Letter from the Office of the Public Prosecutor at the Court of Rome to the Competent Judicial Authority of India, 19 April 2013 (**Annex IT-193**). *See also* Hearing Transcript, 8 July 2019, 226:12-17.

301 Italy's Memorial, para. 5.53, *referring to* 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)**). *See* above, Part I, Section B. *See also* Hearing Transcript, 8 July 2019, 227:10-22.

302 Order, Request for the Prescription of Provisional Measures of 29 April 2016, para. 55.

and India had contested such violations, the dispute between them concerned the interpretation or application of the Convention.

219. At this stage the Arbitral Tribunal must, therefore, first ascertain whether there is a dispute between the Parties, and second, determine whether such dispute concerns the interpretation or application of the Convention.

1. Existence of a Dispute

220. The concept of a dispute is well-established in international law. In international proceedings, a dispute exists when the parties have "a disagreement on a point of law or fact, a conflict of legal views or of interests".[303]

221. Italy claims, as stated in its submissions, that India has acted in a manner inconsistent with several provisions of the Convention and violated Italy's rights under the Convention (*see* Part II, Sections A.1 and B.1). India rejects all of Italy's claims on the merits. India, on its part, counter-claims, as stated in its submissions, that Italy has violated India's rights under the Convention and breached its obligation to have due regard to India's rights under the Convention (*see* Part II, Sections A.2 and B.2). Italy rejects all of India's counter-claims on the merits (*see* Part II, Sections A.1 and B.1).

222. It is thus evident that there is a dispute between the Parties which has given rise to the present proceedings. The Parties differ, however, in their characterisation of that dispute.

2. Characterisation of the Dispute

(a) Positions of the Parties

223. Italy submits that the "real issue in the case" and "object of the claim" is the determination of which State is entitled, under the Convention, to exercise jurisdiction over the incident of 15 February 2012 and "over the two marines in relation to the incident".[304]

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303 Order, Request for the Prescription of Provisional Measures of 29 April 2016, para. 53, *citing Mavrommatis Palestine Concessions (Greece v. Great Britain)*, Judgment of 30 August 1924, P.C.I.J. Series A, No. 2, p. 11.

304 Hearing Transcript, 9 July 2019, 58:17-24.

224. In its Memorial, Italy claims that as a result, and in the course, of this incident, India has acted in a manner that is incompatible with certain provisions of the Convention, and that breached or violated other provisions of the Convention. Italy states in the introductory part of the Memorial:

> The dispute between the Italian Republic ("Italy") and the Republic of India ("India") concerning the "Enrica Lexie" is a dispute about who has jurisdiction over the *M/V Enrica Lexie*, an Italian-flagged oil tanker, and over the two Italian Marines stationed on the board the *Enrica Lexie*, in respect of an incident that occurred on 15 February 2012 about 20.5 nautical miles off the Indian coast of Kerala. The incident occurred when the *Enrica Lexie* was exercising the freedom of navigation *en route* from Galle in Sri Lanka to Port Said, Egypt.[305]

225. During the Hearing, counsel for Italy, Sir Daniel Bethlehem KCMG QC, in setting out Italy's case, stated the following:

> The central questions before you [the Arbitral Tribunal] in these proceedings are whether India was entitled to circumvent and oust Italy's flag state jurisdiction; and whether India was entitled to ignore the immunity of Italian state officials and, by doing so, to exercise its own jurisdiction over the marines. […] Italy has sought from the very outset to exercise its jurisdiction, as prescribed by international law.
>
> […]
>
> Italy roots its claims to jurisdiction squarely in UNCLOS, both in the system of flag-state jurisdiction established by UNCLOS and in its specific provisions.[306]

226. India, on the other hand, submits that "the core issue, the real subject matter of the dispute" is the question whether the Marines are entitled to immunity from criminal proceedings arising out of the "Enrica Lexie" incident.[307] This, in India's view, means that the dispute is not one concerning the interpretation or application of the Convention,[308] and is therefore outside the jurisdiction of the Arbitral Tribunal, because it "is essentially based on a set of rules extraneous to UNCLOS, belonging to general (customary) international law on immunities of States officials".[309]

227. During the Hearing, counsel for India, Professor Alain Pellet, provided the following explanation regarding the position of India in the dispute between the Parties:

> Since the ITLOS and this Tribunal had not accepted our view *prima facie* during the written phase of the proceedings, we have only stressed the lack of jurisdiction of the Tribunal concerning, more precisely, the issue of the claimed immunities of the marines and the Italian request that the Tribunal order India to "cease to apply the provisions of the 1976 Maritime

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305 Italy's Memorial, para. 1.1.

306 Hearing Transcript, 8 July 2019, 45:22-46:4, 46:20-23.

307 Hearing Transcript, 13 July 2019, 107:5-110:8.

308 India's Counter-Memorial, para. 5.9, *citing* PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 220.

309 India's Rejoinder, para. 3.14.

> Zones Act and the 1981 Notification"…. [U]pon reflection, India has decided to maintain its initial view concerning the more general lack of jurisdiction of the Tribunal in this case.[310]
>
> […]
>
> [S]upposing yet that you [the Arbitral Tribunal] do not decline to globally exercise your jurisdiction on Italy's claims, as we think you should, it remains that India of course maintains, in the alternative, its objection to the jurisdiction of the Tribunal concerning : (1) the cessation of the application of India's Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act 1976 and Ministry of Home Affairs notification dated 27th August 1981; and (2) the objection to jurisdiction concerning the immunities of the marines.[311]

228. In its Counter-Memorial, India stressed:

> While the case has been labeled the "*Enrica Lexie Incident*", it should more accurately be referred to as the "*St Antony Incident*". The consequences of the incident all related to the *St Antony*. The shots fired by the Marines killed two Indian nationals. […] The centre of gravity of the incident thus rests with India, and India's courts thereafter exercised jurisdiction over the Marines after they had entered Indian territory.[312]

229. Italy objects to the late stage at which India raised this general objection to the Arbitral Tribunal's jurisdiction, particularly after India had accepted said jurisdiction subsequent to the provisional measures phase.[313] In any event, Italy maintains that the Arbitral Tribunal does have general jurisdiction over this dispute because the "real claim" concerns the interpretation and application of provisions of the Convention.[314]

230. In its Counter-Memorial, India also introduced counter-claims alleging that, when the Marines shot at the "St. Antony" and killed the two fishermen on board, who were legitimately exercising their right to fish in India's exclusive economic zone, Italy violated India's rights and breached Italy's obligations under a number of provisions of the Convention.

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310 Hearing Transcript, 13 July 2019, 106:8-15, 107:2-4.

311 Hearing Transcript, 13 July 2019, 112:18-113:6.

312 India's Counter-Memorial, para. 1.3 [emphasis added by India].

313 Hearing Transcript, 18 July 2019, 88:24-89:18, *citing Corfu Channel case*, Judgment of April 9th, 1949: I.C.J. Reports 1949, p. 4 at p. 15; *Rights of Minorities in Upper Silesia (Minority Schools) (Germany v. Poland)*, Judgment of 26 April 1928, P.C.I.J. Series A, No. 15, p. 25.

314 Hearing Transcript, 18 July 2019, 89:21-90:18.

(b) **Characterisation of the Dispute by the Arbitral Tribunal**

231. In order to determine the nature of the dispute submitted to it by the Parties, the Arbitral Tribunal is required, on an objective basis,[315] to "isolate the real issue in the case and […] identify the object of the claim".[316]

232. In *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)* (hereinafter "*South China Sea Arbitration*"), the arbitral tribunal observed:

> Where a dispute exists between parties to the proceedings, it is further necessary that it be identified and characterized. The nature of the dispute may have significant jurisdictional implications, including whether the dispute can fairly be said to concern the interpretation or application of the Convention or whether subject-matter based exclusions from jurisdiction are applicable. Here again, an objective approach is called for, and the Tribunal is required to "isolate the real issue in the case and to identify the object of the claim".[317]

233. A dispute may be characterised in many ways. However, in identifying the real issue in dispute, the applicant's notification and statement of claim instituting the proceedings have particular significance. In *Fisheries Jurisdiction (Spain v. Canada)*, the ICJ observed that, in order to identify its task in any proceedings, the court "must begin by examining the Application"[318] and "look at the Application as a whole".[319] At the same time, the ICJ observed that, "while giving particular attention to the formulation of the dispute chosen by the Applicant", "it is for the Court itself, to determine on an objective basis the dispute dividing the parties, by examining the position of both parties".[320] The ICJ further pointed out in that judgment that, where "uncertainties or disagreement arise with regard to the real subject of the dispute […] or the exact nature of the

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315 PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Award on Jurisdiction and Admissibility of 29 October 2015, para. 150.

316 *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 457 at p. 466, para. 30. *See also* PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 208.

317 PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Award on Jurisdiction and Admissibility of 29 October 2015, para. 150; *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 457 at p. 466, para. 30; *see also Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, I.C.J. Reports 1995, p. 288 at p. 304, para. 55.

318 *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, p. 432 at p. 448, para. 29.

319 *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, p. 177 at p. 207, para. 70.

320 *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, p. 432 at p. 448, paras 29-30.

claims submitted to it", a tribunal "cannot be restricted to a consideration of the terms of the Application alone". [321]

234. Thus, while giving particular attention to the formulation of the dispute chosen by the applicant, the position of both parties and their pleadings must be considered. In doing so, a distinction must be made "between the dispute itself and arguments used by the parties to sustain their respective submissions on the dispute".[322]

235. The Arbitral Tribunal observes that, notwithstanding their differences in characterising the dispute, the Parties' disagreements on points of law or fact and conflicts of legal views or interests, as they are expressed in the submissions, are related to which State may exercise jurisdiction over the incident involving the "Enrica Lexie" and the "St. Antony" which led, as claimed by the Parties, to the alleged violations of various provisions of the Convention referred to in their respective final submissions.

236. In its Notification and Statement of Claim instituting the present proceedings, Italy refers to "the dispute concerning the Enrica Lexie Incident", [323] and provides the following introductory summary of the dispute:

> This Notification and Statement of Claim addresses the dispute between the Italian Republic ("Italy") and the Republic of India ("India") over "the Enrica Lexie Incident". This concerns an incident 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 criminal jurisdiction over two Italian Marines from the Italian Navy ("Italian Marines") in respect of that incident. India's exercise of criminal jurisdiction over the Italian Marines violates the 1982 United Nations Convention on the Law of the Sea ("UNCLOS" or "the Convention"), to which Italy and India are party. [324]

237. The Arbitral Tribunal also recalls Italy's description of the dispute contained in Italy's Memorial, quoted in full in paragraph 224 above.

238. On the basis of these facts, Italy has consistently maintained in its pleadings that the dispute is one "regarding the legality under UNCLOS of India's exercise of criminal jurisdiction over the

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321 *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, p. 432 at p. 448, para. 29.

322 *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, p. 432 at p. 449, para. 32. *See also* PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Award on Jurisdiction and Admissibility of 29 October 2015, para. 150; PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 208.

323 Notification and Statement of Claim, Title, Section II, para. 2.

324 Notification and Statement of Claim, para. 1.

Italian Marines".[325] To the extent that Italy refers to issues of immunity in defining its dispute in its pleadings, it is with respect to its relevance as an *exception* to India's exercise of criminal jurisdiction over the Marines, and as one out of several bases on which Italy alleges such exercise to be unlawful.[326]

239. Turning to Italy's submissions as presented in the Notification and Statement of Claim, the Arbitral Tribunal notes that Italy sought specific declaratory relief in respect of the question of immunity.[327] That request, however, was but one of several bases upon which Italy substantiated its more general request for a finding that, "by asserting and exercising jurisdiction over the Enrica Lexie and the Italian Marines", India violated the Convention. Indeed, the asserted immunity of the Marines was not the only basis upon which Italy alleges India's exercise of jurisdiction to be contrary to the Convention. On Italy's case, it was conceivable that the dispute between the Parties would be decided without a determination on the question of immunity (such as by a finding by the Arbitral Tribunal that Italy has exclusive jurisdiction over the incident under Articles 87 or 97 of the Convention).

240. For its part, India, in its account of the facts giving rise to the present case, places greater emphasis on the "St. Antony" and its crew, and the events that occurred on board that fishing vessel as a consequence of the conduct of the Marines. The Arbitral Tribunal recalls India's response to Italy's characterisation of the dispute in its Counter-Memorial, quoted in full in in paragraph 228.

241. In a section of the Counter-Memorial entitled "What the Case Is Really About: The Killing of Its Nationals on the *St Antony*",[328] India elaborates further on that characterisation, making no reference to questions of immunity.

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325 Notification and Statement of Claim, para. 25. *See e.g.*, Italy's Memorial, paras 1.1 ("a dispute about who has jurisdiction over the MV *Enrica Lexie*, an Italian-flagged oil tanker, and over two Italian Marines stationed on board the *Enrica Lexie*, in respect of an incident"), 1.5 ("the dispute … about which of Italy and India has jurisdiction over the *Enrica Lexie* and over the Marines to investigate and take whatever action is required under the law in respect of the conduct of the ship and of the Marines"), III.2 ("[t]he dispute before the Tribunal is a dispute as to whether Italy or India has jurisdiction over the *Enrica Lexie* and the Marines"); Italy's Reply, paras 1.2 ("the heart of the dispute dispute before the Tribunal is whether it is Italy or India that has jurisdiction over two Italian Marines … for purposes of any penal or disciplinary proceedings against them that may be warranted arising out of the 'Enrica Lexie' Incident"; 2.9 ("the central question in the present dispute is which State may exercise jurisdiction over the two Marines").

326 Italy's Memorial, paras 1.14 ("[r]educed to its core, the dispute between the Parties is a dispute about jurisdiction and immunity from jurisdiction"); 8.12 ("[t]he core question in the present dispute is which State may exercise jurisdiction over the two Marines. Whether the Marines are entitled to immunity from Indian criminal jurisdiction is part of this core question."); 8.18 ("[t]he dispute between Italy and India is in essence a dispute about jurisdiction, and immunity is about immunity from jurisdiction") [emphasis added].

327 Notification and Statement of Claim, para. 33, subparagraph (b).

328 India's Counter-Memorial, p. 3.

242. The Arbitral Tribunal observes, in light of the foregoing, that at no point in their written pleadings in this Arbitration does either Party characterise the dispute between them as one primarily relating to immunity.

243. Having analysed and established the nature of the dispute between the Parties in the present proceedings, the Arbitral Tribunal concludes that the Parties' dispute is appropriately characterised as a disagreement as to which State is entitled to exercise jurisdiction over the incident of 15 February 2012 involving the "Enrica Lexie" and the "St. Antony", which raises questions under several provisions of the Convention, including Articles 56, 58, 59, 87, 92, 97, 100, and 300, the interpretation or application of which the Parties have different views. The dispute may raise, but is not limited to, the question of immunity of the Marines.

244. The Arbitral Tribunal thus finds, as it had already concluded on a *prima facie* basis in the proceedings on provisional measures,[329] that there is a dispute between the Parties concerning the interpretation or application of the Convention in the present case.

3. Conclusion

245. The Arbitral Tribunal concludes that as the dispute between the Parties relates to the interpretation or application of the Convention, it has jurisdiction over the dispute underlying the present Arbitration, subject to its decision on the specific objections to jurisdiction raised by India, including with respect to the question of the immunity of the Marines, which will be addressed by the Arbitral Tribunal in conjunction with the claims of Italy to which they relate.[330]

B. OBLIGATION TO EXCHANGE VIEWS

246. Article 283, paragraph 1, of the Convention provides:

> When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.

329 Order, Request for the Prescription of Provisional Measures of 29 April 2016, paras 52-55.

330 *See* Part V, Section A.1 for Italy's claims regading the compatibility with UNCLOS of India's 1976 Maritime Zones Act and 1981 Notification; and Part V, Section C.1 for the alleged violation by India of the immunity of the Italian Marines.

247. The Arbitral Tribunal notes that, when the dispute arose between the Parties, they expeditiously proceeded to an exchange of views at various diplomatic[331] and political[332] levels, aimed at settling the dispute by negotiations or other peaceful means. The Arbitral Tribunal further notes that both Parties agree that these efforts did not lead to an agreement regarding the settlement of the dispute. The Arbitral Tribunal is consequently of the view that the requirements of Article 283, paragraph 1, of the Convention are satisfied.

C. ADMISSIBILITY OF ADDITIONAL CLAIM OF ITALY

248. As India contests the timeliness, and therefore admissibility, of the submission of Italy's claim concerning the alleged incompatibility of The Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 (hereinafter the "1976 Maritime Zones Act") and the 1981 Notification, under the Convention, the Arbitral Tribunal must examine whether this particular claim of Italy forms part of the dispute in respect of which the Parties have proceeded to an exchange of views, in terms of Article 283, paragraph 1, of the Convention. The Arbitral Tribunal shall consider this question in the context of the discussion of this claim (*see* Part V, Section A.1).

D. ADMISSIBILITY OF COUNTER-CLAIMS OF INDIA

249. In its Counter-Memorial, India raised several counter-claims, to which Italy responded in subsequent written and oral pleadings. Before addressing the merits of these counter-claims, the Arbitral Tribunal must satisfy itself that such counter-claims fall within its jurisdiction, and that they are admissible in the present proceedings.

250. India submits in this regard that its counter-claims are admissible.[333] India argues that, while the Rules of Procedure do not specifically address counter-claims, they do set out the principle that the Parties enjoy equal treatment and have a full opportunity to present their case.[334] India submits

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331 *See e.g.*, Letter from the Minister of Foreign Affairs of Italy to the Minister of External Affairs of India, 10 April 2012 (**Annex IT-166**); Letter from the Minister of Foreign Affairs of Italy to the Minister of External Affairs of India, 18 December 2012 (**Annex IT-179**); *Note Verbale* No. 415/6/2012 from India's Ministry of External Affairs to the Embassy of Italy in India, 13 May 2013 (**Annex IN-23**); *Note Verbale* No. 415/6/2012 from India's Ministry of External Affairs to the Embassy of Italy in India, 5 June 2013 (**Annex IN-24**); Italy's Memorial, para. 7.11; India's Counter-Memorial, para. 3.41.

332 *See e.g.*, *Note Verbale* 112/656 from Italy to India, 9 March 2012 (**Annex IT-160**) recalling a telephone conversation between the Prime Minister of India, Dr. Manmohan Singh and Prime Minister of Italy, Prof. Mario Monti; "PM's telephonic conversation with Italian PM Matteo Renzi", Press Information Bureau of the Indian Prime Minister's Office, 11 August 2014 (**Annex IT-203**); Italy's Memorial, paras 7.9, 7.42.

333 India's Counter-Memorial, paras 8.2-8.6.

334 India's Counter-Memorial, para. 8.2.

that this principle extends to its right to present counter-claims, as it argues is reflected in the practice of the ICJ and ITLOS.[335] India refers to Article 98 of the ITLOS Rules, which states that a "party may present a counter-claim provided that it is directly connected with the subject-matter of the claim of the other party and that it comes within the jurisdiction of the Tribunal".[336]

251. According to India, its "counter-claims arise out of the same factual matrix as Italy's claims". India states that its counter-claims "concern the same events that occurred on 15 February 2012 that are the subject-matter of the claims [...] although they focus on what happened with respect to the *St Antony*, which is really at the heart of the case, not the *Enrica Lexie*".[337]

252. India clarifies that it submits its counter-claims without prejudice to its arguments regarding the lack of jurisdiction over Italy's claims, both generally and individually.[338]

253. Italy, in its written and oral pleadings, has not raised objections to the Arbitral Tribunal's jurisdiction over, or the admissibility of, India's counter-claims.[339]

254. While the Rules of Procedure adopted by the Arbitral Tribunal in consultation with the Parties at the beginning of the proceedings do not expressly provide for, and regulate, the right to present counter-claims, the Arbitral Tribunal has no doubt that arbitral tribunals established pursuant to Annex VII to the Convention have the inherent power to hear counter-claims. This is consistent with the view previously taken by arbitral tribunals in the Annex VII arbitrations of *Barbados v. The Republic of Trinidad and Tobago*[340] and *Guyana v. Suriname.*[341]

255. The Arbitral Tribunal recalls in this regard that Annex VII, Article 5, to the Convention empowers an arbitral tribunal to "determine its own procedure, assuring each party a full opportunity to be heard". The Arbitral Tribunal further observes that the rules of procedure in both alternative fora for the compulsory settlement of disputes under the Convention, the ICJ and ITLOS, make express provision for the filing of counter-claims by respondent States, and there is no reason why respondent States should be in any different position in Annex VII arbitrations. Finally, the Arbitral Tribunal notes that all major arbitral rules of procedure, including the PCA Arbitration

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335 India's Counter-Memorial, paras 8.3-8.4, *referring to* I.C.J. Rules of Court, Article 80(1); *citing* ITLOS Rules of the Tribunal, Article 98.

336 India's Counter-Memorial, para. 8.3, *citing* ITLOS Rules of the Tribunal, Article 98.

337 India's Counter-Memorial, para. 8.4.

338 India's Counter-Memorial, para. 8.5.

339 *See* India's Counter-Memorial, para. 8.1; Italy's Reply, paras 10.1-10.5.

340 PCA Case No. 2004-02: *Barbados v. The Republic of Trinidad and Tobago*, Award of 11 April 2006, RIAA Vol. XXVII, p. 147 at pp 208-09, paras 213-17.

341 PCA Case No. 2004-04: *Guyana v. Suriname*, Award of 17 September 2007, PCA Award Series at p. 2, RIAA Vol. XXX, p. 1.

Rules 2012 and the PCA Optional Rules for Arbitrating Disputes between Two States, envisage the submission of counter-claims.

256. It is a general principle of procedural law, consistently applied by international courts and tribunals, that a counter-claim may be admitted only if it comes within the jurisdiction of the court or tribunal concerned and is directly connected with the subject-matter of the claim of the other party. The Arbitral Tribunal finds that these conditions are met in the present case. India's counter-claims raise questions in respect of several provisions of the Convention – notably Articles 56, 58, 87, 90, and 88 – and therefore concern the interpretation or application of the Convention pursuant to Article 288, paragraph 1, of the Convention. Moreover, the counter-claims arise directly from the incident of 15 February 2012 involving the "Enrica Lexie" and the "St. Antony", which forms the basis of Italy's claims. India's counter-claims are accordingly admissible.

E. APPLICABLE LAW

257. The Arbitral Tribunal observes that Article 293 of the Convention defines the law applicable in the present case. This Article states:

> *Article 293*
>
> *Applicable law*
>
> 1. A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.
>
> 2. Paragraph l does not prejudice the power of the court or tribunal having jurisdiction under this section to decide a case *ex aequo et bono*, if the parties so agree.

258. The Arbitral Tribunal notes that the Parties have a disagreement as to the application of Article 293 to the question of the immunity of the Marines, and as to whether such question falls within the jurisdiction of the present Arbitral Tribunal pursuant to Article 288, paragraph 1, of the Convention.[342] This matter will be addressed in Part V, Section C.1 below.

V. CLAIMS OF ITALY REGARDING ALLEGED BREACHES BY INDIA OF UNCLOS AND VIOLATIONS OF RIGHTS OF ITALY UNDER UNCLOS

259. Italy's claims in the present proceedings concern (i) the compatibility with the Convention of India's 1976 Maritime Zones Act and 1981 Notification; (ii) alleged breaches by India of provisions of Part VII (High Seas) of the Convention; and (iii) the alleged violation by India of

[342] Italy's Memorial, paras 8.17, 11.1.

the immunity of the Italian Marines. The Arbitral Tribunal shall address Italy's claims in this order.

A. COMPATIBILITY WITH UNCLOS OF INDIA'S 1976 MARITIME ZONES ACT AND 1981 NOTIFICATION

260. Italy claims that certain sections of India's 1976 Maritime Zones Act and 1981 Notification are incompatible with the Convention.[343] The 1976 Maritime Zones Act is India's main legislation governing India's jurisdiction over maritime zones. The Parties' disagreement centres, in particular, on the following sections of these two domestic legal instruments.

261. Section 5 of the 1976 Maritime Zones Act provides, in relevant part:

> (1) The contiguous zone of India (hereinafter referred to as the contiguous zone) is an area beyond and adjacent to the territorial waters and the limit of the contiguous zone is the line every point of which is at a distance of twenty-four nautical miles from the nearest point of the baseline referred to in sub-section (2) of section 3.
>
> (2) Notwithstanding anything contained in sub-section (1), the Central Government may whenever it considers necessary so to do having regard to International Law and State practice, alter, by notification in the Official Gazette, the limit of the contiguous zone.
>
> […]
>
> (4) The Central Government may exercise such powers and take such measures in or in relation to the contiguous zone as it may consider necessary with respect to,—
>
> (a) the security of India, and
>
> (b) immigration, sanitation, customs and other fiscal matters.[344]

262. Section 7 of the 1976 Maritime Zones Act provides, in relevant part:

> (1) The exclusive economic zone of India (hereinafter referred to as the exclusive economic zone) is an area beyond and adjacent to the territorial waters, and the limit of such zone is two hundred nautical miles from the baseline referred to in subsection (2) of section 3.
>
> (2) Notwithstanding anything contained in sub-section (1), the Central Government may, whenever it considers necessary so to do having regard to International Law and State practice, alter, by notification in the Official Gazette, the limit of the exclusive economic zone.
>
> […]
>
> (4) In the exclusive economic zone, the Union has,—
>
> […]
>
> (e) such other rights as are recognised by International Law.

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343 The Arbitral Tribunal recalls Italy's formal submission that "[b]y the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976, and Ministry of Home Affairs Notification No. S.O. 671(E) dated 27 August 1981, India has acted and is acting in a manner that is incompatible with UNCLOS with regard to Articles 33(1), 56(1), 56(2), 58(2), 87(1)(a) and/or 89". Italy's Memorial, p. 188.

344 1976 Maritime Zones Act, Sections 5(1)-(2) and 5(4) (**Annex IT-65**).

[…]

(7) The Central Government may, by notification in the official Gazette,—

(a) extend, with such restrictions and modifications as it thinks fit, any enactment for the time being in force in India or any part thereof in the exclusive economic zone or any part thereof; and

(b) make such provisions as it may consider necessary for facilitating the enforcement of such enactment, and any enactment so extended shall have effect as if the exclusive economic zone or the part thereof to which it has been extended is a part of the territory of India.[345]

263. The 1981 Notification, which refers to the 1976 Maritime Zones Act, provides, in relevant part:

> In exercise of the powers conferred by sub section (7) of section 7 of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 (80 of 1976), the Central Government hereby extends to the exclusive economic zone, referred to therein, the Acts specified in the Schedule hereto annexed subject to the modifications (if any) and the provisions for facilitating the enforcement of such Acts specified in the said schedule.[346]

264. Part I of the Schedule to the 1981 Notification, in turn, lists the Indian Penal Code and the Indian Code of Criminal Procedure, as modified to include new Section 188A, which provides:

> 188A. Offence committed in the 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, Continential 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.[347]

1. Jurisdiction and Admissibility

(a) Existence of a Dispute at the Relevant Time in Respect of the 1976 Maritime Zones Act and 1981 Notification

265. The Arbitral Tribunal shall first consider whether it has jurisdiction over Italy's claim regarding the compatibility with UNCLOS of the 1976 Maritime Zones Act and 1981 Notification.

i. Position of India

266. India objects to the jurisdiction of the Arbitral Tribunal over Italy's claim that the 1976 Maritime Zones Act and 1981 Notification are incompatible with the Convention on the ground that "[t]here

345 1976 Maritime Zones Act, Sections 7(1)-(2), 7(4)(e), and 7(7) (**Annex IT-65**).

346 1981 Notification (**Annex IT-45**).

347 1981 Notification, Schedule, Part I (**Annex IT-45**).

was no dispute between the Parties over the above mentioned Italian claim at the date of the filing of Italy's Notification and Statement of Claim of 26 June 2015".[348]

267. Consistent with ICJ jurisprudence, India submits that the dispute invoked must have existed, and be crystallised, on the date of the application.[349] The existence of a dispute, in turn, "must be assessed on the basis of diplomatic exchanges between the Parties previous to its submission to the Court or tribunal", and "the evidence must show that the Parties 'hold clearly opposite views' with respect to the claimed issue".[350]

268. Similarly, India argues, while the conduct of the Parties subsequent to the Notification and Statement of Claim, such as statements made during judicial proceedings, may be relevant, they can only serve to confirm the existence of a dispute, clarify its subject matter, or determine whether the dispute has disappeared as of the time when the Arbitral Tribunal is to make its decision.[351] Subsequent conduct alone, India claims, is not sufficient for establishing the existence of the dispute, and cannot crystallise the dispute when, as in this case, it had not crystallised before the Notification and Statement of Claim.[352]

269. Applying the law to the facts of this case, India asserts that, not unlike Belgium in "the *Hissene Habré* case" before the ICJ, Italy "fails to establish that a clear opposition of views between the Parties exists in the present case", and "seeks to manufacture such an opposition of views where there is none".[353] In particular, India asserts, Italy "neither in its notification of claims nor at any time before, during its diplomatic exchanges which led to this notification, drew India's attention to the fact that it considered the 1976 act and the 1981 notification unlawful or contrary to the UNCLOS and was requesting the cessation of their application".[354]

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348 India's Counter-Memorial, para. 4.2.

349 India's Counter-Memorial, para. 4.7, *citing Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016, p. 255 at p. 271, para. 39; India's Rejoinder, para. 2.13; Hearing Transcript, 13 July 2019, 20:9-21:7.

350 India's Counter-Memorial, para. 4.3, *citing Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 422 at pp 444-45, para. 54; India's Rejoinder, para. 2.6, *citing Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016, p. 255 at p. 271, para. 39; Hearing Transcript, 13 July 2019, 26:14-18.

351 India's Counter-Memorial, paras 4.8-4.10.

352 India's Counter-Memorial, para. 4.10; India's Rejoinder, para. 2.14.

353 India's Rejoinder, para. 2.6. *See also* India's Counter-Memorial, para. 4.2; Hearing Transcript, 13 July 2019, 24:4-26:7, *citing Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 422 at pp 444-45, para. 54.

354 Hearing Transcript, 13 July 2019, 26:1-8. *See also* India's Counter-Memorial, para. 4.11.

270. Even though India "by no means denies that both Italy's Statement of Claim and Memorial take another position and *now* question the compatibility of the 1976 Act and the 1981 Notification with UNCLOS", it asserts that "this is precisely what [Italy] was not entitled to do failing a conflict of views on this matter before the Statement of Claim was made".[355] India submits that it was only in its Memorial that Italy "clearly articulated the more far-reaching position that the 1976 Act and the 1981 Notification are in themselves in breach of UNCLOS and that they must be repealed".[356]

271. Moreover, India claims, the evidence proffered by Italy to establish the existence of the dispute "shows that *both* Parties *agree* that the 1976 Maritime Zones Act and the 1981 Notification are to be, and can be, read in harmony with UNCLOS", and consequently, that "neither the Act nor the Notification can constitute a claim of sovereignty over the EEZ".[357]

272. In any event, India maintains, while the Marines and Italy challenged the interpretation of the two domestic laws before Indian courts, "at no time […] were there any questions of annulling the act or notification now in dispute, or terminating or ceasing their application".[358] In India's view, there "could indeed be a difference of opinion concerning the interpretation of these instruments; but interpretation on the one hand and contestation of the validity of certain texts on the other hand cannot be equated".[359] In this respect, India also considers questions of domestic law to be irrelevant in this matter because "unless expressly referred to, […] international arbitrators[] are not called upon to apply the rules of domestic law any more than [they] have the power to annul or amend them".[360] It is for this reason that India considers Justice Verma's expert reports to be irrelevant, and did not deem it necessary to either produce an expert report in response or to cross-examine Justice Verma.[361]

273. India concludes that it is also irrelevant whether Italy's claim "arises 'directly out of the question which is the subject-matter' of" its Notification and Statement of Claim, because there was no genuine dispute between Italy and India concerning the legality of the 1976 Maritime Zones Act and the 1981 Notification at the time Italy filed its Notification and Statement of Claim.[362]

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355 India's Rejoinder, para. 2.13 [emphasis added by India].

356 India's Rejoinder, para. 2.12. *See also* India's Counter-Memorial, para. 4.5.

357 India's Rejoinder, paras 2.6-2.11, *citing Aban Loyd Chiles Offshore Ltd. v. Union of India*, (2008) 11 SCC 439, para. 74 [emphases added by India].

358 Hearing Transcript, 13 July 2019, 27:3-29:13.

359 Hearing Transcript, 13 July 2019, 29:5-9.

360 Hearing Transcript, 13 July 2019, 30:1-5.

361 Hearing Transcript, 13 July 2019, 30:6-23.

362 India's Rejoinder, paras 2.12, 2.15.

274. Accordingly, India submits, the Arbitral Tribunal lacks jurisdiction over this claim because the Parties did not hold "clearly opposite views" regarding the compatibility of the 1976 Maritime Zones Act and the 1981 Notification at the time of the Statement of Claim.[363]

ii. Position of Italy

275. Italy maintains that India's objection to the Arbitral Tribunal's jurisdiction over its claim regarding the compatibility of the 1976 Maritime Zones Act and 1981 Notification with the Convention fails.[364] Italy claims that "[t]here is no doubt whatsoever that a dispute existed between Italy and India on the extension of India's penal jurisdiction beyond the territorial sea *prior to* the filing of Italy's Statement of Claim".[365] Accordingly, Italy submits that "there was a dispute between the Parties regarding the compatibility of the 1976 Act and the 1981 Notification with UNCLOS"[366] prior to 26 June 2015, when the Notification and Statement of Claim was filed.

276. As an initial matter, Italy does not disagree that in order for there to be a legal dispute, the Parties must hold clearly opposite views with respect to the issue brought before the relevant court or tribunal pursuant to Part XV of the Convention, and that the date for determining the existence of such a dispute is the date on which the application is submitted.[367] Italy also submits that, as confirmed by ITLOS and ICJ jurisprudence, "the existence of such a disagreement can be inferred from conduct"[368] and "'any statement or documents exchanged between the parties', paying special attention to 'the author of the statement or document, their intended or actual addressee, and their content'." [369]

277. Applying the above to this case, and contrary to India's claim, Italy contends that this requirement has been met because the Parties "have held 'clearly opposite views' on the consistency of the Maritime Zones Act 1976 and the 1981 Notification with UNCLOS since 2012".[370] In particular, Italy asserts that "the conformity with UNCLOS of the Maritime Zones Act 1976 and the 1981

363 India's Rejoinder, paras 2.4, 2.6-2.15; India's Counter-Memorial, paras 4.2-4.12.

364 Italy's Reply, para. 2.32.

365 Italy's Reply, para. 2.32 [emphasis added by Italy]. *See also* Italy's Rejoinder, paras 3.2, 3.12.

366 Italy's Rejoinder, para. 3.2; Hearing Transcript, 9 July 2019, 130:18-21.

367 Italy's Reply, para. 2.37, *citing Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016, p. 255 at p. 271, paras 38-39.

368 Hearing Transcript, 9 July 2019, 130:21-131:2, *referring to M/T "San Padre Pio" (Switzerland v. Nigeria)*, Provisional Measures, Order of 6 July 2019, ITLOS Reports 2018-2019 [forthcoming], para. 57.

369 Hearing Transcript, 18 July 2019, 64:9-21, *citing Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016, p. 255 at pp 271-72, paras 39-40.

370 Italy's Reply, para. 2.38.

Notification was raised by Italy *at every stage of those proceedings*", and that the "juxtaposition of views and interpretations between [the Parties] on this issue emerged early on and remained prominent throughout the domestic proceedings".[371]

278. In this regard, Italy points to various oral and written submissions made by Italy and India in the relevant domestic court proceedings, in which, Italy alleges, India and Italy (on behalf of the Marines) take opposing views with respect to the question whether, if the correct Indian law interpretation of the 1976 Maritime Zones Act and the 1981 Notification was that they effected a wholesale extension of the Indian Penal Code beyond India's territorial sea, the 1976 Maritime Zones Act and the 1981 Notification would be incompatible with the Convention.[372] In these domestic proceedings in which each State was involved at the highest levels,[373] Italy argues, the Parties also took opposing views with respect to the question whether Indian law would prevail in the event that the 1976 Maritime Zones Act and the 1981 Notification were found to be incompatible with the Convention.[374]

279. Moreover, while it is true that Italy, in the domestic proceedings, "tried to argue for a read-down of those instruments precisely to avoid a breach of India's obligations under UNCLOS", Italy points out that these "arguments were strongly resisted by the Indian government in the proceedings before its courts" and ultimately rejected by the Supreme Court of India.[375] Indeed, according to Italy, in a finding which constitutes binding law in India, the Supreme Court of India rejected the interpretation of the 1976 Maritime Zones Act and the 1981 Notification that would

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371 Italy's Reply, para. 2.33 [emphasis added by Italy]. *See also* Italy's Rejoinder, para. 3.6; Hearing Transcript, 9 July 2019, 132:1-5; Hearing Transcript, 18 July 2019, 60:12-15, 61:5-9.

372 Italy's Reply, para. 2.33, *citing* Notes of Argument submitted by the Advocate-General of Kerala, 27 March 2012, para. 6.i (**Annex IT-271**); Written Submissions filed on behalf of Massimiliano Latorre and Salvatore Girone and Italy, 2 April 2012, paras 26, 18-30 (**Annex IT-272**); Counter Affidavit filed on behalf of the Ministry of External Affairs, 7 May 2012, para. R (**Annex IT-273**); Special Leave Petition 20370 of 2012, 11 July 2012, pp 91-92 (**Annex IT-18**); Written Submissions submitted on behalf of the Union of India by the Additional Solicitor General, 12 September 2012, pp 4, 9, 11, 14 (**Annex IT-275**). *See also* Italy's Rejoinder, para. 3.7, *citing* Notes of Argument submitted by the Advocate-General of Kerala, 27 March 2012, p. 5 (**Annex IT-271**); Written Submissions filed on behalf of Massimiliano Latorre and Salvatore Girone and Italy, 2 April 2012, para. 26 (**Annex IT-272**); Judgment of the High Court of Kerala, 29 May 2012, pp 23-24 (**Annex IT-17**); Special Leave Petition 20370 of 2012, 11 July 2012, pp 90-91, 133 (**Annex IT-18**); Written Submissions submitted on behalf of the Union of India by the Additional Solicitor General, 12 September 2012, pp 3-4, 8, 9 (**Annex IT-275**); Hearing Transcript, 18 July 2019, 61:11-62:22, *citing* Written Submissions filed on behalf of Massimiliano Latorre and Salvatore Girone and Italy, 2 April 2012, para. 26 (**Annex IT-272**); Writ Petition No. 236 of 2014 under Article 32 of the Constitution of India, 6 March 2014, para. 4(I) (**Annex IT-56**); Special Leave Petition 20370 of 2012, 11 July 2012, para. 5 (**Annex IT-18**).

373 Hearing Transcript, 18 July 2019, 60:15-21.

374 Italy's Rejoinder, para. 3.7.

375 Hearing Transcript, 9 July 2019, 132:5-133:5. *See also* Hearing Transcript, 18 July 2019, 63:11-18.

allow them to be read harmoniously with the Convention, and instead adopted an interpretation inconsistent with the Convention.[376]

280. On the basis of the above, Italy alleges that there is "evidence [which is] copious and explicit, [and which] flatly contradicts India's contention that 'it cannot be said that India was aware, or could not have been unaware, that Italy was making … an allegation that India was in breach of its obligations' under UNCLOS by effect of the Maritime Zones Act 1976 and the 1981 Notification".[377] To the contrary, Italy claims, India was fully aware of Italy's position and "resisted it expressly by pushing for an interpretation of its laws that India knew Italy regarded as inconsistent with UNCLOS".[378]

281. Italy further asserts that this evidence shows that the legal dispute had crystallised well before Italy's submission of the dispute to this Arbitral Tribunal, and was and remains a central element in the legal dispute between the Parties.[379] This demonstrates, contrary to India's claim, that Italy has maintained a "consistent position […] that, if the correct Indian law interpretation of the 1976 Act and the 1981 Notification is that they effected a wholesale extension of Indian criminal law beyond India's territorial sea, those two instruments would be incompatible with UNCLOS".[380]

282. In response to India's claim that Italy quoted selectively from the Parties' submissions in the domestic court proceedings, specifically omitting passages from the *Aban Loyd Chiles Offshore Ltd. v. Union of India* case, Italy argues that those passages are not relevant to this Arbitration.[381] This is because both the High Court of Kerala and the Supreme Court of India have, since 2008, held that the 1976 Maritime Zones Act and the 1981 Notification do effect a wholesale extension of Indian penal law beyond India's territorial sea, and that therefore the interpretation of the two legal instruments as a matter of Indian law, is incompatible with the Convention.[382]

(b) **Admissibility of Claim of Italy**

283. The Arbitral Tribunal must examine, furthermore, whether this particular claim of Italy constitutes a new, additional claim and is admissible.

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376 Italy's Reply, para. 2.34; Italy's Rejoinder, para. 3.8; Hearing Transcript, 9 July 2019, 133:15-20.

377 Italy's Reply, para. 2.35, *citing* India's Counter-Memorial, para. 4.12.

378 Italy's Reply, para. 2.35.

379 Italy's Reply, para. 2.36.

380 Italy's Rejoinder, para. 3.10.

381 Italy's Rejoinder, para. 3.11.

382 Italy's Rejoinder, para. 3.11.

i. Position of India

284. India argues that, even if there were a pre-existing dispute between the Parties regarding the compatibility of the 1976 Maritime Zones Act and the 1981 Notification, Italy's claim is inadmissible because it was "not raised, directly or indirectly, in the Statement of Claim".[383] India argues that Italy's challenge to the compatibility of the 1976 Maritime Zones Act and the 1981 Notification with the Convention constitutes a new, additional claim that "transforms the dispute brought before this Tribunal".[384]

285. India argues that, in line with the *jurisprudence constante* of international courts and tribunals, the Notification and Statement of Claim must set out the subject of the dispute.[385] Thus, while the claims made in the Notification and Statement of Claim can be clarified or specified later in the proceedings, any "additional claim must have been implicit [therein], or must arise directly out of the question which is the subject matter of that application".[386] This requirement, India alleges, "is all the more compelling in the present case" given that Italy is asking the Arbitral Tribunal "no less than to nullify *de facto* an Act of Parliament", and is "all the more extraordinary [since] prior to the filing of its Memorial, Italy had never protested against the 1976 Act notwithstanding the fact that the Act was duly published by the Division of the Law of the Sea".[387]

286. In this respect, India emphasises that it is necessary to "distinguish between the dispute itself and arguments used by the Parties to sustain their respective submissions to the dispute".[388] In India's view, while Italy "might have in principle the right to argue that the act and the [notification]

383 India's Rejoinder, para. 2.16.

384 India's Counter-Memorial, para. 4.13.

385 India's Counter-Memorial, para. 4.4; Hearing Transcript, 13 July 2019, 17:12-18:10, *citing Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, p. 432 at p. 447-48, para. 29; *Case Concerning the Administration of the Prince von Pless*, Order of 4 February 1933, P.C.I.J. Series A/B, No. 52, p. 11 at p. 14. *See also* India's Counter-Memorial, para. 4.13, *citing Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 275 at pp 318-19, para. 99; India's Rejoinder, para. 2.18, *citing M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, ITLOS Reports 2013, p. 4 at p. 44, para. 143; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, I.C.J. Reports 2003, p. 161 at p. 213, para. 117.

386 India's Counter-Memorial, para. 4.4; Hearing Transcript, 13 July 2019, 18:14-19:17, *citing Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 240 at p. 266, para. 67; *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, ITLOS Reports 2013, p. 4 at p. 44, para. 142.

387 India's Counter-Memorial, para. 4.5; Hearing Transcript, 13 July 2019, 21:8-17.

388 Hearing Transcript, 13 July 2019, 16:23-17:4, *citing Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, p. 432 at p. 449, para. 32.

cannot justify India's case […] it cannot indeed make it the subject matter of a claim, of a submission before the Tribunal".[389]

287. In addition, while Italy reserved its right to supplement and/or amend its claim and the relief sought as necessary, India maintains that such "reservation is of no effect at all" because it "cannot circumvent the well-established rule that any posterior request or submission must remain within the framework of the initial application or notification".[390]

288. In this case, India argues, Italy "indisputably introduces a new dispute of a nature different from the one it initially brought before this Tribunal" because Italy requests the Arbitral Tribunal "to order India to cease applying instruments which were not even mentioned in its Statement of Claim".[391] According to India, by now "advancing these claims and making them part of its submissions, Italy has extended the dispute beyond the limits of the reliefs sought and described in its application" and "tries to transform and expand unduly the subject matter of the dispute".[392]

ii. Position of Italy

289. Italy maintains that its Notification and Statement of Claim includes its claim regarding the incompatibility of the 1976 Maritime Zones Act and the 1981 Notification with the Convention.[393] Referring to its description of the dispute and the first form of relief sought in its Notification and Statement of Claim, Italy notes that it clearly alleged that, by exercising criminal jurisdiction over the Marines, India was in breach of various obligations under the Convention.[394] In addition, Italy points to one of the grounds of its claims described in its Notification and Statement of Claim which provides:

> By extending the application of its domestic criminal laws and, consequently, providing for the apparent jurisdiction of the Indian investigating and prosecuting authorities, and the Indian courts, over incidents occurring in international waters in excess of the limits prescribed in UNCLOS regarding the jurisdiction of coastal States in the contiguous zone and the exclusive economic zone, India has acted and continues to act in a manner incompatible *inter alia* with Article 56(2) and Article 89 of UNCLOS.[395]

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389 Hearing Transcript, 13 July 2019, 16:7-12.

390 Hearing Transcript, 13 July 2019, 22:3-25.

391 India's Rejoinder, para. 2.19.

392 Hearing Transcript, 13 July 2019, 32:3-11.

393 Italy's Reply, paras 2.39-2.43.

394 Italy's Reply, paras 2.39-2.41, *citing* Notification and Statement of Claim, paras 1, 29-30, 33(a); Italy's Rejoinder, para. 3.13, *citing* Notification and Statement of Claim, para. 29(h). *See also* Hearing Transcript, 9 July 2019, 134:12-15.

395 Notification and Statement of Claim, para. 29(h).

290. These paragraphs, as well as the relief section,[396] Italy claims, "explicitly put in issue India's application of its domestic criminal laws to the contiguous zone and the exclusive economic zone",[397] and India's exercise of jurisdiction as a consequence of such application.[398]

291. In addition, Italy points out, Italy's language in the Notification and Statement of Claim mirrored the language used by India in domestic proceedings, thereby rendering it "inconceivable that when India received Italy's notification, it did not immediately understand what the almost identical language used by Italy was referring to".[399] Moreover, Italy submits, India cites no authority, and there is none, that would support India's claim that Italy is required to mention the 1976 Maritime Zones Act and 1981 Notification by name in its Notification and Statement of Claim.[400]

292. In addition, relying on the judgment of the ICJ in *Oil Platforms (Islamic Republic of Iran v. United States of America)* (hereinafter "*Oil Platforms*"), Italy maintains that its Memorial merely provides additional evidence relating to its original claim made in paragraph 29, subparagraph (h), of its Notification and Statement of Claim;[401] this evidence, namely, being the "specifics relating to how Indian criminal law has been extended to the Indian contiguous zone and exclusive economic zone through the 1976 Act and the 1981 Notification".[402]

293. Italy also dismisses India's argument that Italy's claim, like that of Saint Vincent and the Grenadines in *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)*, did not "arise […] directly out of the Application".[403] Unlike Saint Vincent and the Grenadines which "had not identified any violation of Article 300 in the notification and in the memorial", and instead only alleged such violations by Spain "after the closure of the written proceedings", Italy "did expressly identify the extension of criminal laws as discrete Indian conduct in respect of which Italy was notifying a claim for breach of certain provisions of UNCLOS".[404]

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396 Hearing Transcript, 18 July 2019, 55:16-56:4, *referring to* Notification and Statement of Claim, para. 33(a).

397 Italy's Reply, para. 2.42. *See also* Hearing Transcript, 9 July 2019, 134:16-135:4; Hearing Transcript, 18 July 2019, 55:2-9.

398 Hearing Transcript, 18 July 2019, 55:10-16.

399 Hearing Transcript, 18 July 2019, 56:5-18, *citing* Counter Affidavit filed on behalf of the Ministry of External Affairs, 7 May 2012, para. R (**Annex IT-273**).

400 Italy's Rejoinder, para. 3.14.

401 Italy's Rejoinder, paras 3.15-3.16.

402 Italy's Rejoinder, para. 3.15.

403 Hearing Transcript, 18 July 2019, 56-58:8, *referring to* Hearing Transcript, 13 July 2019, 19:2-12.

404 Hearing Transcript, 18 July 2019, 58:1-13.

294. The fact that Italy's claim regarding the compatibility of the two pieces of Indian legislation with the Convention is included in the terms of the Notification and Statement of Claim, Italy alleges, is "so incontrovertible that it is not necessary for Italy to reply to India's argument" that Italy's claim is an additional claim over which the Arbitral Tribunal lacks jurisdiction.[405] Nevertheless, Italy maintains that even if Italy's claim were regarded as an additional claim, it would still be admissible.[406]

295. According to Italy, ICJ and ITLOS jurisprudence allows additional claims to be submitted in two situations: where the additional claim is implicit in the Notification and Statement of Claim, or where the additional claim arises directly out of the question which is the subject-matter of the Notification and Statement of Claim.[407] In this case, Italy argues, "there can be no doubt that this claim was either/both implicit in the original claim or/and arises '*directly out of the question which is the subject-matter*' of it".[408] This is because, Italy claims, the 1976 Maritime Zones Act and 1981 Notification are central to the dispute between the Parties over who has jurisdiction over the Marines, in particular because they are necessary conditions for India's assertion and exercise of jurisdiction over them.[409]

296. In addition, Italy dismisses India's reliance on the ICJ's judgment in *Certain Phosphate Lands in Nauru (Nauru v. Australia)*,[410] arguing that unlike this case, Australia's "claim on the allocation of the overseas assets of the British Phosphate Commissioners advanced in the memorial [was] inadmissible because […] it only had a link 'of a general nature' with the original claim" and raised questions "that appear […] to be extraneous to the original claim".[411]

2. Alleged Breaches by India of Provisions of UNCLOS

297. Italy submits that Section 5, paragraph 4, of the 1976 Maritime Zones Act, and Section 7, paragraph 7, of the 1976 Maritime Zones Act, read in conjunction with the 1981 Notification, are incompatible with Article 33, paragraph 1; Article 56, paragraphs 1 and 2; Article 58,

405 Italy's Reply, para. 2.43.

406 Italy's Reply, paras 2.44-2.46; Hearing Transcript, 9 July 2019, 135:5-9; Hearing Transcript, 18 July 2019, 58:14-19.

407 Italy's Reply, paras 2.44-2.45, *citing Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010, p. 639 at p. 657, para. 41; *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, ITLOS Reports 2013, p. 4 at p. 44, para. 142; Hearing Transcript, 9 July 2019, 135:9-136:4,

408 Italy's Reply, para. 2.46 [emphasis added by Italy]. *See also* Hearing Transcript, 9 July 2019, 136:7-13.

409 Italy's Reply, para. 2.46.

410 *See* Hearing Transcript, 13 July 2019, 19:13-17.

411 Hearing Transcript, 18 July 2019, 58:20-59:14, *citing Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 240 at p. 266, paras 67-68.

paragraph 2; Article 87, paragraph 1, subparagraph (a); and/or Article 89 of the Convention.[412] India, in response, denies that it applied the 1976 Maritime Zones Act and the 1981 Notification in any way that was contrary to UNCLOS".[413]

(a) **Position of Italy**

298. Italy claims that, by enacting the 1976 Maritime Zones Act and the 1981 Notification – which purport to extend India's criminal jurisdiction over its contiguous zone and exclusive economic zone – India "has acted and is acting in a manner that is incompatible with UNCLOS with regard to Articles 33(1), 56(1), 56(2), 58(2), 87(1)(a) and/or 89".[414]

299. As a preliminary matter, Italy submits that there is "ample support for the proposition that the mere passage or existence of national legislation may breach international legal obligations".[415] Italy acknowledges that whether a breach is caused by the mere enactment of legislation, or whether the legislation has to be implemented in a given case before a breach can be said to have occurred, depends on the nature of the primary obligation. However, since provisions of UNCLOS "set[] limits to, *inter alia*, prescriptive jurisdiction – that is, to the right of States to legislate on certain matters", Italy maintains that it is "in the nature of such provisions that they may be violated by the mere enactment of legislation".[416]

300. Elaborating on this point, Italy asserts that the Convention was "intended to be a comprehensive legal regime governing the law of the sea", particularly in relation to rules that govern the rights and duties of States in the maritime zones regulated under the regime.[417] Therefore, Italy argues, any assertion and exercise of rights, control, or jurisdiction by coastal States beyond their territorial sea requires an affirmative legal basis under the Convention.[418] In the absence of such a legal basis, the extension of jurisdiction and the exercise of adjudicative jurisdiction based on an extension of prescriptive jurisdiction beyond the territorial sea would be unlawful under international law and incompatible with the Convention.[419]

412 Italy's Memorial, p. 188.
413 India's Rejoinder, para. 5.10.
414 Italy's Memorial, p. 188.
415 Italy's Memorial, para. 9.14.
416 Italy's Memorial, para. 9.18.
417 Italy's Memorial, para. 9.19. *See also* Hearing Transcript, 9 July 2019, 140:24-141:1.
418 Italy's Memorial, para. 9.23.
419 Italy's Memorial, para. 9.23.

301. Turning to the 1976 Maritime Zones Act and the 1981 Notification, Italy submits that they give India "the right, under its domestic law, to apply and enforce penal laws over any person, Indian or foreign citizen, in its EEZ who is found to have committed an offence punishable under the penal laws extended and made applicable to the EEZ of India".[420] This understanding is, according to Italy, consistent with the views of India's own legal advisors,[421] the interpretation and application of that law by the Indian courts, including the Supreme Court in the proceedings against the Marines,[422] the Indian Ministry of Home Affairs,[423] and the expert opinion of a former justice of the Supreme Court of India.[424]

i. Alleged Aspects of Incompatibility between the 1976 Maritime Zones Act and 1981 Notification, and the Convention

302. On the above premises, Italy submits that the 1976 Maritime Zones Act and the 1981 Notification are incompatible with the Convention in three respects.

303. First, Italy submits that by purporting to subject the exclusive economic zone to its sovereignty, India is in breach of Article 89 of the Convention. In support of this claim, which Italy notes that India has essentially ignored,[425] Italy contends that Article 89 must be read in conjunction with Article 87, regarding the freedom of the high seas, from which the prohibition of exercising sovereignty over the high seas flows.[426] In this context, Italy submits that Article 89 does not only apply to prohibit *de jure* annexation, but also to "all state conduct amounting in effect to an assertion of sovereignty".[427] In Italy's view, criminal law and criminal jurisdiction "are typical expressions of the 'juridical order' of a state" and "quintessential manifestations of

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420 Hearing Transcript, 9 July 2019, 119:10-120:3, *citing* Justice Deepak Verma, Second Expert Report: The "Enrica Lexie" Incident, dated 25 July 2017, para. 38.

421 Hearing Transcript, 9 July 2019, 112:17-117:19, *referring to* Letter from the Ministry of External Affairs of India (Legal & Treaties Division) to the Ministry of Home Affairs of India, 25 March 1983, para. 3(c) (**Annex IT-67**); Letter from the Ministry of Home Affairs of India to the Ministry of External Affairs of India (Legal & Treaties Division), 14 April 1983, para. 3 (**Annex IT-68**); Letter from the Ministry of External Affairs of India (Legal & Treaties Division) to the Ministry of Home Affairs of India, 3 May 1983 (**Annex IT-69**).

422 Hearing Transcript, 9 July 2019, 117:20-118:7, 120:14-22, *referring to Republic of Italy & Ors v. Union of India & Ors*, Supreme Court of India, Judgment of 18 January 2013, Judgment of Kabir CJ, para. 99 (**Annex IT-19**); Justice Deepak Verma, Second Expert Report: The "Enrica Lexie" Incident, dated 25 July 2017, para. 36.

423 Hearing Transcript, 9 July 2019, 118:8-119:9, *referring to* Notification of the Ministry of Home Affairs of India of 14 June 2016 (**Annex IT-215**).

424 Hearing Transcript, 9 July 2019, 121:4-11, *referring to* Justice Deepak Verma, Second Expert Report: The "Enrica Lexie" Incident, dated 25 July 2017, para. 38.

425 Hearing Transcript, 9 July 2019, 138:9-15.

426 Hearing Transcript, 9 July 2019, 136:24-138:3. *See also* Italy's Memorial, para. 9.39.

427 Hearing Transcript, 9 July 2019, 138:21-25. *See also* Italy's Memorial, para. 9.39.

sovereignty".[428] As such, the fact that India "is extending the full body of its criminal laws to the EEZ *tout court*" is a "deep and comprehensive assertion of typically sovereign authority [that] must be properly characterised as an attempt to subject the EEZ to Indian sovereignty".[429]

304. Second, Italy claims that the 1976 Maritime Zones Act and 1981 Notification are contrary to the rules on the rights of coastal States in the exclusive economic zone and the contiguous zone in the Convention, and more specifically Articles 33(1), 56, and 58.

305. In support of this claim, Italy reiterates its position that the Convention "was intended to be a comprehensive regime and to provide a complete basis for the rights and duties of states in the maritime zones".[430] This is confirmed, according to Italy, by Article 55 of the Convention, which provides that the zone is "subject to" a specific legal regime and "governed by" the relevant provisions of the Convention.[431] Similarly, Italy notes, ITLOS upheld this position in *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)* (hereinafter "*M/V 'SAIGA' (No. 2)*"), when it rejected Guinea's argument that its application of its customs laws in the exclusive economic zone was not contrary to the Convention because "rights or jurisdiction in the exclusive economic zone, which the Convention does not expressly attribute to the coastal States, do not fall automatically under the freedom of the high seas".[432] Instead, ITLOS found that "the Convention does not empower a coastal State to apply its customs laws in respect of any other parts of the exclusive economic zone not mentioned [in Article 55]".[433] Accordingly, Italy submits, when "there is no legal basis in the Convention for a particular coastal State's right in the EEZ, it must follow that that right would breach UNCLOS", otherwise, "the identification of rights and duties in the different maritime zones in the Convention would be hollowed out of any legal significance".[434]

306. In Italy's view, the customs laws applied by Guinea to the exclusive economic zone in the *M/V "SAIGA" (No. 2)* case are no different from the criminal laws applied by India in this case because there is no legal basis in the Convention for their application by the coastal State in the

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428 Hearing Transcript, 9 July 2019, 139:6-9.

429 Hearing Transcript, 9 July 2019, 139:14-19. *See also* Italy's Reply, para. 6.15.

430 Hearing Transcript, 9 July 2019, 140:25-141:1. *See also* Italy's Reply, para. 6.14.

431 Hearing Transcript, 9 July 2019, 141:1-12.

432 Hearing Transcript, 9 July 2019, 141:14-142:14, *citing M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10 at p. 54, para. 125.

433 Hearing Transcript, 9 July 2019, 142:9-19, *citing M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10 at pp 54, 56, paras 127, 136.

434 Hearing Transcript, 9 July 2019, 142:24-143:6. *See also* Italy's Memorial, paras 9.30-9.35; Italy's Reply, para. 6.11.

exclusive economic zone.[435] Indeed, Italy claims, "there is no plausible reading of the provisions in UNCLOS that deal with the EEZ that could sustain the broad and all-encompassing extension of penal jurisdiction that India has provided for" in its domestic laws.[436] Therefore, Italy submits that Section 7, paragraph 7, of the 1976 Maritime Zones Act, in conjunction with the 1981 Notification, violates the Convention by extending India's jurisdiction in the exclusive economic zone beyond the authorised limits in the Convention in breach of Article 56, paragraph 1, and Article 58, paragraph 2.[437]

307. In addition, Italy submits that the same analysis applies *mutatis mutandis* to the contiguous zone.[438] Under Article 33, paragraph 1, of the Convention, coastal States may exercise the control necessary to "prevent the infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; [and] punish infringement of the above laws and regulations committed within its territory or territorial sea". Section 5, paragraph 4, of the 1976 Maritime Zones Act authorises India to exercise the control necessary "with respect to […] the security of India".[439] Because the exercise of control necessary with respect to "the security of India" has no basis in Article 33, paragraph 1, or anywhere else in the Convention, Italy submits that it is incompatible with the Convention,[440] and that India itself was aware of this inconsistency but chose not to amend its legislation.[441]

308. Third, Italy submits that the 1976 Maritime Zones Act and the 1981 Notification interfere with other States' freedom of navigation in breach of Article 87, paragraph 1, subparagraph (a), which is extended to the exclusive economic zone by effect of Article 58, paragraph 1.[442]

309. In support of this claim, Italy quotes ITLOS' judgment in *M/V "Norstar" (Panama v. Italy)* (hereinafter "*M/V 'Norstar'*"),[443] in which ITLOS found that "if a State applies its criminal and customs laws to the high seas and criminalizes activities carried out by foreign ships thereon, it

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435 Hearing Transcript, 9 July 2019, 142:20-23.

436 Hearing Transcript, 9 July 2019, 143:9-15. *See also* Italy's Reply, para. 6.14. *See also* Italy's Memorial, paras 9.30-9.41.

437 Italy's Memorial, paras 9.24, 9.36, 9.41; Italy's Reply, paras 6.14-6.15.

438 Hearing Transcript, 9 July 2019, 144:5-7.

439 1976 Maritime Zones Act, Sections 5(1)-(2) and 5(4) (**Annex IT-65**).

440 Italy's Memorial, para. 9.27. *See also* Italy's Reply, para. 6.13; Hearing Transcript, 9 July 2019, 144:18-145:22.

441 Hearing Transcript, 9 July 2019, 145:23-146:20, *citing* O.P. Sharma, 'Indian and the United Nations Convention on the Law of the Sea' (1995) 26 Ocean Development and International Law 391, at 404.

442 Italy's Memorial, para. 9.44; Italy's Reply, para. 6.15.

443 Hearing Transcript, 18 July 2019, 76:22-77:3; Hearing Transcript, 9 July 2019, 148:13-149:22, *citing M/V "Norstar" (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], paras 222-23.

would constitute a breach of article 87 of the Convention, unless justified by the Convention or other international treaties",[444] and that "even acts which do not involve physical interference or enforcement on the high seas may constitute a breach of the freedom of navigation".[445] Italy adds that "acts short of physical interference or enforcement include, on the *Norstar* analysis, the exercise of prescriptive jurisdiction".[446] Further, Italy submits that ITLOS found that it was not necessary to demonstrate that the legislation at issue had a "chilling effect" on navigation in order to establish a breach of Article 87.[447] While Italy maintains that the 1976 Maritime Zones Act and the 1981 Notification, "by its nature, by its scope, has a chilling effect" on navigation, in Italy's view, even if they did not, the threshold for establishing a breach of Article 87 of the Convention, as articulated by ITLOS in *M/V "Norstar"*, is clearly met in this case where India has not only exercised prescriptive jurisdiction but also adopted specific enforcement measures to ensure the effectiveness of such jurisdiction.[448]

310. Moreover, contrary to India's contention, Italy maintains that it is irrelevant whether India only exercised jurisdiction over the Marines in India's internal waters.[449] This is because, in *M/V "Norstar"*, ITLOS rejected a similar argument made by Italy and instead held that "even when enforcement is carried out in internal waters, Article 87 may still be applicable and be breached if a State extends its criminal and customs laws extraterritorially to activities of foreign ships on the high seas and criminalizes them".[450] Accordingly, in Italy's view, "even if the enforcement happened in a place where it would have been in theory permissible, the fact that it had been preceded and enabled by the unlawful prescriptive jurisdiction results in a breach of Article 87 and in the freedom of the high seas".[451]

311. Italy similarly dismisses India's attempts to distinguish the *M/V "Norstar"* case on the basis that, unlike the Italian decree at issue in that case, the 1981 Notification only criminalises conduct by foreign persons and not foreign vessels. According to Italy, "[i]t is an established principle of the

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444 *M/V "Norstar" (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], para. 225. *See* Hearing Transcript, 18 July 2019, 76:22-77:3.

445 *M/V "Norstar" (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], para. 223. *See* Hearing Transcript, 9 July 2019, 148:13-23.

446 Hearing Transcript, 9 July 2019, 149:3-22, *referring to M/V "Norstar" (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], para. 225.

447 Hearing Transcript, 9 July 2019, 150:7-11, *citing M/V "Norstar" (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], para. 224.

448 Hearing Transcript, 9 July 2019, 150:4-6; 150:12-16.

449 Hearing Transcript, 9 July 2019, 151:8-24.

450 Hearing Transcript, 9 July 2019, 150:17-151:24.

451 Hearing Transcript, 9 July 2019, 151:19-24.

law of the sea that a vessel and those on board the vessel are an inseparable legal unit".[452] In addition, while it is true that ITLOS did not address Panama's claim concerning the legality of criminal charges over those involved in the operation of M/V "Norstar", it was not, as India contends, because it concerned the exercise of jurisdiction over persons, as opposed to vessels, but because Panama failed to pursue the claim in this regard.[453]

312. Similarly, in response to India's argument that unlike the bunkering activities in M/V "Norstar" the Marines' conduct in this case was unlawful, Italy maintains that "it is not possible to say *a priori*, without the determination of a court, whether conduct is illegal or legal".[454] In addition, not only did ITLOS find that the criminalisation of activities carried out by foreign ships on the high seas would constitute a breach of the Convention, but also the extension of criminal laws to the high seas.[455] The fact that the extension of criminal laws, which by definition concern activities which the State regards as unlawful, is prohibited, demonstrates, in Italy's view, that even laws that prohibit unlawful activities may not be extended or applied to the high seas.[456]

ii. India's Alleged Bases for Exercising Jurisdiction over the Marines

313. Italy responds to India's argument that the 1976 Maritime Zones Act and the 1981 Notification are compatible with the Convention because India was entitled to exercise jurisdiction over the "Enrica Lexie" and the Marines on the basis of the principles of territoriality and passive personality under international law, as well as compatible and complementary rules under Indian law, as provided in Section 4, paragraph 2, of the Indian Penal Code and Section 7, paragraph 4, subparagraph (e), of the 1976 Maritime Zones Act.

314. With respect to the principles of territoriality and passive personality, Italy rejects India's reliance thereon to justify its exercise of jurisdiction for several reasons.[457]

315. First, with respect to the territoriality principle, according to Italy, India asserts that this basis of jurisdiction is consistent with international law because Article 92, paragraph 1, of the Convention, which applies to the exclusive economic zone by virtue of Article 58, paragraph 2, of the Convention, provides that "Indian flagged vessels 'shall be subject to its exclusive

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452 Hearing Transcript, 18 July 2019, 77:4-78:2, *citing M/V "Virginia G" (Panama/Guinea-Bissau)*, Judgment, ITLOS Reports 2014, p. 4 at p. 48, para. 127.

453 Hearing Transcript, 18 July 2019, 78:11-79:19.

454 Hearing Transcript, 18 July 2019, 80:9-14.

455 Hearing Transcript, 18 July 2019, 80:15-81:15.

456 Hearing Transcript, 18 July 2019, 81:6-15.

457 Italy's Reply, paras 6.25-6.38.

jurisdiction'."[458] Italy, however, argues that India "misinterprets the meaning and scope" of Article 92, paragraph 1, of the Convention.[459]

316. India, Italy notes, fails to recognise that exclusive flag-State jurisdiction under Article 92, paragraph 1, of the Convention applies to ships on the high seas.[460] In addition, according to Italy, such jurisdiction "does not mean that such ships are assimilated into Indian territory for all purposes, given that '[t]he view that a ship is a floating part of state territory has long fallen into disrepute'."[461]

317. Accordingly, Italy submits that Indian exclusive jurisdiction over the "St. Antony" could not justify the exercise of jurisdiction over the Marines on the "Enrica Lexie".[462] It is for this reason, Italy claims, that the evidence of State practice proffered by India is not only distinguishable from the present case because it involves examples of offences wholly committed by persons on board their flagged ships, but also irrelevant.[463]

318. Second, with respect to the passive personality principle, Italy points out that it "can in no way be said to have been the basis for India's position in the case of the marines, nor can it be described as part of the ratio of the judgment of the Supreme Court".[464] While India claims that the passive personality principle is incorporated in Section 7, paragraph 4, subparagraph (e), of the 1976 Maritime Zones Act, which provides that, in the exclusive economic zone, India has, in addition to those provided in the Convention, "such 'rights as are recognised by international law',"[465] Italy notes that this provision did not play "any meaningful role in the [domestic proceedings]".[466]

319. In this regard, Italy rejects India's position that the Arbitral Tribunal should look not to the legal basis India relied upon during the domestic proceedings, but the bases India may invoke in the context of these inter-State proceedings.[467] In Italy's view, this position "is untenable" because "India cannot assert and exercise its jurisdiction on one basis and then, when challenged about

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458 India's Counter-Memorial, para. 3.13.

459 Italy's Reply, para. 6.26.

460 Italy's Reply, para. 6.27.

461 Italy's Reply, para. 6.28, *citing* James Crawford, *Brownlie's Principles of Public International Law* (8th edn., Oxford University Press, 2012), p. 464.

462 Italy's Reply, paras 6.29-6.30.

463 Italy's Reply, para. 6.31.

464 Hearing Transcript, 9 July 2019, 126:2-17, *citing* Justice Deepak Verma, Second Expert Report: The "Enrica Lexie" Incident, dated 25 July 2017, paras 23, 44.

465 India's Counter-Memorial, para. 3.16.

466 Italy's Reply, para. 6.33.

467 Hearing Transcript, 18 July 2019, 67:4-8.

the legality of that basis, seek some *a posteriori* justification" especially because "the basis that is identified at the moment when the jurisdiction is asserted and exercised […] is the basis that matters".[468] In this case, Italy notes, "there can be no doubt that India's justification was the unqualified extension of Indian criminal laws and justification to the EEZ by the [1976 Maritime Zones Act and the 1981 Notification]".[469]

320. Third, even if India were entitled to rely on legal bases other than those invoked in the domestic proceedings, those cited by India, in Italy's view, also do not sustain its arguments with respect to the passive personality principle.

321. For one, Italy does not consider India's attempt to read passive personality into Article 56 of the Convention to be of any merit.[470] According to Italy, "there is simply no basis for this loose interpretation of a coastal state's rights in the EEZ".[471] In fact, India's argument would appear, in Italy's view, to fail the test as articulated by ITLOS in *M/V "Virginia G" (Panama/Guinea-Bissau)* with respect to the scope of a coastal State's rights with respect to fishing, namely that, as "apparent from the list in article 62 […] for all activities that may be regulated by a coastal State there must be a direct connection to fishing".[472] In Italy's view, "[i]t is hopeless to suggest, as India does, that a blanket extension of its criminal laws jurisdiction in the EEZ could be justified on the basis of a direct connection to fishing".[473]

322. In addition, Italy rejects India's claim that because the Convention's regime on maritime zones is not comprehensive, it is entitled to rely on rights that are neither formally expressed nor excluded from the Convention, including those provided under the passive personality principle.[474] India's position, Italy points out, "goes against the settled jurisprudence […] [that] the UNCLOS regime of maritime zones has been regarded as comprehensive"[475] and as providing "a complete basis for the rights and duties of States in the maritime zones".[476] Specifically, Italy submits that the Convention "expressly overrides *Lotus*-type passive personality in the event of collisions or other

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468 Hearing Transcript, 18 July 2019, 67:15-23.

469 Hearing Transcript, 18 July 2019, 67:24-68:3.

470 Hearing Transcript, 9 July 2019, 127:6-8.

471 Hearing Transcript, 9 July 2019, 127:19-20.

472 Hearing Transcript, 9 July 2019, 127:21-128:5, *citing M/V "Virginia G" (Panama/Guinea-Bissau)*, Judgment, ITLOS Reports 2014, p. 4 at p. 68, para. 215.

473 Hearing Transcript, 9 July 2019, 128:6-9.

474 Hearing Transcript, 18 July 2019, 74:20-75:2.

475 Hearing Transcript, 18 July 2019, 75:2-4. *See also* Italy's Reply, para. 6.36; Hearing Transcript, 9 July 2019, 137:9-138:6.

476 Italy's Reply, para. 6.36.

incidents of navigation on the high seas because it was considered to 'constitute an intolerable interference with international navigation'."[477]

323. Moreover, Italy contends that the passive personality principle itself is considered controversial, dubious, and problematic as a matter of general international law.[478] While India appears to claim that the ICJ has ruled decisively on the passive personality principle, Italy points out that India was relying on the only separate opinion in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (hereinafter "*Arrest Warrant*") that expressed this view, namely that of Judge Guillaume.[479] In reality, Italy notes, the majority judgment in that case was silent on the issue of passive personality, and Judges Higgins, Kooijmans and Buergenthal actually conclude in their separate opinion that passive personality jurisdiction has been "long regarded as controversial" and "has only more recently been met with less opposition, and only for crimes of international terrorism".[480]

324. Indeed, a general rule of passive personality does not exist as wide in scope as India claims, especially because, in Italy's view, State practice on which India relies is lacking in uniformity and consistency.[481] In particular, Italy points out that "37 of the 49 states that India claims to have supposedly adopted the passive personality principle in their legislation in fact generally subject it to a combination of two preconditions: that the crime must have been committed abroad; and that the State of nationality of the offender must have first failed or refused to exercise its jurisdiction over the crime".[482] Indeed, Italy notes that India's own Law Commission stated that the "'[p]assive personality principle […] has found no place in Anglo-American jurisprudence',"[483] and India itself has not actually expressly stated that the principle has indeed

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477 Italy's Reply, para. 6.36, *citing* Yoshifumi Tanaka, *The International Law of the Sea* (2nd edn., Cambridge University Press, 2015), p. 160.

478 Italy's Reply, paras 6.37-6.38, *citing* Malcolm N. Shaw, *International Law* (7th edn., Cambridge University Press, 2014), p. 483; James Crawford, *Brownlie's Principles of Public International Law* (8th edn., Oxford University Press, 2012), p. 461.

479 Hearing Transcript, 18 July 2019, 68:20-69:10.

480 Hearing Transcript, 18 July 2019, 69:11-20, referring to *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, I.C.J. Reports 2002, p. 3 at p. 76-77, para. 47. *See also* Hearing Transcript, 9 July 2019, 128:22-129:5.

481 Italy's Reply, para. 6.38.

482 Hearing Transcript, 18 July 2019, 71:17-72:2, *referring to* India's Counter-Memorial, pp 55-63 (Afghanistan, Albania, Angola, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Capo Verde, Cambodia, China, Colombia, Czech Republic, Estonia, Ethiopia, France, FYROM, Germany, Greece, Iceland, India, Ireland, Kyrgyzstan, Latvia, Mexico, Moldova, Montenegro, Niger, Poland, Republic of Korea, Russian Federation, Serbia, Slovakia, Slovenia, Sweden, Timor-Leste, Tunisia, Ukraine, and the United States).

483 Hearing Transcript, 18 July 2019, 70:3-15, *citing*, Law Commission of India, Forty-Second Report, Indian Penal Code, June 1971, found at Second Expert Report of Justice Verma, Tab 3.

crystallised into a rule of customary international law.[484] In any event, none of the legislation cited by India "extends criminal jurisdiction to the exclusive economic zone in the same way and to the same extent as the contested provisions of Indian law"[485] nor constitutes evidence of *opinio juris*.[486]

325. Finally, Italy contends that India's arguments regarding territorial and passive personality jurisdiction are not dispositive of Italy's claim that the provisions of the 1976 Maritime Zones Act and the 1981 Notification extend India's jurisdiction in the exclusive economic zone beyond the limits allowed under the Convention.[487] Italy asserts that the provisions of the 1976 Maritime Zones Act and the 1981 Notification "have nothing whatever to do with the issue of Indian jurisdiction over Indian flagged vessels".[488] According to Italy, India's assertion of jurisdiction over the contiguous zone pursuant to the provisions at issue "is different from and goes beyond jurisdictional claims based on the passive personality principle" such that the "unlawfulness of India's extension of its jurisdiction could not be cured by passive personality *even if* such a 'principle' were available in this case".[489] Italy submits that this is true particularly because neither pieces of Indian legislation challenged by Italy could import passive personality.[490]

326. With regard to the domestic law bases on which India relies for its jurisdiction, namely Section 4, paragraph 2, of the Indian Penal Code, and Section 7, paragraph 4, subparagraph (e), of the 1976 Maritime Zones Act, Italy similarly considers them to be untenable.

327. First, Italy asserts that India's account of the basis upon which it exercised jurisdiction is "fundamentally misleading" because "it is contrary to the position expressly taken by both the Indian Government and the Indian courts during the domestic criminal proceedings".[491] Not only did "both the Indian Government and the Indian courts base India's jurisdiction on the 1981 Notification",[492] they also took the affirmative position that Section 4, paragraph 2, of the Indian Penal Code was not applicable to the facts of the case.[493] In addition, even though the Indian

484 Hearing Transcript, 18 July 2019, 71:8-13.

485 Hearing Transcript, 18 July 2019, 72:13-16.

486 Hearing Transcript, 18 July 2019, 73:6-12.

487 Italy's Reply, paras 6.31-6.32.

488 Italy's Reply, para. 6.31.

489 Italy's Reply, para. 6.32 [emphasis added by Italy].

490 Italy's Reply, para. 6.34.

491 Italy's Reply, paras 5.2, 5.7. *See also* Italy's Reply, para. 6.33; Hearing Transcript, 9 July 2019, 122:21-123:10.

492 Italy's Reply, paras 5.7-5.8. *See also* Hearing Transcript, 9 July 2019, 123:11-17.

493 Hearing Transcript, 9 July 2019, 122:21-123:7, *citing Republic of Italy & Ors v. Union of India & Ors*, Supreme Court of India, Judgment of 18 January 2013, Judgment of Kabir CJ, paras 61, 99 (**Annex IT-19**); Justice Deepak Verma, Second Expert Report: The "Enrica Lexie" Incident, dated 25 July 2017, para. 22.

Government mentioned Section 7, paragraph 4, subparagraph (e), and the passive-personality principle in the course of its argument before the Supreme Court, it did not advance the particular argument that India now makes in its Counter-Memorial.[494]

328. Second, even if India's position before its own courts were irrelevant, the bases of jurisdiction now advanced by India are, in Italy's view, "flawed as a matter of Indian legal analysis".[495] Relying on the expert report of Justice Verma submitted with its Reply, Italy maintains that Section 4, paragraph 2, of the Indian Penal Code does not apply in this case because the Marines did not commit the alleged offence while they were on board the Indian-flagged "St. Antony".[496] As a result, according to Italy, the "fundamental precondition" for the application of Sections 179 and 188, paragraph b, of the Indian Code of Criminal Procedure – that the persons be accused of an offence punishable under the Indian Penal Code – would not be met either, and therefore, those provisions would also not apply.[497] In addition, Italy submits that, contrary to India's claim, Section 7, paragraph 4, subparagraph (e), of the 1976 Maritime Zones Act does not have the effect of incorporating the passive personality principle into Indian law.[498] This is because under Indian law, Italy claims, "penal jurisdiction can only be created by specific legislation enacted by the legislature 'with' […] 'definiteness and preciseness'," and Section 7, paragraph 4, subparagraph (e), of the 1976 Maritime Zones Act does not meet that standard.[499]

(b) **Position of India**

329. The Arbitral Tribunal recalls that, in objecting to the Arbitral Tribunal's jurisdiction over this claim, India maintains that there was no dispute between the Parties on this issue at the relevant time. Accordingly, because India is of the view that this dispute is not properly before the Arbitral Tribunal, India engages with Italy's arguments only in the alternative.[500]

330. India maintains that, even if a dispute existed at the relevant time, the 1976 Maritime Zones Act and the 1981 Notification are compatible with the Convention because India has "never exercised any criminal jurisdiction over the Marines, or any jurisdiction over the *Enrica Lexie*, in its

494 Italy's Reply, para. 5.10. *See also* Hearing Transcript, 9 July 2019, 126:2-6.

495 Italy's Reply, para. 5.11.

496 Italy's Reply, para. 5.11(1), *citing* Justice Deepak Verma, Second Expert Report: The "Enrica Lexie" Incident, dated 25 July 2017, para. 15; Hearing Transcript, 9 July 2019, 123:18-124:22.

497 Italy's Reply, para. 5.11(1), *citing* Justice Deepak Verma, Second Expert Report: The "Enrica Lexie" Incident, dated 25 July 2017, paras 5, 30-32.

498 Italy's Reply, para. 5.11(2), *referring to* Justice Deepak Verma, Second Expert Report: The "Enrica Lexie" Incident, dated 25 July 2017, paras 38-43.

499 Hearing Transcript, 9 July 2019, 125:10-20.

500 Hearing Transcript, 13 July 2019, 32:19-33:5; Hearing Transcript, 20 July 2019, 137:10-14.

contiguous zone or EEZ",[501] and therefore "did not act, or apply the [1976 Maritime Zones Act] and the [1981] Notification in its exclusive economic zone or contiguous zone, in any way that was contrary to UNCLOS".[502]

331. India submits, rather, that it "had jurisdiction to investigate upon the shootings against the St Antony and, as a necessary consequence of this right, it must have jurisdiction to sue and try the authors of these shootings".[503] Similarly, India contends that the 1976 Maritime Zones Act and the 1981 Notification, "insofar as they are relevant in respect to the present case", are in conformity with the Convention, because they are "in the keeping with" the legal bases India has invoked to justify its exercise of jurisdiction.[504]

332. India disagrees with Italy's claim that the Convention "created a comprehensive and complete normative system including the whole law of the sea".[505] To the contrary, India contends that the Convention "leaves open quite a large range of issues" including concerning the regime of internal waters and the issue of biodiversity in areas beyond national jurisdiction".[506] This understanding is, in India's view, further confirmed by Article 59, which addresses "cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone", and the fact that dispute settlement bodies are called to apply, besides the Convention itself, "other rules of international law not incompatible with [the] Convention".[507] Accordingly, India submits, while a coastal State does not have sovereignty over its exclusive economic zone, "this does not mean that it has no rights beyond the 'sovereign rights' and the 'jurisdiction' expressly recognized" in the Convention.[508]

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501 India's Rejoinder, para. 5.7.

502 India's Rejoinder, para. 5.10.

503 Hearing Transcript, 20 July 2019, 137:14-18.

504 India's Counter-Memorial, paras 4.23-4.24.

505 Hearing Transcript, 13 July 2019, 33:6-34:12.

506 Hearing Transcript, 13 July 2019, 33:15-19, *citing "Ara Libertad" (Argentina v. Ghana)*, Provisional Measures, Order of 15 December 2012, Separate Opinion of Judges Cot and Wolfrum, ITLOS Reports 2012, p. 332 at p. 370, para. 25; K. Trümpler, 'Article 8, Internal Waters', in Alexander Proelß (ed.), *The United Nations Convention on the Law of the Sea: A Commentary* (C.H. Beck, Hart, Nomos, 2017), p. 90, para. 15; Donald. R. Rothwell and Tim Stephens, *The International Law of the Sea* (2nd edn., Hart Publishing, 2016), p. 55; UNGA, Res. 69/292, 6 July 2015, "Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction".

507 Hearing Transcript, 13 July 2019, 34:1-12.

508 Hearing Transcript, 13 July 2019, 34:13-18.

i. Alleged Aspects of Incompatibility between the 1976 Maritime Zones Act and 1981 Notification, and the Convention

333. In view of the above considerations, India rejects Italy's claim that it has unlawfully subjected a portion of the high seas to Indian sovereignty, via a blanket extension of its criminal laws, in breach of Article 33, paragraph 1, Article 56, paragraphs 1 and 2, Article 58, paragraph 2, Article 87, paragraph 1, subparagraph (a), and Article 89 of the Convention.[509]

334. With respect to Italy's claim regarding Article 89, India maintains that it does not prevent flag States from dealing with crimes committed on ships flying its flag, and the 1976 Maritime Zones Act "only establishes specific and well-determined rights which are neither formally dealt with nor excluded by the Convention".[510]

335. With respect to Italy's claim regarding Article 87, India disagrees with Italy's presumption that "coming within the purview of the application of Indian criminal law" would constitute "a factor that may discourage transit through the Indian exclusive economic zone".[511] Moreover, India maintains that "[f]reedom of navigation does not imply impunity or immunity from the application of the coastal state's criminal legislation and procedure in matters over which it has jurisdiction".[512]

336. India also dismisses Italy's reliance on the *M/V "Norstar"* judgment, in which ITLOS found that if a State "applies its criminal and customs laws to the high seas and criminalises activities carried out by foreign ships thereon, it would constitute a breach of Article 87 of the Convention, unless justified by the Convention or international treaties".[513] Notwithstanding the fact that this finding has been highly controversial as evident from the dissents of seven ITLOS judges, India claims that it does not apply in this case because its circumstances are distinguishable.[514] In particular, India notes, the *M/V "Norstar"* case involved the "criminalisation by a state of 'activities carried out by foreign ships'" and not foreign persons.[515] The challenged Italian decree in *M/V "Norstar"*, India points out, specifically targeted the activities of the *vessel* itself, alleging it to be a tax

509 Hearing Transcript, 13 July 2019, 34:20-35:10, *citing* Hearing Transcript, 9 July 2019, 104:21-23; Italy's Memorial, para. 9.41.

510 Hearing Transcript, 13 July 2019, 35:2-5.

511 Hearing Transcript, 13 July 2019, 35:15-36:1, *citing* Italy's Memorial, para. 9.40.

512 Hearing Transcript, 13 July 2019, 36:2-6.

513 Hearing Transcript, 13 July 2019, 36:7-14, *citing M/V "Norstar" (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], para. 225.

514 Hearing Transcript, 13 July 2019, 36:15-19, *citing M/V "Norstar" (Panama v. Italy)*, Judgment of 10 April 2019, Joint Dissenting Opinion of Judges Cot, Pawlak, Yanai, Hoffmann, Kolodkin, Lijnzaad and Judge *ad hoc* Treves, ITLOS Reports 2018-2019 [forthcoming].

515 Hearing Transcript, 13 July 2019, 37:19-22. *See also* Hearing Transcript, 20 July 2019, 140:24-141:6.

avoidance scheme, whereas the 1976 Maritime Zones Act "regulates the activities of *persons* in the EEZ, to the exclusion of those of vessels, which are mentioned in no provision of the act"[516] and the 1982 Notification only concerns offenses "committed *by any person* in the exclusive economic zone".[517] In the same vein, India observes, ITLOS did not even address, much less uphold, Panama's other claim that Italy had breached the Convention by filing criminal charges against persons having an interest in the M/V "Norstar"'s operations.[518]

337. Another significant difference, in India's view, is that the bunkering activities targeted by Italy in *M/V "Norstar"* were not unlawful *per se*, while the "actions [that] the marines are accused of are, nearly by way of definition, illegal".[519] This is relevant, according to India, because ITLOS made clear in its *M/V "Norstar"* judgment that "the principle of exclusive flag-state jurisdiction prohibits the extension of states' 'prescriptive jurisdiction to *lawful activities* conducted by foreign ships on the high seas'."[520]

ii. India's Alleged Bases for Exercising Jurisdiction over the Marines

338. In India's view, since "UNCLOS does not envisage the particular circumstances of the present case […] it is open for the Tribunal to turn to other rules of international law 'not incompatible with the Convention',"[521] and this includes the following two legal bases on which India relies for its exercise of jurisdiction over the "Enrica Lexie" and the Marines.

339. First, India submits that it may rely on the "principle of law which assimilates ships with national territory for the purpose of exercising jurisdiction in relation to crimes committed on board ships bearing the national flag", or the "territoriality" principle.[522]

340. According to India, this is reflected in Article 92, paragraph 1, of the Convention, which states that "[s]hips shall sail under the flag of one State only and […] shall be subject to its exclusive jurisdiction on the high seas", and applies to the exclusive economic zone by virtue of Article 58,

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516 Hearing Transcript, 13 July 2019, 36:20-37:15 [emphases added].

517 Hearing Transcript, 13 July 2019, 37:15-19, *citing M/V "Norstar" (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], paras 222, 225-26 [emphasis added by India].

518 Hearing Transcript, 13 July 2019, 37:23-38:8.

519 Hearing Transcript, 13 July 2019, 38:9-15, *citing M/V "Norstar" (Panama v. Italy)*, Judgment of 10 April 2019, Joint Dissenting Opinion of Judges Cot, Pawlak, Yanai, Hoffmann, Kolodkin, Lijnzaad and Judge *ad hoc* Treves, ITLOS Reports 2018-2019 [forthcoming], para. 20. *See also* Hearing Transcript, 20 July 2019, 141:7-15.

520 Hearing Transcript, 13 July 2019, 38:16-21, *citing M/V "Norstar" (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], para. 225 [emphasis added by India].

521 India's Counter-Memorial, para. 4.22, *citing* Article 293 of the Convention.

522 India's Counter-Memorial, para. 4.23(b).

paragraph 2.[523] Indeed, India points out, Italy itself has admitted that it "does not in these proceedings contend anywhere that India lacked exclusive jurisdiction over the St Antony".[524] India also posits that the right of coastal States to protect fisheries, as provided in Article 56 of UNCLOS, must extend to the protection of fishing boats and fishermen, "who are key actors in the exploitation and conservation of fish resources".[525] Therefore, in a situation where a murder is committed on board a fishing boat flying the national flag of a given State, as in this case, the flag State, namely India, "had jurisdiction over the St Antony by virtue of [Article 92, paragraph 1]"[526] and "was entitled to investigate the deaths of the occupants of the St Antony and to prosecute the perpetrators of these killings independently of the provisions of the 1976 act and the 1981 notification".[527]

341. Second, India asserts that it has jurisdiction *ratione personae* over the Marines based on the passive personality principle.[528]

342. According to India, Section 7, paragraph 4, subparagraph (e), of the 1976 Maritime Zones Act provides that, in its exclusive economic zone, India has "such rights as are recognised by International Law".[529] Such rights include the passive personality principle, which, according to India, is a "widely recognized principle of international law" and provides that "foreigners can be punished for acts abroad which injure nationals of the forum".[530] In India's view, the passive personality principle is justified by the permissive principle of jurisdiction, as developed under the French doctrine of *théorie de la compétence*, according to which "a state may act at the international level if it can rely on a title, which can be, in particular, its territory or the nationality of the recipient or beneficiary of the rule or of the action of the state".[531] In fact, India contends that the passive personality principle applies particularly in this case when "an accusation of crime of such gravity as a murder is at stake" and the argument that is sometimes invoked against the passive personality principle – that "the perpetrators may not have been aware of the illegality of

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523 Hearing Transcript, 13 July 2019, 39:7-16.

524 Hearing Transcript, 20 July 2019, 137:21-23, *citing* Hearing Transcript, 10 July 2019, 58:10-13.

525 India's Counter-Memorial, para 4.19. *See also* Hearing Transcript, 13 July 2019, 46:23-47:2.

526 Hearing Transcript, 13 July 2019, 39:17-21. *See also* India's Counter-Memorial, paras 3.13-3.15 and 4.20-4.21.

527 Hearing Transcript, 13 July 2019, 40:5-9.

528 India's Counter-Memorial, paras 3.16-3.18.

529 India's Counter-Memorial, para. 3.16, *citing* 1976 Maritime Zones Act, Section 7(4)(e) (**Annex IT-65**).

530 India's Counter-Memorial, paras 3.16, 4.17.

531 Hearing Transcript, 13 July 2019, 41:5-42:10, *referring to* Cedric Ryangaert, *Jurisdiction in International Law* (Oxford University Press, 2008), p. 31; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, I.C.J. Reports 2002, p. 3 at p. 76-77, para. 47.

their acts under the law of a foreign state" – is clearly irrelevant.[532] India further points out that Italy itself has admitted that "India is fully entitled to exercise its jurisdictions over its nationals" and that in Indian territorial waters, the "Enrica Lexie" "could be boarded for purpose of investigation and the arrest of persons on board".[533] This, in India's view, "unavoidably implies that India can investigate on murders of its nationals, determine who are the persons suspected to be the authors, arrest them and sue them".[534]

343. Similarly, India argues that the passive personality principle is consistent with Article 56 of the Convention, which provides that, in the exclusive economic zone, States have "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources" which must also extend to the protection of fishermen who are key actors in the exploitation and conservation of fisheries.[535]

344. Addressing Italy's arguments, India considers it irrelevant that the passive personality principle was not the basis for India's exercise of jurisdiction in its own courts because the relevant question is whether the principle of passive personality is compatible with the Convention, and "in the relations between parties to UNCLOS, Articles 56(1) and 89 justify recourse to this principle".[536] For the same reason, India does not deem it relevant whether the 1976 Maritime Zones Act and the 1981 Notification are grounded in the passive personality principle.[537]

345. India also dismisses Italy's claim that the passive personality principle has not crystallised as a customary rule of international law, and that "the limited state practice that exists in its support is by reference to international crimes".[538] Italy's position, in India's view, is contradicted by the fact that "at least 49 states have included the principle of passive personality in their legislation" and that the ICJ itself has found that "[u]nder the law as classically formulated, a State normally has jurisdiction over an offence committed abroad only if […] the offender, or at the very least the victim, has nationality of that State".[539] Moreover, regardless of whether the passive personality principle has crystallised as a customary rule, the State practice cited by India shows

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532 Hearing Transcript, 13 July 2019, 42:11-19.

533 Hearing Transcript, 20 July 2019, 138:1-8, *citing* Hearing Transcript, 10 July 2019, 58:16-18; Hearing Transcript, 11 July 2019, 32:13-24.

534 Hearing Transcript, 20 July 2019, 138:9-12.

535 India's Counter-Memorial, paras 4.19-4.20.

536 Hearing Transcript, 13 July 2019, 43:4-16. *See also* Hearing Transcript, 20 July 2019, 139:6-15.

537 Hearing Transcript, 20 July 2019, 139:16-20.

538 Hearing Transcript, 13 July 2019, 44:7-17.

539 Hearing Transcript, 13 July 2019, 45:22-46:5, *citing Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, Separate Opinion of President Guillaume, I.C.J. Reports 2002, p. 3 at p. 37, para. 4.

"that a large number of states interpret UNCLOS as authorising them to regulate matters concerning the EEZ and/or the high seas when they are not dealt with in UNCLOS".[540]

346. India states that it "has full sovereignty over its territorial sea and can exercise jurisdiction therein". Since "the Marines were only taken into custody after the Enrica Lexie was in port", India argues that it "was entitled to exercise criminal jurisdiction over them." Thus, according to India, "India had jurisdiction to arrest the Marines, and the right to exercise criminal jurisdiction by instituting proceedings against them afterwards".[541]

347. Finally, while maintaining, contrary to Italy's contention, that the "question before this Tribunal is not on what legal basis India relied during the domestic proceedings, but which bases it may invoke in the context of the ongoing inter-state proceedings", India nevertheless submits that it was also entitled to act on the basis of domestic law.[542]

348. In particular, India contends that it is "entitled to investigate and bring charges for alleged crimes that took place on the *St Antony*" based on Section 4, paragraph 2, of the Indian Penal Code, read with Sections 179 and 188, paragraph b, of the Indian Criminal Code of Procedure.[543] Section 4, paragraph 2, of the Indian Penal Code, which reflects the territoriality principle, provides that "[t]he provisions of this Code apply also to any offence committed by […] any person on any ship or aircraft registered in India wherever it may be".[544] According to India, Sections 179 and 188, paragraph (b), of the Indian Criminal Code of Procedure, in turn, provide that when such offences are committed, "the offence may be inquired into or tried by a Court within whose local jurisdiction such thing has been done or such consequence ensued", and that the person committing the offence "may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found".[545]

349. India claims that, by virtue of these provisions, the Indian Penal Code "applies to acts that caused the death of persons on the Indian registered *St Antony*" and that under its domestic law, India may exercise jurisdiction over both the "Enrica Lexie" incident and the Marines because they were located in Indian territory after the "Enrica Lexie" entered India's territorial sea.[546]

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540 Hearing Transcript, 20 July 2019, 140:8-17.

541 India's Counter-Memorial, para. 3.18. *See also* India's Counter-Memorial, paras 3.12, 3.44.

542 Hearing Transcript, 13 July 2019, 40:18-41:4. *See also* Hearing Transcript, 20 July 2019, 139:6-15.

543 India's Counter-Memorial, paras 3.7-3.12.

544 Indian Penal Code (Act No. 45 of 1860), Section 4(2) (**Annex IN-19**).

545 Indian Code of Criminal Procedure, 1973 (Act No. 2 of 1974), Sections 179 and 188(b) (**Annex IN-20**).

546 India's Counter-Memorial, para. 3.12.

350. India disagrees with Italy's contention that Section 4, paragraph 2, of the Indian Penal Code does not apply in this case because the persons accused of the offence did not commit the offence while they were on board the "St. Antony".[547] India submits that Italy's interpretation is inconsistent with the object and purpose of the provision, which focuses on crimes that occur on an Indian registered ship.[548] India claims that, because "the killing of the two fishermen and the damage to the boat, which form the basis of an alleged crime, clearly occurred *on* an Indian ship", Section 4, paragraph 2, does apply.[549] India submits moreover that the language of Section 4, paragraph 2, makes clear that it applies to any offence committed on an Indian registered ship "wherever it may be".[550]

351. Accordingly, in India's view, "it could act on the basis of both its domestic law, the act of 1976 and the notification of 1981, and the international law principle[s], which "do not exclude or contradict each other, but rather combine to establish Indian jurisdiction".[551]

3. Analysis of the Arbitral Tribunal

352. Italy claims that, by enacting the 1976 Maritime Zones Act and issuing the 1981 Notification, India has acted and is acting in a manner that is incompatible with UNCLOS with regard to Article 33, paragraph 1; Article 56, paragraphs 1 and 2; Article 58, paragraph 2; Article 87, paragraph 1, subparagraph (a); and/or Article 89.[552] Italy further claims that the aforementioned Act and Notification were the basis for the exercise by India of criminal jurisdiction over the Marines[553] and requests the Arbitral Tribunal to "order, in addition or in the alternative, that" India shall "cease to apply the provisions of the 1976 Maritime Zones Act and the 1981 Notification insofar as they are incompatible with UNCLOS".[554]

353. India maintains that the 1976 Maritime Zones Act and the 1981 Notification are compatible with the Convention,[555] and that India has "never exercised any criminal jurisdiction over the Marines,

547 India's Rejoinder, paras 5.14-5.18.
548 India's Rejoinder, paras 5.16-5.17.
549 India's Rejoinder, paras 5.16-5.17 [emphasis added by India].
550 India's Rejoinder, para. 5.15.
551 Hearing Transcript, 13 July 2019, 40:15-41:4.
552 Italy's Memorial, p. 188, 1 (a).
553 Italy's Memorial, para. 6.19.
554 Italy's Memorial, p. 189, 2 (a).
555 India's Counter-Memorial, para. 4.24.

or any jurisdiction over the Enrica Lexie, in its contiguous zone or EEZ" on the basis of this legislation.[556]

354. As noted by the Arbitral Tribunal in Part IV, Section A.2(b) related to the identification of a dispute, the Parties' dispute that has given rise to the present Arbitration is appropriately characterised as a disagreement as to which State is entitled to exercise jurisdiction over the incident of 15 February 2012 involving the "Enrica Lexie" and the "St. Antony", which raises questions under several provisions of the Convention, including Articles 56, 58, 59, 87, 92, 97, 100, and 300 on the interpretation or application of which the Parties have different views. The Arbitral Tribunal will accordingly need to consider whether Italy's argument that the 1976 Maritime Zones Act and 1981 Notification are incompatible with the Convention is relevant to the dispute before it.

355. It is common ground between the Parties that Italy did not raise the alleged incompatibility of the 1976 Maritime Zones Act and 1981 Notification in the abstract, as a separate dispute independent of the events of 15 February 2012. Rather, Italy regards the 1976 Maritime Zones Act and 1981 Notification as relevant because it considers that the measures allegedly undertaken by India in the exclusive economic zone *vis-à-vis* the "Enrica Lexie" were based on that legislation.

356. The Arbitral Tribunal notes that Indian authorities commenced investigation and asserted their jurisdiction in relation to the incident of 15 February 2012 on 16 February 2012, when the "Enrica Lexie" was anchored in Indian territorial waters, 4.5 miles off the shore of Kochi (*see* above paragraphs 157 to 158). On that date, the Coast Guard informed those on board the "Enrica Lexie" that they were under investigation "for the murder of the two fishermen" (*see* above paragraph 158). Thus, it is established that no enforcement actions were taken by the Indian authorities against the "Enrica Lexie" or the Marines in the Indian exclusive economic or contiguous zones.

357. The Arbitral Tribunal observes that the Indian Coast Guard, at the time of its action in the Indian exclusive economic zone on 15 February 2012, did not provide any indication as to the legal basis for its action. Any such discussion post-dates the incident.

[556] India's Rejoinder. para. 5.7.

358. Italy notably draws the attention of the Arbitral Tribunal to internal communications exchanged between different Indian ministries,[557] and pleadings of the Union of India before Indian courts,[558] in which India sought during the initial stage of its internal proceedings to justify the conduct of the Coast Guard in part by reference to the 1976 Maritime Zones Act and 1981 Notification.

359. In the present Arbitration, in contrast, India has not reiterated the argument that its conduct was based on the 1976 Maritime Zones Act and 1981 Notification. Rather, India relies on the territoriality and passive personality principles under international law, which are addressed in Part V, Section A.2, as well as provisions of its criminal code, as bases for the actions of its Coast Guard.

360. The Arbitral Tribunal observes that from among the Articles of UNCLOS with which Italy claims the Indian legislation is incompatible, only Article 87, paragraph 1, subparagraph (a), concerning freedom of navigation on the high seas is specifically referred to in the Italian submissions as being breached by India. However, this claim by Italy, which is examined in Part V, Section B.1(b) is not based on the alleged extension of the Indian legislation to the exclusive economic zone.

361. In these circumstances, the Arbitral Tribunal does not consider that Italy has established that the conduct of India of which Italy complains in the present Arbitration was in fact based on the 1976 Maritime Zones Act and 1981 Notification. Accordingly, even if questions may arise as to the compatibility of that legislation with the Convention, the Arbitral Tribunal sees no need to address that issue in the context of the present dispute.

362. The Arbitral Tribunal will now examine whether the two legal bases on which India relies in the present proceedings in support of the exercise of its jurisdiction over the "Enrica Lexie" incident and the Marines are compatible with the Convention. India invokes the "territoriality principle"[559] and the "passive personality principle"[560] as such legal bases.

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557 Letter from the Ministry of External Affairs of India (Legal & Treaties Division) to the Ministry of Home Affairs of India, 25 March 1983, para. 3(c) (**Annex IT-67**); Letter from the Ministry of Home Affairs of India to the Ministry of External Affairs of India (Legal & Treaties Division), 14 April 1983, para. 3 (**Annex IT-68**); Letter from the Ministry of External Affairs of India (Legal & Treaties Division) to the Ministry of Home Affairs of India, 3 May 1983 (**Annex IT-69**).

558 Hearing Transcript, 9 July 2019, 117:20-118:7, 120:14-22, *referring to Republic of Italy & Ors v. Union of India & Ors*, Supreme Court of India, Judgment of 18 January 2013, Judgment of Kabir CJ, para. 99 (**Annex IT-19**); Justice Deepak Verma, Second Expert Report: The "Enrica Lexie" Incident, dated 25 July 2017, para. 36.

559 India's Counter-Memorial, paras 3.14-3.15, 4.23(b).

560 India's Counter-Memorial, paras 3.16-3.18, 4.23(a), Hearing Transcript, 13 July 2019, 41:23-42:10.

363. The Arbitral Tribunal considers that, to justify India's exercise of jurisdiction in the present case, it would be sufficient for either of the two bases to be compatible with the Convention.

364. The territoriality principle invoked by India denotes the principle that a State may exercise jurisdiction over any offence committed in its territory. According to India, this principle may be extended to a vessel, so that a State may exercise jurisdiction over any offence committed on board its vessel wherever it may be, as if the offence were committed in its territory.[561]

365. The Arbitral Tribunal notes that such an extended territoriality principle is well established, and the domestic criminal legislation of a large number of States confers jurisdiction over offences committed on board national ships or aircraft.[562] In this regard, the Arbitral Tribunal does not consider that this principle amounts to assimilating a vessel with national territory "for all purposes" as if "a ship is a floating part of state territory", as Italy argues.[563]

366. In the view of the Arbitral Tribunal, it is also well established that, where the commission of an offence involves the territories of more than one State (for example, an offence was commenced in the territory of one State and completed in the territory of another State), both the State in whose territory an offence was commenced (subjective territoriality principle) and the State in whose territory it was completed (objective territoriality principle) may exercise jurisdiction over the offence.[564] Likewise, where an offence was commenced on board one vessel and completed on board another vessel, the flag States of both vessels may have concurrent jurisdiction over the offence.[565]

367. In the present case, the Marines on board the "Enrica Lexie" fired at the "St. Antony", resulting in the death of two Indian fishermen on board the "St. Antony" and damage to the vessel.[566] The incident thus involves two vessels: the alleged offence was commenced on board the Italian vessel, "Enrica Lexie", and completed on board the Indian vessel, "St. Antony". According to the territoriality principle, both Italy and India are entitled to exercise jurisdiction over the incident.

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561 India's Counter-Memorial, paras 3.13-3.15, 4.20-4.21; India's Rejoinder, para. 7.13; Hearing Transcript, 13 July 2019, 39:17-21.

562 This principle is comprised within the domestic laws of at least 81 States. *See* India's Counter-Memorial, para. 4.21 and pp 64-76 ("Domestic Criminal Legislation conferring Jurisdiction over Crimes committed on board National Ships").

563 Italy's Reply, para. 6.28.

564 *S.S. "Lotus" (France v. Turkey)*, Judgment of 7 September 1927, P.C.I.J. Series A, No. 10, pp 19, 23.

565 *S.S. "Lotus" (France v. Turkey)*, Judgment of 7 September 1927, P.C.I.J. Series A, No. 10, p. 25; Alexander Proelß (ed.), *The United Nations Convention on the Law of the Sea: A Commentary* (C.H. Beck, Hart, Nomos, 2017), pp 722-23.

566 First Information Statement relating to First Information Report no. 2 of 2012, Kerala Police, 15 February 2012, para. 2 (**Annex IT-110**).

However, this is without prejudice to the question whether India is precluded from exercising jurisdiction over the Marines because of their status as State officials entitled to immunity in relation to acts performed in the exercise of their official functions. This question will be addressed in Part V, Section C, of the Award.

368. Furthermore, in the Arbitral Tribunal's view, India's exercise of jurisdiction over the "Enrica Lexie" incident is not only compatible with the Convention, but justified by Article 92, paragraph 1, of the Convention, which provides for the principle of exclusive flag State jurisdiction. Pursuant to this principle, India, as the flag State, has exclusive jurisdiction over the "St. Antony" and may assert its jurisdiction in respect of the offence that was allegedly completed on board its vessel in the exclusive economic zone, in the same way as Italy, as the flag State, has exclusive jurisdiction over the "Enrica Lexie" and may assert its jurisdiction in respect of the offence that was allegedly commenced on board its vessel.

369. Having found that the territoriality principle can provide a valid legal basis for India's exercise of jurisdiction over the "Enrica Lexie" incident, the Arbitral Tribunal does not find it necessary to address the validity of the second base invoked by India, the passive personality principle.

370. The Arbitral Tribunal recalls that the Parties engaged in extensive discussion as to whether India is entitled to exercise jurisdiction over the "Enrica Lexie" incident under its domestic criminal laws.[567] However, the Arbitral Tribunal is not called upon to rule on any question of Indian law or proceedings instituted before Indian courts. Accordingly, there is no need for the Arbitral Tribunal to address such question in the present proceedings.

B. ALLEGED BREACHES AND VIOLATIONS BY INDIA OF PROVISIONS OF PART VII (HIGH SEAS) OF UNCLOS

371. Italy claims that India, through its conduct on, and subsequent to, 15 February 2012, has breached several provisions of Part VII of the Convention, namely, Article 87, paragraph 1, subparagraph (a) (freedom of navigation); Article 92 (status of ships); Article 97 (penal jurisdiction in matters of collision or any other incident of navigation); and Article 100 (duty to cooperate in the repression of piracy), read together with Article 300 (good faith and abuse of rights).

[567] *See e.g.*, India's Counter-Memorial, paras 3.7-3.12; India's Rejoinder, paras 5.13-5.18; Hearing Transcript, 13 July 2019, 40:15-41:4; Hearing Transcript, 20 July 2019, 139:6-15; Italy's Reply, paras 5.2, 5.7-5.12, 6.33, 6.35, 6.39; Hearing Transcript, 9 July 2019, 122:21-127:5.

372. These provisions are found in Part VII of the Convention and apply to the high seas. Article 58 of the Convention, however, extends the application of these provisions to the exclusive economic zone. Article 58 provides:

> *Article 58*
>
> *Rights and duties of other States in the exclusive economic zone*
>
> 1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.
>
> 2. 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.
>
> 3. In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.

373. The Parties agree that, although the "Enrica Lexie" incident occurred in India's exclusive economic zone, the provisions of Part VII indicated above apply by virtue of Article 58.[568]

374. Italy relies on these provisions of Part VII in the following requests for relief, as set out in its Memorial:

> (b) By directing the *Enrica Lexie* to change course and proceed into India's territorial sea, India violated Italy's freedom of navigation, in breach of UNCLOS Article 87(1)(a).
>
> (c) By interdicting the *Enrica Lexie* and escorting her to Kochi, India violated Italy's exclusive jurisdiction over the *Enrica Lexie*, in breach of UNCLOS Article 92.
>
> (d) India violated, and continues to violate, Italy's exclusive right to institute penal or disciplinary proceedings against the Marines, in breach of UNCLOS Article 97(1).
>
> (e) By ordering the detention of the *Enrica Lexie* between February and May 2012, and investigating those on board, India violated the prohibition contained in UNCLOS Article 97(3).
>
> [...]
>
> (g) By failing to cooperate in the repression of piracy, India violated UNCLOS Article 100, read with UNCLOS Article 300.[569]

375. India has not raised any objections to the jurisdiction of the Arbitral Tribunal in its Counter-Memorial or Rejoinder in respect of these requests for relief.

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568 Italy's Memorial, paras 10.7, 10.31, 10.39, 10.65; Italy's Reply, paras 7.4, 7.15; India's Counter-Memorial, paras 3.13, 6.21, n. 388, 8.1, 8.19.

569 Italy's Memorial, p. 188.

376. In the following subsections, the Arbitral Tribunal will summarise the positions of the Parties with respect to Italy's claims under these provisions of the Convention in the order that Italy raises them in its Memorial.

1. Alleged Breaches by India of Articles 87, paragraph 1, subparagraph (a), and 92 of UNCLOS

377. The Parties disagree over the interpretation of Article 87, paragraph 1, subparagraph (a), and Article 92 of the Convention. These Articles address the freedom of navigation and the status of ships on the high seas which, by virtue of Article 58, also apply to the exclusive economic zone.

378. Article 87, paragraph 1, subparagraph (a), provides:

> *Article 87*
>
> *Freedom of the high seas*
>
> 1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:
>
> (a) freedom of navigation;

379. Article 92 provides:

> *Article 92*
>
> *Status of ships*
>
> 1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.
>
> 2. A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.

380. Since the Parties' claims turn on findings with regard to a common set of contested facts,[570] the Arbitral Tribunal will first summarise the Parties' positions in respect of these facts, before proceeding to summarise the Parties' arguments under Article 87, paragraph 1, subparagraph (a), and Article 92, respectively.

[570] Italy's Reply, para. 7.22; India's Rejoinder, para. 6.20.

(a) Circumstances of the Alteration of the Course of the "Enrica Lexie" to Proceed to Kochi

381. The Parties disagree on the circumstances that led the "Enrica Lexie" to alter course and proceed to Kochi, thereby entering into India's territorial sea.

i. Position of Italy

382. Italy asserts that once the Indian authorities became aware of the "Enrica Lexie" incident, they "developed a pretext designed to cause the Enrica Lexie to sail into India's territorial sea",[571] directed the "Enrica Lexie" to "interrupt its voyage to proceed to Kochi", "interdicted" it beyond India's territorial sea, and "escorted" it into India's territorial sea.[572] In support of this claim, Italy refers to the following evidence.

383. Neither Party disputes that the firing incident was declared closed at 17:00 SMT/17:30 IST[573] and that at 17:50 SMT/18:10 IST, the "Enrica Lexie" had resumed its planned voyage.[574] Captain Vitelli's report in an SSAS message had been sent to MRCC Rome, given that Italy was the flag State of the vessel. The MRCC Rome "would then have informed MRCC Mumbai".[575]

384. Italy asserts that India's contention that the incident was not reported to MRCC Mumbai is incorrect for three reasons. First, according to Italy, it was not the responsibility of a ship's captain navigating beyond India's territorial waters to report the incident to the Indian authorities. Besides, the Italian and international authorities that he did inform, in turn, informed the Indian authorities. Otherwise, there would be no explanation as to why the MRCC Mumbai's Duty Controller during the call to "Enrica Lexie" at 18:30 SMT/19:00 IST informed the "Enrica Lexie" that the Indian Coast Guard had captured two pirate boats "suspected to be related to the firing of shots from the Enrica Lexie". [576] Second, when the Indian authorities requested that Captain Vitelli share with them a copy of the message he had sent to others, he did so.[577] Third, based on

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571 Hearing Transcript, 18 July 2019, 162:7-9.

572 Italy's Memorial, para. 4.106. *See also* Italy's Reply, para. 4.27.

573 Italy's Memorial, para. 4.30.

574 Italy's Memorial, para. 4.31, *referring to* Additional Statement of Umberto Vitelli, 2 March 2012, p. 93 (**Annex IT-157**). *See also* Hearing Transcript, 9 July 2019, 1:15-17; Hearing Transcript, 18 July 2019, 157:22-25.

575 Hearing Transcript, 18 July 2019, 157:25-158:4, *referring to* Hearing Transcript, 15 July 2019, 42:3-19.

576 Hearing Transcript, 18 July 2019, 158:9-20, *referring to* Letter from the Mercantile Marine Department of the Ministry of Shipping of India to the Commissioner of Police, Kochi, 23 March 2012, attaching "Interim Report into the Marine Casualty of Death of Two Fishermen off Kochi due to Firing by M.T. Enrica Lexie, Flag Italy, on 15.02.2012", 12 March 2012, p. 7 (**Annex IT-161**).

577 Hearing Transcript, 18 July 2019, 158:21-153:2, *referring to* Email from the Master of the "Enrica Lexie" to MRC C Mumbai, 19:30 (IST), 15 February 2012 (**Annex IT-119**).

the evidence of Captain Fredy, the Indian authorities also received a report from the "St. Antony" concerning the "death of two fishermen aboard it following fire from a merchant tanker", before the "St. Antony" reached shore.[578]

385. Italy submits that the matter then became a "police case", and "a joint operation involving India's police, Coast Guard and Navy was then launched" with the objective to "'investigate' the vessel involved in the firing incident, to apprehend it, and to arrest the individuals who India believed were responsible for the firing".[579]

386. At 17:10 SMT/17:40 IST, according to Italy, Indian Coast Guard District HQ 4 informed DIG [redacted] of the CGAE that "a fishing boat was fired by a merchant vessel at sea" and "directed [redacted] to conduct search for *suspected vessel* between Kollam and Kadungalloor".[580] Italy further submits that the Coast Guard also ordered a search of the ship, directing ICGS "Samar" "to divert from area patrol and proceed with max speed to reach area and render assistance *for apprehension of suspect vessel*".[581]

387. Italy submits that, at approximately 18:30 SMT/19:00 IST, the MRCC Mumbai, "not the Indian police and not India's Coast Guard in Kochi",[582] called the "Enrica Lexie" and spoke by telephone with Captain Noviello and Mr. Gupta. Mr. Gupta explained in a declaration that the Commander of MRCC Mumbai

> advised ENRICA LEXIE that they came to know that our vessel had a suspected pirate attack and in lieu of this they have caught 2 boats with suspected pirates and they asked [a]bout own vessel's present speed, course and position. After that they *instructed the vessel* to approach to Cochin Port as they wanted the Master to give his statement and witness. Also they requested the vessel to forward the Incident Report to MRCC Mumbai.[583]

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578 Hearing Transcript, 18 July 2019, 159:3-9.

579 Hearing Transcript, 18 July 2019, 159:10-19. *See also* Hearing Transcript, 9 July 2019, 1:18-2:1.

580 Italy's Memorial, para. 4.59, *citing* Statement by Commandant [redacted], Coast Guard Air Enclave Kochi, 19 February 2012, p. 1 (**Annex IT-7**) [emphasis added by Italy]. *See also* "Coast Guard, fishermen made a smart move", The Times of India (Electronic Edition), 18 February 2012 (**Annex IT-39**); Italy's Reply, para. 4.44; Hearing Transcript, 9 July 2019, 5:6-8.

581 Italy's Memorial, para. 4.59, *citing* Boarding Officer's Report MV "Enrica Lexie", 16-17 February 2012, para. 2 (**Annex IT-9**) [emphasis added by Italy]. *See also* Hearing Transcript, 9 July 2019, 5:11-13, 13:16-14:21.

582 Hearing Transcript, 18 July 2019, 160:2-3.

583 Italy's Memorial, para. 4.60, *citing* Declaration of Sahil Gupta, 15 February 2012 (**Annex IT-118**) [emphasis added by Italy]. *See also* Log Book of the Master of the "Enrica Lexie" (**Annex IT-14**); Letter from the Mercantile Marine Department of the Ministry of Shipping of India to the Commissioner of Police, Kochi, 23 March 2012, attaching "Interim Report into the Marine Casualty of Death of Two Fishermen off Kochi due to Firing by M.T. Enrica Lexie, Flag Italy, on 15.02.2012", 12 March 2012, p. 7 (**Annex IT-161**); Italy's Reply, para. 4.30; Hearing Transcript, 9 July 2019, 16:3-19:13; Hearing Transcript, 18 July 2019, 159:21-160:12.

388. Italy alleges that "[a]s we now know, no pirate vessels had in fact been captured by the Indian authorities" and that "[t]his was a false pretext deployed by the Indian authorities to cause Captain Vitelli to change the Enrica Lexie's course".[584]

389. Relying on a statement from Captain Vitelli and on the Log Book, Italy submits that, in the course of the 18:30 SMT/19:00 IST telephone call from MRCC Mumbai, Captain Vitelli requested a written message from MRCC Mumbai through Mr. Gupta.[585] In the same statement, Captain Vitelli explained that, after the incident, the "Enrica Lexie" "did not change our route. … We altered after getting the telephone call from MRCC Mumbai".[586]

390. Italy submits that Captain Vitelli maintained his course for a while longer after receiving the telephone call from MRCC Mumbai. According to Italy, Captain Vitelli had anticipated receiving the written message by the time he reached the point at which he would be across from Kochi, but when the message did not arrive by the time he reached that point, Captain Vitelli turned for Kochi, "believing himself to be under a duty to do so; at least a seaman's duty, if not a legal duty" as he considered the MRCC Mumbai to be the "highest authority" in that area.[587] According to Italy, ultimately, the "pretext worked",[588] as Captain Vitelli headed towards Kochi, "for the purposes of assisting the MRCC and Coast Guard authorities to identify two suspected pirate boats that he had been informed had been arrested".[589]

391. While Italy concedes that Captain Vitelli did not turn the "Enrica Lexie" towards Kochi "because he felt under threat" or "because he was coerced by the Indian Coast Guard",[590] Italy submits that it is clear that "there was trickery, that there was ruse, that there was misdirection, focused on bringing the Enrica Lexie into Indian territorial waters".[591]

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584 Hearing Transcript, 18 July 2019, 160:13-16.

585 Italy's Memorial, para. 4.61, *referring to* Log Book of the Master of the "Enrica Lexie" (**Annex IT-14**); Statement of Umberto Vitelli (**Annex IT-216**). *See also* Hearing Transcript, 9 July 2019, 19:14-19.

586 Italy's Reply, para. 4.36, *citing* Additional Statement of Umberto Vitelli, 2 March 2012, p. 91 (**Annex IT-157**). *See also* Italy's Reply, para. 4.37.

587 Hearing Transcript, 18 July 2019, 162:11-163:10, *referring to* "Coast Guard, fishermen made a smart move", The Times of India (Electronic Edition), 18 February 2012 (**Annex IT-39**); "Smart move brings ship to Kochi", Express Buzz (Electronic edition), 18 February 2012 (**Annex IT-268**); Hearing Transcript, 15 July 2019, 50:25-51:11; International Convention on maritime search and rescue, 1979 (Hamburg, 27 April 1979), UNTS, Vol. 1405, p. 119, Annex, Chapter 2; (Confidential Annex), p. 3 (**Annex IT-262**).

588 Hearing Transcript, 18 July 2019, 162:17.

589 Hearing Transcript, 18 July 2019, 45:21-46:7.

590 Hearing Transcript, 18 July 2019, 14:1-5.

591 Hearing Transcript, 18 July 2019, 2:14-20. *See also* Hearing Transcript, 18 July 2019, 2:21-3:4, 162:4-9, 170:19-171:5.

392. Italy submits that the ruse only became apparent to those on board the "Enrica Lexie" when they arrived at Kochi anchorage, at which point, "surrounded by Coast Guard patrol boats, they were effectively detained, unable to move, unable to resume their intended course".[592] According to Italy, the ruse became "a *de facto* detention",[593] which was formalised on 16 February 2012 when Commandant [redacted] and 36 Police and Coast Guard officers boarded the vessel, formally detained it, and commenced investigation.[594]

393. Italy further avers that "behind the ruse [...] there was a big stick: it was prepared, it was raised, it was ready for use, if the misdirection did not work".[595] In contending this, Italy relies on the testimony of Commandant [redacted] that the Boarding Party practised its "boarding drill", the evidence of DIG [redacted] on "encircling", "directing", and "monitoring" the "Enrica Lexie" to ensure that it did not leave, evidence of Commandant [redacted] that at the Kochi anchorage, "continuous pressure" was applied on the Marines and the Captain to comply with the Coast Guard's directions, and that he had detained the "Enrica Lexie" inside the territorial sea, "over the protests of the captain and of the marines, and in the face of a written note of protest from Sergeant Latorre asserting exclusive Italian jurisdiction and the immunity of the marines".[596]

394. Italy adds that according to Captain Vitelli's testimony, while on his way to Kochi, he knew that he was being monitored.[597] Captain Vitelli stated that he saw blurs on the radar screen and knew that there was movement not far away, but did not know what it was.[598]

395. Italy submits that the Coast Guard western regional commander, SPS Basra, was later quoted in a *Times of India* article as saying that "[w]hen Enrica Lexie officials confirmed they had an encounter with pirates, we asked them to sail to Kochi *to identify the pirates*".[599] According to Italy, SPS Basra explained that "[t]he Coast Guard had actually tricked the Italian ship" and "informed them that they were under investigation for the murder of two fishermen only after they reached the outer anchorage".[600] Referring to this account, Admiral Piroli's stated:

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592 Hearing Transcript, 18 July 2019, 46:18-21.

593 Hearing Transcript, 18 July 2019, 46:22.

594 Hearing Transcript, 18 July 2019, 46:15-47:4.

595 Hearing Transcript, 18 July 2019, 3:2-4.

596 Hearing Transcript, 18 July 2019, 3:13-25, 14:6-11.

597 Hearing Transcript, 18 July 2019, 15:12-17:12, *referring to* Hearing Transcript, 15 July 2019, 52:3-25.

598 Hearing Transcript, 18 July 2019, 168:18-169:1, *referring to* Hearing Transcript, 15 July 2019, 52:3-24.

599 Italy's Memorial, para. 4.61; Italy's Reply, para. 4.39, both *citing* "Coast Guard, fishermen made a smart move", The Times of India (Electronic Edition), 18 February 2012 (**Annex IT-39**) [emphasis added].

600 Italy's Reply, para. 4.39, *citing* "Coast Guard, fishermen made a smart move", The Times of India (Electronic Edition), 18 February 2012 (**Annex IT-39**); "Smart move brings ship to Kochi", Express Buzz (Electronic edition), 18 February 2012 (**Annex IT-268**); "Italian vessel erred in judgment", The Hindu

> The invitation to sail towards Cochin is possibly a deception by the Indian part … The posture of the Indian authorities that followed was in fact very different from what they made MV LEXIE's Shipmaster believe with their request to change course. … [T]he Indian Coast Guard asked MV LEXIE to head towards Cochin to collaborate in the identification of captured pirates. *This was a mystification of facts: MV LEXIE was already under investigation for the murder of two people*, as the events following its anchoring off the port of Cochin would reveal later.[601]

396. Italy counters India's argument that based on the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* case, the press report on SPS Basra's statements should not be given any weight. Italy asserts that it relies not on press reports containing general descriptions or the appreciation of the journalists but "direct quotations from the regional commander of the Coast Guard published contemporaneously in India's newspaper of record", which neither he nor India has ever corrected or denied.[602] Italy adds that even if the reports quoting SPS Basra are treated only as a form of corroboration, they corroborate other contemporaneous evidence that India instructed the "Enrica Lexie" on a pretext. Such evidence includes the Piroli Report and the Flash Report to the Presidency of the Republic of Italy.[603]

397. According to Italy, by 18:40 SMT/19:10 IST, when MRCC Mumbai identified and indicated that the "Enrica Lexie" was the "vessel [that] fired on a suspected pirate boat", the "Enrica Lexie" was "in position 243 Kochi Lt 37 n miles, about 34 n miles from the incident position".[604] Italy argues that this evidence further puts to an end any suggestion that, by this point, India was "in the dark" concerning the incident.[605]

398. Italy submits that, according to a statement by DIG [redacted], the pilot of the Dornier aircraft, at 18:50 SMT/19:20 IST, the CGAE received from Coast Guard District HQ 4 "the name and type of

(Electronic edition), 18 February 2012 (**Annex IT-269**). *See also* Hearing Transcript, 9 July 2019, 31:24-32:7; Hearing Transcript, 18 July 2019, 161:2-16.

601 Italy's Reply, para. 4.40, *citing* Piroli Report (Confidential Annex), pp 3-34-3-35 (**Annex IT-233**) [emphasis added by Italy].

602 Hearing Transcript, 9 July 2019, 32:8-17, *referring to* India's Rejoinder, para. 6.81.

603 Hearing Transcript, 9 July 2019, 32:22-34:11 *referring to* Interforce Operations High Command Flash Report no. 016/SO to the Presidency of the Republic of Italy and various Ministries, 15:30 (CET), 15 February 2012 (**Annex IT-115**); Piroli Report (Confidential Annex), pp 3-34-3-35 (**Annex IT-233**).

604 Italy's Memorial, para. 4.38, *citing* Boarding Officer's Report MV "Enrica Lexie", 16-17 February 2012, para. 3 (**Annex IT-9**); *referring to* National Maritime Search and Rescue Board, Report, 4 June 2012, p. 11 (**Annex IT-6**). *See also* Italy's Reply, para. 4.34; Hearing Transcript, 9 July 2019, 20:4-8.

605 Hearing Transcript, 18 July 2019, 162:2-4; Hearing Transcript, 9 July 2019, 20:16-21.

vessel involved in the firing",[606] and a *Times of India* article reported that, at 19:00 SMT/19:30 IST, the Southern Naval Command sent INS "Kabra" "to augment force level".[607]

399. DIG [redacted] further recounts that, at 19:05 SMT/19:35 IST, the Indian Coast Guard Dornier aircraft CG760 took off from INS "Garuda" for a "sea-air coordinated search".[608] At the same time, Coast Guard District HQ 4 instructed Commandant [redacted], officer of the watch at ICGS "Lakshmibai", "to sail with dispatch for interrogation positively and to *interrogate/identify all the merchant vessels in the area for confirming of a firing incident*".[609] The ICGS "Lakshmibai" "was sailed from Kochi … (with 04 police personnel embarked) to the most probable area for search and *interdiction of the suspected merchant vessel*".[610]

400. While the "Enrica Lexie" was turning, but before it had begun navigating towards Kochi,[611] the Indian Coast Guard Dornier aircraft CG760 located the "Enrica Lexie" at 19:20 SMT/19:50 IST at position 09° 51.6' N 075° 37.5' E, beyond India's territorial sea.[612] According to DIG [redacted]:

> *At 19.20 hrs.* [IST] *we got the name and type of vessel involved in the firing*. At 19.35 hrs. [IST] I along with Assistant Commandant Mayank Varma and Rajyasree Rathore as crew took off from INS Garuda in CG 760. The Dornier Air Craft at 19.50 hrs. [IST] We located the vessel ENRICA LEXIE in the Position 09°51.6"N and 075°37.5"E.[613]

401. DIG [redacted] further explained that, upon locating the "Enrica Lexie", the Dornier aircraft "encircled" it and contacted it over VHF channels 16 and 10. The "Enrica Lexie" "confirmed the

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606 Italy's Memorial, para. 4.62, *citing* Statement by Commandant [redacted], Coast Guard Air Enclave Kochi, 19 February 2012, p. 1 (**Annex IT-7**).

607 Italy's Memorial, para. 4. 62, *citing* "Coast Guard, fishermen made a smart move", The Times of India (Electronic Edition), 18 February 2012 (**Annex IT-39**). *See also* Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 175 (**Annex IT-131**); Italy's Reply, paras 4.42-4.43, 7.38.

608 Italy's Memorial, para. 4.63, *referring to* Statement by Commandant [redacted], Coast Guard Air Enclave Kochi, 19 February 2012, p. 1 (**Annex IT-7**); *citing* National Maritime Search and Rescue Board, Report, 4 June 2012, p. 11 (**Annex IT-6**). *See also* Hearing Transcript, 9 July 2019, 21:5-9.

609 Italy's Memorial, para. 4.64, *citing* Statement of [redacted], Assistant Commandant, Coast Guard District HQ 4, Kochi, 18 February 2012, p. 1 (**Annex IT-134**) [emphasis added by Italy].

610 Italy's Memorial, para. 4.64, *citing* National Maritime Search and Rescue Board, Report, 4 June 2012, p. 11 (**Annex IT-6**) [emphasis added by Italy].

611 Hearing Transcript, 18 July 2019, 163:11-12, *referring to* Hearing Transcript, 15 July 2019, 46:12-13, 78:8.

612 Italy's Memorial, para. 4.65, *referring to* Statement by Commandant [redacted], Coast Guard Air Enclave Kochi, 19 February 2012 (**Annex IT-7**); Boarding Officer's Report MV "Enrica Lexie", 16-17 February 2012, para. 4 (**Annex IT-9**).

613 Italy's Reply, para. 4.44, *citing* Statement by Commandant [redacted], Coast Guard Air Enclave Kochi, 19 February 2012, p. 1 ("[IST]" added) (**Annex IT-7**) [emphasis added by Italy]. *See also* Statement of Witness in connection with the NIA investigation, Statement of Commandant [redacted], Coast Guard, 750 Squadron, Coast Guard Air Station, Daman, 19 September 2013, p. 37 (**Annex IT-279**).

firing at the boat by the security guards on the vessel who belong to [the] Italian Navy".[614] Dornier aircraft's crew "directed them to amend the course and proceed to Kochi harbour" and "informed" them to remain on the VHF channels, through which the Dornier aircraft continuously contacted them.[615] Italy asserts that "this direction came in the context of the instruction already received from MRCC Mumbai".[616] The Dornier aircraft "vectored ICG ships for interception" of the "Enrica Lexie".[617]

402. According to Italy, the "Enrica Lexie" "altered the course towards Kochi" at 19:15 SMT/19.45 IST, and after it had turned, the Dornier aircraft "shadowed it to Kochi anchorage" from the height of 3,000 to 5,000 feet.[618]

403. Italy states that at 19:30 SMT/20:00 IST, ICGS "Lakshmibai" sailed with four police officers from the Coastal Police Station at Fort Kochi on board "with the admitted goal of investigating, intercepting and then apprehending the Enrica Lexie".[619] Italy further states that according to the testimony of Commandant [redacted], he was conducting boarding drills with the four policemen as the "Lakshmibai" left Kochi, heading for a location beyond India's territorial sea.[620] ICGS "Lakshmibai" called the "Enrica Lexie" on VHF channel 16. INS "Kabra" also began searching for the "Enrica Lexie".[621]

404. According to Italy, the "Enrica Lexie" responded to ICGS "Lakshmibai"'s VHF call at 19:45 SMT/20:15 IST and confirmed that, at about 16:00 SMT/16:30 IST, the "Enrica Lexie" had resorted to firing while in transit. Italy alleges that the ICGS "Lakshmibai" "directed the vessel

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614 Italy's Memorial, para. 4.66, *citing* Statement by Commandant [redacted], Coast Guard Air Enclave Kochi, 19 February 2012, p. 2 (**Annex IT-7**).

615 Italy's Memorial, para. 4.66, *citing* Statement by Commandant [redacted], Coast Guard Air Enclave Kochi, 19 February 2012, p. 2 (**Annex IT-7**). *See also* Italy's Reply, para. 4.45; Hearing Transcript, 18 July 2019, 163:15-164:1.

616 Hearing Transcript, 18 July 2019, 164:12-14.

617 Italy's Memorial, para. 4.66, *citing* National Maritime Search and Rescue Board, Report, 4 June 2012, p. 11 (**Annex IT-6**).

618 Italy's Memorial, para. 4.66, *citing* Statement by Commandant [redacted], Coast Guard Air Enclave Kochi, 19 February 2012, p. 2 (**Annex IT-7**); Statement filed on behalf of the Coast Guard, Kochi, 28 February 2012, para. 6 (**Annex IT-152**). *See also* Italy's Reply, para. 4.45; Hearing Transcript, 18 July 2019, 167:12-16.

619 Hearing Transcript, 18 July 2019, 164:15-19, *referring to* Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 175 (**Annex IT-131**); Hearing Transcript, 16 July 2019, 129:17-20, 130:13-15, 138:20-25, 140:24-145:1.

620 Hearing Transcript, 18 July 2019, 164:19-165:3, *referring to* Hearing Transcript, 16 July 2019, 86:23-26.

621 Italy's Memorial, para. 4.67, *referring to* Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 175 (**Annex IT-131**); Boarding Officer's Report MV "Enrica Lexie", 16-17 February 2012, para. 4 (**Annex IT-9**); Statement of [redacted], Assistant Commandant, Coast Guard District HQ 4, Kochi, 18 February 2012 (**Annex IT-134**); Statement of K. Suresh, Adhikari, Coast Guard District HQ 4, Kochi, 18 February 2012 (**Annex IT-132**).

to proceed towards Kochi".[622] Italy further alleges that Commandant [redacted] instructions were "[y]ou have to come to the Kochi".[623]

405. As noted above, at 20:06 SMT/20:36 IST, the "Enrica Lexie" received an e-mail from MRCC Mumbai referring to the telephone call at 18:30 SMT/19:00 IST and indicating MRCC Mumbai's understanding that there had been "a piracy incident/firing incident by your vessel on a suspicious skiffs". The e-mail, Italy submits, included a "request" for the "Enrica Lexie" to "head for Kochi and establish communication with Indian Coast Guard […] for further deposition/clarification", and further inquired as to the "Enrica Lexie"'s estimated time of arrival at Kochi.[624] Italy submits that if Captain Vitelli turned before 19:30 SMT/20:00 IST, it was not that e-mail that prompted the turn.[625]

406. Italy contends that India and Admiral Piroli erred in their perception of the time that the e-mail from MRCC Mumbai was received by the "Enrica Lexie" and in the suggestion that the version of the e-mail that India has submitted into evidence in this Arbitration was drawn from a computer that was on Italian time. Italy notes that the timestamp of such an e-mail is determined "by the computer on which the email is found, not the computer from which it is sent".[626] Italy then notes that the timestamp of the original e-mail is 16:06, while that of the forwarding e-mail is 15:16, and asserts that the e-mail cannot have been forwarded before it was received.[627] Noting that the time in the "Enrica Lexie" was set to Italian time, Italy concludes that the computer from which the e-mail was taken was not set to Central European Time (hereinafter "CET"), but on Coordinated Universal Time (hereinafter "UTC"), which is an hour behind CET.[628] Further, according to Italy, the e-mail produced by India is not supported by witness evidence and does not prove that the e-mail from the MRCC Mumbai to the "Enrica Lexie" was received before the "Enrica Lexie" turned for Kochi.[629] Italy states that this is in contrast to Captain Vitelli's "clear"

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622 Italy's Memorial, para. 4.68, *citing* Statement of [redacted], Assistant Commandant, Coast Guard District HQ 4, Kochi, 18 February 2012, pp 1-2 (**Annex IT-134**). *See also* "Coast Guard, fishermen made a smart move", The Times of India (Electronic Edition), 18 February 2012 (**Annex IT-39**).

623 Hearing Transcript, 18 July 2019, 168:1-2, *referring to* Hearing Transcript, 16 July 2019, 110:15-16.

624 Italy's Memorial, para. 4.69, *citing* E-mail from MRCC Mumbai to Master of the "Enrica Lexie", 15 February 2012 (**Annex IT-8**). *See also* E-mail from MRCC Mumbai to the Master of the "Enrica Lexie", 16:10 (CET), 15 February 2012 (**Annex IT-123**); Italy's Reply, para. 4.38; Hearing Transcript, 18 July 2019, 165:4-11.

625 Hearing Transcript, 9 July 2019, 7:6-8.

626 Hearing Transcript, 18 July 2019, 166:7-8.

627 Hearing Transcript, 18 July 2019, 165:15-166:11, *referring to* E-mail from the Shipmaster of the "Enrica Lexie" to the Shipowner of the "Enrica Lexie" dated 15 February 2012 at 19:46 IST (**Annex IN-35**).

628 Hearing Transcript, 18 July 2019, 165:15-166:11.

629 Hearing Transcript, 18 July 2019, 166:12-167:5.

written and oral statements that he received the e-mail at 20:06 SMT/20:36 IST, after he had begun navigating towards Kochi.[630]

407. At 20:17 SMT/20:47 IST, according to Italy, Captain Vitelli sent an e-mail to MSCHOA and UKMTO, with a copy to Fratelli D'Amato SpA, stating, with reference to the e-mail from MRCC Mumbai, that the "Enrica Lexie" had altered its course and was proceeding to Kochi.[631]

408. Italy contends that, after contacting the "Enrica Lexie" over VHF again, at approximately 21:00 SMT/21:30 IST, ICGS "Lakshmibai" "intercepted" the "Enrica Lexie". The location at which this interception occurred is imprecise, but it is uncontested that the interception occurred "after Captain Vitelli had amended his course and beyond India's territorial sea".[632] Italy allges that the ICGS "Lakshmibai", like the Dornier aircraft, stayed in "continuous communication with the […] Enrica Lexie".[633] Together with the Dornier, ICGS "Lakshmibai" "escorted" the "Enrica Lexie" to Kochi.[634]

409. Italy asserts that the suggestion that the escort of the "Enrica Lexie" by air and sea was to ensure safe passage "through sea lanes unknown to the Enrica Lexie might or might not be true", but even if true, it was not the only purpose. [635] This is demonstrated not only by contemporaneous evidence, but from the fact that once the "Enrica Lexie" anchored at Kochi anchorage, it continued to be monitored to ensure that it did not leave the anchorage. According to Italy, this was in implementation of the instructions under which the Coast Guard had been operating, that is, to "apprehend" the "Enrica Lexie".[636]

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630 Hearing Transcript, 18 July 2019, 167:6-11, *referring to* Additional Statement of Umberto Vitelli, 2 March 2012, p. 57 (**Annex IT-157**); (Confidential Annex), p. 3 (**Annex IT-262**); Hearing Transcript, 15 July 2019, 49:3-50:9.

631 Italy's Memorial, para. 4.70, *referring to* E-mail from the Master of the "Enrica Lexie" to MSCHOA and UKMTO, 16:18 (CET), 15 February 2012 (**Annex IT-120**).

632 Hearing Transcript, 18 July 2019, 168:3-10. *See also* Italy's Memorial, para. 4.71, *referring to* Statement by Commandant [redacted], Coast Guard Air Enclave Kochi, 19 February 2012 (**Annex IT-7**); Statement of [redacted], Assistant Commandant, Coast Guard District HQ 4, Kochi, 18 February 2012, pp 1-2 (**Annex IT-134)**.

633 Italy's Reply, para. 4.52, *citing* Statement of Witness in connection with the NIA investigation, Statement of Deputy Commandant [redacted], Coast Guard, 745 Squadron, Coast Guard Regional Headquarters, Andaman and Nicobar Islands, 19 September 2013, p. 32 (**Annex IT-278**). *See also* Statement by Commandant [redacted], Coast Guard Air Enclave Kochi, 19 February 2012, p. 2 (**Annex IT-7**).

634 Italy's Reply, para. 4.52, *citing* Statement of [redacted], Assistant Commandant, Coast Guard District HQ 4, Kochi, 18 February 2012, p. 2 (**Annex IT-134**); Statement of Witness in connection with the NIA investigation, Statement of Deputy Commandant [redacted], Coast Guard, 745 Squadron, Coast Guard Regional Headquarters, Andaman and Nicobar Islands, 19 September 2013, p. 32 (**Annex IT-278**). *See also* Hearing Transcript, 9 July 2019, 28:21-30:5; Hearing Transcript, 18 July 2019, 168:11-15.

635 Hearing Transcript, 18 July 2019, 169:2-6.

636 Hearing Transcript, 18 July 2019, 169:2-24 *referring to* Hearing Transcript, 16 July 2019, 125:14-18; Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012,

410. At 21:18 SMT/21:48 IST, the "Enrica Lexie" arrived at Kochi anchorage and "began to drop anchor, at position 09º 56.0' N 076º 04.1' E, within India's territorial sea".[637] Italy points out that ICGS "Lakshmibai" continued "patrolling in the *Enrica Lexie*'s vicinity after the *Enrica Lexie* anchored". ICGS "Samar" also reached the area that night.[638]

411. Italy states that the Indian Coast Guard later stated that, "[t]hough no warning shots were fired by Coast Guard at MT Enrica Lexie", ICGS "Lakshmibai" "escorted it till our outer anchorage of Kochi".[639] Italy asserts that, referring to this statement, Admiral Piroli "inferred that the local Coast Guard was ready to use force to enforce compliance by MV LEXIE, if necessary".[640] Further, Italy alleges, if the "Enrica Lexie" had not complied, it "would have been apprehended anyway", given that in addition to the Dornier and the "Lakshmibai", the INS "Kabra" had sailed at 19:00 SMT/19:30 IST and the 100-metre-long "Samar" similarly had been diverted.[641]

412. According to Italy, the Indian Coast Guard informed the "Enrica Lexie" that its officers would board the "Enrica Lexie" the following morning, on 16 February 2012. The Dornier aircraft "remained above the *Enrica Lexie* until 22:45 [SMT/23:15 IST], where it had been for more than three hours".[642]

413. Finally, Italy contends that the "contemporaneous evidence" of India's own authorities, such as the Coast Guard "Diary of Events", and the National Maritime Search and Rescue Board's Report of 4 June 2012, permit the conclusion that the "Enrica Lexie" initially had no intention of

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p. 175 (**Annex IT-131**); Boarding Officer's Report MV "Enrica Lexie", 16-17 February 2012, para. 4 (**Annex IT-9**).

637 Italy's Memorial, para. 4.72, *referring to* Log Book of the Master of the "Enrica Lexie", p. 2 (**Annex IT-14**); Extract from the "Enrica Lexie" Log Book for 15 February 2012 (**Annex IT-121**).

638 Italy's Memorial, para. 4.72, *referring to* Boarding Officer's Report MV "Enrica Lexie", 16-17 February 2012, para. 5 (**Annex IT-9**).

639 Italy's Memorial, para. 4.71, *citing* Statement filed on behalf of the Coast Guard, Kochi, 28 February 2012, para. 6 (**Annex IT-152**); Statement of [redacted], Assistant Commandant, Coast Guard District HQ 4, Kochi, 18 February 2012, pp 1-2 (**Annex IT-134)**. *See also* National Maritime Search and Rescue Board, Report, 4 June 2012, p. 11 (**Annex IT-6**); Italy's Reply, para. 4.55; Hearing Transcript, 9 July 2019, 8:22-9:4.

640 Italy's Reply, para. 4.56, *citing* Piroli Report (Confidential Annex), p. 3-36 (**Annex IT-233**). *See also* Hearing Transcript, 9 July 2019, 29:21-30:1.[641] Hearing Transcript, 18 July 2019, 171:6-10, *referring to* Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 175 (**Annex IT-131**).

641 Hearing Transcript, 18 July 2019, 171:6-10, *referring to* Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 175 (**Annex IT-131**).

642 Italy's Memorial, para. 4.74, *referring to* Log Book of the Master of the "Enrica Lexie", p. 3 (**Annex IT-14**); Statement by Commandant [redacted], Coast Guard Air Enclave Kochi, 19 February 2012, p. 2 (**Annex IT-7**).

proceeding to the Indian coast and that there was a "causal effect" of India's intervention on the "Enrica Lexie"'s turn for Kochi.[643]

ii. Position of India

414. India asserts that the decision of the Captain of the "Enrica Lexie" to proceed to the port of Kochi "was entirely voluntary" and was not based on any threatening or coercive measures on the part of India.[644] It states that India simply "requested" the "Enrica Lexie" to head to Kochi port to give its version of the events that took place.[645] India also opposes Italy's "erroneous" claim that India's "interdiction" of the "Enrica Lexie" violated its freedom of navigation.[646]

415. According to India, the events leading to the alteration of course by the "Enrica Lexie" are as follows:

> [T]he Shipmaster received a request from MRCC Mumbai. That request was passed on to Italian military officials and the ship owner. Neither raised any objection. The Shipmaster then made the decision to alter course. This was an entirely voluntary decision with no hint of any threat or coercion, or exercise of jurisdiction, by India.[647]

416. India alleges that after the incident, the "Enrica Lexie" simply continued on its way and that Captain Vitelli failed to report the incident to MRCC Mumbai, leaving India "in the dark".[648] It adds that the Captain of the "Enrica Lexie" failed to preserve the VDR data concerning the incident.[649] India avers that Italy's assertion that the SSAS message, having been sent to MRCC Rome, would have been passed on to MRCC Mumbai is not based on any evidence.[650] It argues that if this were the case, there would have been no reason for India "to have recourse to its Bangalore satellite station for determining what vessels were out in the area, then trying to

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643 Italy's Reply, para. 4.11. *See also* Italy's Reply, paras 4.53, 4.67; Hearing Transcript, 9 July 2019, 10:12-15, *referring to* Statement filed on behalf of the Coast Guard, Kochi, 28 February 2012, para. 7 (**Annex IT-152**); Hearing Transcript, 9 July 2019, 11:16-23, *referring to* National Maritime Search and Rescue Board, Report, 4 June 2012, p. 11 (**Annex IT-6**).

644 India's Counter-Memorial, para. 2.32.

645 India's Counter-Memorial, para. 2.44.

646 India's Counter-Memorial, para. 2.32. *See also* India's Counter-Memorial, para. 2.44; India's Rejoinder, para. 4.4.

647 India's Counter-Memorial, para. 2.40.

648 Hearing Transcript, 12 July 2019, 7:12; Hearing Transcript, 20 July 2019, 25:4. *See also* Hearing Transcript, 12 July 2019, 7:1-16; Hearing Transcript, 20 July 2019, 24:21-25:6.

649 India's Counter-Memorial, para. 2.22, *referring to* Investigation Report of the National Investigation Agency in RC No 04/2013/NIA/DLI, dated 4 April 2013 (hereinafter the "NIA Report") (Confidential Annex), para. 11.13 (**Annex IN-27**). *See also* Hearing Transcript, 12 July 2019, 2:11-18.

650 Hearing Transcript, 20 July 2019, 25:7-15, *referring to* Hearing Transcript, 18 July 2019, 158:9-20

winnow that data down to four potential vessels, and then telephoning or calling each of these four vessels".[651]

417. Referring to the Piroli Report, India asserts that at "either 18:40 or 19:00", the Indian Coast Guard at MRCC Mumbai contacted the "Enrica Lexie" by telephone and had a conversation with Second Officer, Sahil Gupta, after Captain Noviello had difficulty understanding the transmission.[652] India submits that there is no written record of that conversation, and in his statement to the NIA, the Second Officer "merely" stated that he answered a call from MRCC Mumbai and handed the phone over to Captain Noviello.[653] India asserts that MRCC Mumbai advised the "Enrica Lexie" that it had come to know that the vessel had been involved in a suspected pirate attack and that two boats had been caught with suspected pirates.[654] MRCC Mumbai sought to know the location of the "Enrica Lexie" and "supposedly, according to Mr. Gupta's account, 'instructed' the vessel to approach Kochi port so that the captain of the vessel could give a statement. MRCC Mumbai also requested the vessel to forward an incident report to it".[655] India submits that it was not until this call that India received confirmation that the "Enrica Lexie" was the vessel involved in the firing incident.[656]

418. India refutes Italy's argument that the call from MRCC Mumbai to the "Enrica Lexie" was a ruse because the MRCC referred to two pirate crafts having been taken and asked the vessel to come to port. India notes that this "so-called 'ruse'" was never mentioned again in any subsequent communication that the Coast Guard had with the vessel or in the written message that the MRCC Mumbai sent.[657] Further, India adds, there is no evidence, in any of the numerous communications that Captain Vitelli and the Marines had afterwards with either the shipowner or the Italian naval authorities, that this initial phone call "was ever questioned or thought to be a ruse".[658] India also

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651 Hearing Transcript, 20 July 2019, 25:16-23. *See also* Hearing Transcript, 12 July 2019, 8:14-9:6.

652 India's Counter-Memorial, para. 2.36, *referring to* Piroli Report (Confidential Annex), p. 2-10 (**Annex IT-233**).

653 India's Counter-Memorial, para. 2.37, *referring to* Piroli Report (Confidential Annex), p. 2-10 (**Annex IT-233**); Statement of Witness in connection with the NIA investigation, Statement of Shri Sahil Gupta, p. 61 (**Annex IN-30**). *See also* India's Rejoinder, para. 4.45.

654 Hearing Transcript, 12 July 2019, 10:3-13.

655 Hearing Transcript, 12 July 2019, 10:9-13, *citing* Declaration of Sahil Gupta, 15 February 2012 (emphasis added) (**Annex IT-118)**. *See also*, Italy's Memorial, para. 4.60.

656 Hearing Transcript, 12 July 2019, 9:7-14; Hearing Transcript, 20 July 2019, 26:2-5.

657 Hearing Transcript, 20 July 2019, 26:17. *See also* Hearing Transcript, 20 July 2019, 26:5-22; Hearing Transcript, 12 July 2019, 10:14-18.

658 Hearing Transcript, 20 July 2019, 27:2-7.

asserts that there is no evidence that Sergeant Latorre and Captain Vitelli "conveyed any impression" that they were "under any obligation or threats to divert to Kochi".[659]

419. India submits that, at 19:05 SMT/19:35 IST, Captain Vitelli and Sergeant Latorre informed CINCNAV about the "request for collaboration" from MRCC Mumbai to alter course for Kochi.[660] CINCNAV, India alleges, "raised no objection".[661] India contends that CINCNAV "considered that the decision rested with the Shipmaster since only he could take decisions about the navigation and course".[662]

420. India emphasises that the e-mail from MRCC Mumbai to the "Enrica Lexie" was received at 19:06 SMT/19:36 IST, before the "Enrica Lexie" changed its course, as indicated in the document produced by India, which was the actual e-mail in which the MRCC sent the message. India recalls, however, that Captain Vitelli in his testimony expressed with certainty that he received the e-mail after he had decided to change course.[663] India alleges that in light of these different versions with respect to the timing of the e-mail, a third source, the Piroli Report, should be consulted.[664]

421. India submits that, contrary to Italy's assertion that Admiral Piroli made an error, the Piroli Report is clear that at 19:16 SMT/19:46 IST, Captain Vitelli forwarded the e-mail message to the shipowner, and one minute later to MSCHOA and UKMTO, in which he added a comment that he had altered course and was proceeding to Kochi.[665] India notes that the message forwarded to the shipowner has as one of the recipients "Mattessi Mario", who accompanied Admiral Piroli to carry out investigations in Kochi, and who would have paid attention to the timing of the messages.[666] Further, in opposition to Italy's suggestion that the e-mail "must have in fact been on UTC", India asserts that there is no evidence to back that suggestion, as the e-mail was clearly sent at 15:16 Italian time.[667]

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659 India's Rejoinder, para. 4.51.

660 India's Rejoinder, para. 6.15; Hearing Transcript, 12 July 2019, 11:23-24, *citing* Piroli Report (Confidential Annex), p. 2-11 (**Annex IT-233**).

661 India's Counter-Memorial, para. 2.39.

662 India's Counter-Memorial, para. 2.39, *referring to* Piroli Report (Confidential Annex), p. 2-11 (**Annex IT-233**). *See also* India's Rejoinder, paras 4.71-4.73; Hearing Transcript, 12 July 2019, 11:22-12:19.

663 Hearing Transcript, 20 July 2019, 28:20-29:12, *referring to* Hearing Transcript, 15 July 2019, 85:20-22. *See also* Hearing Transcript, 12 July 2019, 12:20-16:7.

664 Hearing Transcript, 20 July 2019, 29:14-30:1.

665 Hearing Transcript, 20 July 2019, 30:1-16, *referring to* Hearing Transcript, 18 July 2019, 165:15-23; Piroli Report (Confidential Annex), p. 2-12 (**Annex IT-233**).

666 Hearing Transcript, 20 July 2019, 31:6-20.

667 Hearing Transcript, 20 July 2019, 31:21-32:7. *See also* Hearing Transcript, 20 July 2019, 32:14-24.

422. Furthermore, with regard to the e-mail message from the MRCC Mumbai to the "Enrica Lexie" "requesting it" to proceed to Kochi for "clarification/disposition", India asserts that "[t]here was absolutely no 'ruse' or pretext with respect to this e-mail, and no threats issued if the captain did not comply, and Italy has never suggested that there was".[668] According to India, the e-mail

> simply referred to the firing incident and a request – not an order, a request – to, for clarification/deposition, come to Kochi, that email did not lead to any change of mind, either on the part of Captain Vitelli or the shipowner or the Italian naval officials. No one questioned the request thereafter, and no one ever suggested that in the light of that written email that Captain Vitelli had asked for and received, the earlier phone call had somehow been a "ruse".[669]

423. This e-mail, India adds, did not cause Captain Vitelli or anyone else to question the original phone call that referred to the capture of two pirate skiffs or to change his mind about proceeding to Kochi.[670]

424. India alleges that, after the call, Captain Vitelli did not change the course of the "Enrica Lexie" for the next 45 minutes.[671] According to India, at 19:15 SMT/19:45 IST, after having "received the authorization of the ship owner and no objection by CINCNAV, the *Enrica Lexie* altered its course and headed towards Kochi".[672] India quotes from the Piroli Report that "[t]he Shipmaster agreed to collaborate as requested by the Indian authorities after he spoke with the ship owner and informed CINCNAV".[673] India also quotes the testimony of Captain Vitelli that "all parties were of the same opinion, that is to say, to head towards Kochi and to provide our support, both the military authorities and the owners. We all agreed".[674] India asserts that this was before "any Indian aircraft or Coast Guard vessels had arrived at the scene or made contact with the vessel".[675] According to India, this evidence demonstrates that "Captain Vitelli made a voluntary decision to accede to the request contained in the email from MRCC Mumbai [...] without any coercion being applied by India".[676]

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668 Hearing Transcript, 20 July 2019, 28:9-19. *See also* Hearing Transcript, 12 July 2019, 16:13-20.

669 Hearing Transcript, 20 July 2019, 33:4-13.

670 Hearing Transcript, 20 July 2019, 31:1-5.

671 India's Counter-Memorial, paras 4.54, 4.57, 4.66. 6.15. *See also* Hearing Transcript, 20 July 2019, 27:8-9.

672 India's Counter-Memorial, para. 2.40, *referring to* Piroli Report (Confidential Annex), p. 2-11 (**Annex IT-233**). See also Hearing Transcript, 20 July 2019, 27:11-28:8, *referring to* Hearing Transcript, 15 July 2019, 91:6-12.

673 India's Counter-Memorial, para. 2.40, *citing* Piroli Report (Confidential Annex), p. 3-36 (**Annex IT-233**). *See also* Hearing Transcript, 12 July 2019, 16:24-17:4.

674 Hearing Transcript, 20 July 2019, 28:5-8, *citing* Hearing Transcript, 15 July 2019, 91:6-10.

675 India's Counter-Memorial, para. 2.40. *See also* Hearing Transcript, 12 July 2019, 18:6-19.

676 Hearing Transcript, 12 July 2019, 19:2-6.

425. India states that the Dornier aircraft spotted the "Enrica Lexie" at 19:20 SMT/19:50 IST, "although the Piroli Report indicates that there is no evidence of this".[677] According to India, by this time, Captain Vitelli had already "decided and implemented his decision to proceed to Kochi", which India claims demonstrates that the presence of the Coast Guard had no impact on the Shipmaster's decision to change course.[678]

426. India also contests Italy's interpretation of communications between the aircraft and the "Enrica Lexie", according to which "the aircraft directed the *Enrica Lexie* to proceed to Kochi harbor".[679] India alleges that "by the time the Dornier made radio contact with the *Enrica Lexie*, the Shipmaster of the vessel had already made his decision to alter course and proceed to Kochi".[680]

427. India asserts that when Captain Vitelli was questioned by the Dornier as to whether he had changed course, he answered that he had, which is consistent with the evidence of the log and that of DIG [redacted]. India notes:

> Commandant [redacted] noted that the normal course of the Enrica Lexie – as if it was going to continue its voyage to the Red Sea, which it started to do after the shooting incident – the normal course of the Enrica Lexie would have been in a north-northwesterly direction of about 345°; but when he, Commandant [redacted], reached the vessel, it was heading in a northeasterly direction of 30° to 40°. So that obviously meant that when Commandant [redacted] reached the Enrica Lexie in the Dornier, it had already started to turn towards Kochi; which makes perfect sense, since Captain Vitelli said he had started turning five minutes earlier, at 19.45. And then 40 minutes after that, the log shows that it had completed the turn and was already heading back on an almost due easterly course, a course of 79°, towards Kochi.[681]

428. With regard to the alleged "escort" of the "Enrica Lexie", India asserts that the ICGS "Lakshmibai" "only arrived at the *Enrica Lexie*'s location at 21:30 [IST]" and that this was "well after the Shipmaster of the *Enrica Lexie* had made his decision" to alter course and head for Kochi.[682] India submits that this development "did not seem to cause concern" to Captain Vitelli, and there is no evidence that either he or the Marines contacted naval authorities in Italy to suggest that they were being "forced into port".[683]

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677 India's Counter-Memorial, para. 2.41, *referring to* Piroli Report (Confidential Annex), p. 2-12 (**Annex IT-233**).

678 India's Rejoinder, para. 4.57.

679 India's Counter-Memorial, para. 2.41, *referring to* Italy's Memorial, para. 4.66.

680 India's Counter-Memorial, para. 2.41. *See also* Hearing Transcript, 12 July 2019, 20:3-21.

681 Hearing Transcript, 20 July 2019, 34:6-21.

682 India's Counter-Memorial, para. 2.42. *See also* India's Rejoinder, para. 4.63.

683 India's Counter-Memorial, para. 2.42. *See also* India's Rejoinder, para. 4.62; Hearing Transcript, 12 July 2019, 23:21-26:5, 28:12-29:15.

429. India also notes that Captain Vitelli did not suggest in his testimony that the arrival of the Dornier or the "Lakshmibai" "influenced or somehow constrained his choices".[684] In his testimony, Captain Vitelli stated, "yes, I didn't have the impression that force was being used. I was free to alter the course".[685] Further, India asserts that neither DIG [redacted] nor Commandant [redacted] were under any instruction to force the vessel to head to port if it refused to comply with the request to proceed there.[686]

430. Concerning Italy's allegation that India wielded a "big stick that India was carrying behind its back, readying for use",[687] India argues that there is no evidence of this as demonstrated by the testimonies of DIG [redacted] and Commandant [redacted]. In particular, Commandant [redacted] testified that he did not have the name of the "target vessel"[688] before setting sail, that boarding drills were routine on all his missions, that there was no boarding at any time when the "Enrica Lexie" was navigating to the port, and that the reason why there were police officers on board the "Lakshmibai" was because the report was that there had been a firing incident.[689]

431. India also opposes Italy's contention that Captain Vitelli testified that "he 'communicated with the ship owner and the navy', but then '*continued on my route*'."[690] India submits that this is a misrepresentation, based on the full testimony which stated:

> At 18:00-18:30 hours I had a satellite call from the MRCC who asked me if I had suffered a pirate attack because two pirate boats had been identified. I answered yes and requested a written message. It did not arrive fast. Meanwhile I communicated with the ship owner and the navy. I continued on my route until I was across from Cochin, as I had been asked to go there.[691]

432. India concludes that until the "Enrica Lexie" laid anchor at 21:18 SMT/21:48 IST, "two miles inside of Indian territorial waters about 10 nautical miles from the coast", it "had not exercised any jurisdiction over the vessel or any individuals on board".[692]

433. With regard to Italy's argument that the "Lakshmibai" "intercepted" the "Enrica Lexie", India asserts that as Commandant [redacted] testified, this is "just a normal term that's used. The Coast

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684 Hearing Transcript, 20 July 2019, 35:5-6.

685 Hearing Transcript, 20 July 2019, 35:8-10, *citing* Hearing Transcript, 15 July 2019, 94:14-16.

686 Hearing Transcript, 20 July 2019, 35:13-36:4.

687 Hearing Transcript, 20 July 2019, 38:17-18, *citing* Hearing Transcript, 18 July 2019, 14:24-25.

688 Hearing Transcript, 20 July 2019, 39:13.

689 Hearing Transcript, 20 July 2019, 38:16-41:24, *referring to* Hearing Transcript, 16 July 2019, 98:2-102:3.

690 India's Rejoinder, para. 4.64, *citing* Italy's Reply, para. 4.48 [emphasis added by Italy].

691 India's Rejoinder, para. 4.65, *citing* (Confidential Annex), p. 3 (**Annex IT-262**).

692 India's Counter-Memorial, para. 2.43, *citing* Piroli Report (Confidential Annex), p. 2-13 (**Annex IT-233**); Italy's Memorial, para. 4.72. *See also* India's Rejoinder paras 4.74-4.78.

Guard had remained 3 to 5 miles away, there wasn't any physical interception, and Captain Vitelli didn't even know they were there".[693]

434. In connection with the allegation of "escorting", India asserts that the photographic evidence produced by Italy to show that the "Enrica Lexie" was surrounded by other vessels was not taken at night when the "Enrica Lexie" was proceeding to Kochi, but in "broad daylight", when the "Enrica Lexie" was already anchored.[694] India adds that in any event, Captain Vitelli, according to his oral testimony, did not consider changing his mind about going to Kochi, and "he had no clue that there were any patrol boats around him"[695] while proceeding to Kochi.[696]

(b) Interpretation and Application of Article 87, paragraph 1, subparagraph (a) (Freedom of Navigation)

435. Italy submits that India violated Italy's right to freedom of navigation under Articles 87, paragraph 1, subparagraph (a), of the Convention by directing, interdicting, and escorting the Italian-flagged "Enrica Lexie" beyond its territorial waters. India rejects Italy's claim.

i. Position of Italy

436. According to Italy, "[f]reedom of navigation involves a positive and a negative aspect: positively, vessels of every State may freely navigate on the high seas; negatively, no State may exercise any authority against any vessel sailing under the flag of another State".[697] This negative aspect, Italy contends, precludes a State that might have jurisdiction from exercising it over any vessel sailing under the flag of another State on the high seas.[698] Specifically, Italy submits, ITLOS in its *M/V "Norstar"* judgment makes "clear that there may be no interference or exercise of jurisdiction of any kind, whether physical or otherwise, save in exceptional cases, as provided for in the Convention or other international treaties".[699]

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693 Hearing Transcript, 20 July 2019, 44:11, 44:13-16.

694 Hearing Transcript, 20 July 2019, 44:17, 45:3-4. *See generally* Hearing Transcript, 20 July 2019, 44:16-45:12.

695 Hearing Transcript, 20 July 2019, 45:17-18, *referring to* Hearing Transcript, 15 July 2019, 52:3-16.

696 Hearing Transcript, 20 July 2019, 45:13-18.

697 Italy's Memorial, para. 10.18, *referring to Oscar Chinn (The United Kingdom v. Belgium)*, Judgment of 12 December 1934, P.C.I.J. Series A/B, No. 63, p. 65 at p. 83; Gilbert Gidel, *Le droit international public de la mer*: *Le temps de paix*, Vol. 1 (Sirey, 1932), p. 236.

698 Italy's Memorial, para. 10.19, *citing S.S. "Lotus" (France v. Turkey)*, Judgment of 7 September 1927, P.C.I.J. Series A, No. 10, p. 25.

699 Hearing Transcript, 10 July 2019, 7:18-22, *referring to M/V "Norstar" (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], paras 222-23. *See also* Hearing Transcript, 10 July 2019, 5:12-7:22.

437. Italy further argues that the exceptions to the freedom of navigation provided for in Article 110 (piracy, slave trade, unauthorised broadcasting, no nationality, and refusal to reveal nationality) and Article 111 (hot pursuit) are relatively limited and therefore reaffirm the extent of the freedom.[700]

438. Italy also rejects both of the tests which India proposes for assessing interference with the freedom of navigation under Article 87. According to Italy, the test is neither whether India used force against the "Enrica Lexie", nor whether it boarded or attempted to board the "Enrica Lexie".[701] Italy submits that the cases on which India relies – *Guyana v. Suriname* and the *South China Sea Arbitration* – are inapposite because, in Italy's view, they do not turn on the issue of freedom of navigation.[702] Further, ITLOS' judgment in *M/V "Norstar"*, which explicitly considered the question of what conduct constitutes a breach of Article 87, Italy argues, demonstrates that India's position that only physical interventions can constitute such a breach "is impossible".[703]

439. Italy submits instead that the test is "simply whether India interfered with the freedom of navigation of the *Enrica Lexie*, and it could do so by exercises of authority falling far short of boarding it or using or threatening to use force against it".[704] According to Italy, this test "is confirmed by the exceptions to which freedom of navigation under Article 87 is subject".[705] Italy gives the example of Article 111 which, in its view, provides that escorting a vessel is sufficient to constitute an interference,[706] even though, again according to Italy, none of the exercises of authority under Article 111 necessarily involve boarding the vessel or the use or threat of force.[707]

440. Based on this interpretation, Italy submits that "this coordinated Indian Government operation to bring the Enrica Lexie to Kochi one way or another was plainly an exercise of jurisdiction over

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700 Italy's Memorial, para. 10.21.

701 Italy's Reply, paras 7.6, 7.8, *referring to* India's Counter-Memorial, paras 6.9, 6.13. *See also* Hearing Transcript, 10 July 2019, 8:21-9:9.

702 Italy's Reply, para. 7.7, *referring to* PCA Case No. 2004-04: *Guyana v. Suriname*, Award of 17 September 2007, PCA Award Series at p. 2, RIAA Vol. XXX, p. 1; PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Award of 12 July 2016, paras 1083, 1109.

703 Hearing Transcript, 10 July 2019, 9:10-11, *referring to M/V "Norstar" (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming].

704 Italy's Reply, para. 7.13. *See also* Hearing Transcript, 10 July 2019, 9:19-10:1.

705 Italy's Reply, para. 7.9.

706 Italy's Reply, paras 7.9-7.11. To support its interpretation, Italy also cites the International Law Commission's view in respect of the analogous provision in its 1956 draft Articles: International Law Commission, "Articles Concerning the Law of the Sea with Commentaries" in *Yearbook of the International Law Commission*, Vol. II, p. 265 at p. 285. *See also* Hearing Transcript, 10 July 2019, 17:5-25.

707 Italy's Reply, para. 7.12.

the Enrica Lexie beyond India's territorial sea".[708] Specifically, it asserts that India "exercised its authority beyond its territorial sea to direct, interdict and escort the *Enrica Lexie* into Indian territorial waters for the purpose of conducting a criminal investigation into an incident that occurred outside India's territorial sea".[709] According to Italy, any one of direction, interdiction, or escort "would alone be sufficient" to constitute a breach of Article 87, paragraph 1, subparagraph (a), of the Convention.[710]

441. First, Italy contends that India violated Article 87, paragraph 1, subparagraph (a), by directing the "Enrica Lexie" to change course for Kochi. According to Italy, the "issuing of directions to a ship by the naval, coast guard and other executive organs and agencies of a State that is not the flag State of the ship in question is an exercise of authority over the ship by that State".[711] Italy submits that there is a "convergence of evidence" that is "both clear and compelling that the Indian authorities directed the *Enrica Lexie* to change course".[712] In support of this submission, Italy cites the following evidence:

- Second Officer Gupta's declaration, indicating that "they *instructed the vessel to approach* to Cochin Port".[713]
- Captain Vitelli's Log Book, recording that MRCC Mumbai "ask[ed]" him "to change course and head toward Cochin", followed by an email, "request[ing]" that the "Enrica Lexie" "head for Kochi".[714]
- The Dornier pilot's statement that the aircraft "encircled the vessel and contacted it" and "directed them to amend the course and proceed to Kochi harbour".[715]
- India's National Maritime Search and Rescue Board's Report, stipulating that the Dornier "directed the vessel to proceed to Kochi".[716]

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708 Hearing Transcript, 18 July 2019, 172:6-10, *referring to Guillermo Colunje (Panama) v. United States*, Decision of 27 June 1933, RIAA Vol. VI, p. 342 at pp 343-44.

709 Italy's Reply, para. 7.57.

710 Italy's Reply, para. 7.53.

711 Italy's Reply, para. 7.34. *See also* Hearing Transcript, 10 July 2019, 2:9-18, 20:16-22.

712 Italy's Reply, para. 7.34.

713 Italy's Reply, para. 7.28, *citing* Declaration of Sahil Gupta, 15 February 2012 (**Annex IT-118**) [emphasis added by Italy].

714 Italy's Reply, para. 7.29, *citing* Log Book of the Master of the "Enrica Lexie", p. 2 (**Annex IT-14**); E-mail from MRCC Mumbai to Master of the "Enrica Lexie", 15 February 2012 (**Annex IT-8**). *See also* Italy's Memorial, para. 10.24(1).

715 Italy's Reply, para. 7.30, *citing* Statement by Commandant [redacted], Coast Guard Air Enclave Kochi, 19 February 2012, pp 1-2 (**Annex IT-7**). *See also* Italy's Memorial, para. 10.35(3).

716 Italy's Reply, para. 731, *citing* National Maritime Search and Rescue Board, Report, 4 June 2012, p. 11 (**Annex IT-6**).

- Captain Vitelli's statement to Indian Police, in which he avers that he was "directed to head for Kochi", and his additional statement, asserting that "[t]hey informed [him] to alter the course".[717]
- Statement of [redacted] and the NIA statements, indicating that the Indian authority "directed" the "Enrica Lexie" to proceed to Kochi.[718]

442. Second, Italy argues that the fact that Captain Vitelli decided to go to Kochi, coupled with the fact that he did not believe that he was acting under any coercion, does not assist India's case.[719] This is because, in Italy's view, the Arbitral Tribunal in examining whether a State was exercising jurisdiction should assess "an objective question" determined by the evidence of the acts of the Indian State, not by "the subjective appreciation" of the target of that exercise of jurisdiction.[720] More precisely, according to Italy, "whether a state was exercising jurisdiction is to be determined and assessed by reference to the acts of that state, not by reference to the extent to which the master of the vessel over which jurisdiction was being exercised felt himself to be constrained".[721] Thus, the fact that Captain Vitelli decided to comply with the request to go to Kochi to identify pirate vessels "does not diminish the exercise of jurisdiction by Indian authorities".[722]

443. Third, Italy submits that a State's maritime rescue coordination centre issuing an instruction on a "false pretext" constitutes an interference with freedom of navigation, as any responsible mariner "would need a very good reason indeed not to comply" with an instruction from the closest maritime rescue coordination centre, even while exercising freedoms of the high seas.[723] Italy alleges that if the perpetration of a "falsehood"[724] by the entity tasked under international law with maritime rescue is not an interference with the freedom of navigation,

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717 Italy's Reply, para. 7.32, *citing* Statement of Umberto Vitelli, 19 February 2012, p. 84 (**Annex IT-270**); Additional Statement of Umberto Vitelli, 2 March 2012, p. 89 (**Annex IT-157**).

718 Italy's Reply, para. 7.33, *citing* Statement of [redacted], Assistant Commandant, Coast Guard District HQ 4, Kochi, 18 February 2012, p. 2 (**Annex IT-134**); Statement of Witness in connection with the NIA Investigation, Statement of Deputy Commandant [redacted], Coast Guard, 745 Squadron, Coast Guard Regional Headquarters, Andaman and Nicobar Islands, 19 September 2013, p. 32 (**Annex IT-278**). *See also* Statement of Witness in connection with the NIA Investigation, Statement of K. Suresh, Uttam Adhikari, Coast Guard Regional Headquarters, Andaman and Nicobar Islands, 20 September 2013, p. 35 (**Annex IT-280**); Statement of Witness in connection with the NIA Investigation, Statement of Commandant Neeraj Sharma, Commandant, Coast Guard Headquarters, Delhi, 12 July 2013, p. 39 (**Annex IT-276**); Italy's Memorial, para. 10.35(4).

719 Hearing Transcript, 18 July 2019, 173:12-21.

720 Hearing Transcript, 18 July 2019, 174:11-16.

721 Hearing Transcript, 18 July 2019, 173:16-21.

722 Hearing Transcript, 18 July 2019, 173:25-174:1.

723 Hearing Transcript, 18 July 2019, 174:17-24.

724 Hearing Transcript, 18 July 2019, 175:9.

> then the spectre is raised of maritime rescue coordination centres being freely enlisted in the service of law enforcement agencies and operations, with all of the guile that sometimes forms part of those operations. That would be a frightening prospect indeed for the question of whether responsible, seamanlike mariners would continue to be willing to comply with requests from MRCCs around the world, in circumstances where such compliance requires mariners to deviate from their commercial and other operations in the interests of the safety of all those who use the high seas. Mariners do so absent legal obligation, at least in some countries, because of the special status of MRCCs.[725]

444. Fourth, Italy counters India's argument that Italy acquiesced to Captain Vitelli's turn to Kochi in response to the request from MRCC Mumbai, arguing that "[a]ny consent constituted by such acquiescence would be entirely vitiated by the falsehood involved in the request with which the Italian authorities were presented via Captain Vitelli".[726] Italy states that if Italy acquiesced to anything, it was to a request for the "Enrica Lexie", with Italian naval marines aboard, to identify two pirate vessels.[727]

445. Fifth, Italy contends that India violated Article 87, paragraph 1, subparagraph (a), by interdicting the "Enrica Lexie". According to Italy, the "[i]nterdiction of a vessel is the most manifest and self-evident breach of Articles 87 and 92 of UNCLOS of which it is possible to conceive".[728] Italy submits that a "convergence of evidence showing an interdiction of the *Enrica Lexie* is both clear and compelling".[729] In support of this submission, Italy cites the following evidence:

- The Coast Guard's "Diary of Events", recording that India's Coast Guard launched Dornier "for identification/interdiction of suspect vessel".[730]
- India's National Maritime Search and Rescue Board's Report, recording that the Dornier "vectored ICG ships for interception" of the "Enrica Lexie".[731]
- A contemporaneous news report stating that the Southern Naval Command sent the INS "Kabra" "to augment [the] force level".[732]

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725 Hearing Transcript, 18 July 2019, 175:12-26.

726 Hearing Transcript, 18 July 2019, 176:11-15.

727 Hearing Transcript, 18 July 2019, 176:8-11.

728 Italy's Reply, para. 7.43; Hearing Transcript, 10 July 2019, 14:4-10.

729 Italy's Reply, para. 7.43.

730 Italy's Reply, para. 7.36, *citing* Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 175 (**Annex IT-131**). *See also* Hearing Transcript, 10 July 2019, 12:15-20.

731 Italy's Reply, para. 7.37, *citing* National Maritime Search and Rescue Board, Report, 4 June 2012, p. 11 (**Annex IT-6**).

732 Italy's Reply, para. 7.38, *citing* "Coast Guard, fishermen made a smart move", The Times of India (Electronic Edition), 18 February 2012 (**Annex IT-39**).

- The Boarding Officer of ICGS "Lakshmibai" reporting that the Indian Coast Guard instructed the ICGS "Samar" to "proceed with max speed to reach area and render assistance for apprehension of suspect vessel".[733]

- The Inventory prepared by Assistant Commissioner of Police and India's National Maritime Search and Rescue Board's Report, confirming that "ICGS Lakshmibai was sailed" for "interdiction" of the suspected vessel.[734]

- The Dornier pilot's statement to the Indian police, indicating that they "directed them to amend the course and proceed to Kochi harbor [...] and [they] shadowed it [there]".[735]

- Rohitesh [redacted] statement to the Indian police, saying that "ICGS L[a]kshmibai intercepted the vessel [...] and escorted it till our outer anchorage of Kochi".[736]

446. Sixth, Italy argues that India violated Article 87, paragraph 1, subparagraph (a), by escorting the "Enrica Lexie" beyond its territorial sea with an aircraft and armed vessels of the Indian Coast Guard.[737] Italy adds that "[i]n the absence of the consent of the flag state, [escort] constitutes an interference with freedom of navigation and an unlawful exercise of jurisdiction".[738] In support of this submission, Italy cites the following evidence:

- The report of the Boarding Officer of ICGS "Lakshmibai" that after directing the "Enrica Lexie" to proceed towards Kochi, it then "escorted" the vessel until arrival at Kochi anchorage.[739]

- A letter by the Indian Ministry of Shipping, Road Transport and Highways to the operators of the "Enrica Lexie", confirming that the "Indian Coast Guard intercepted the vessel and escorted her to Kochi for investigation".[740]

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733 Italy's Reply, para. 7.39, *citing* Boarding Officer's Report MV "Enrica Lexie", 16-17 February 2012, para. 2 (**Annex IT-9**). *See also*, Italy's Memorial, para. 10.35(1); Hearing Transcript, 10 July 2019, 13:1-6.

734 Italy's Reply, para. 7.40, *citing* Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 178 (**Annex IT-131**); National Maritime Search and Rescue Board, Report, 4 June 2012, p. 11 (**Annex IT-6**). *See also* Italy's Memorial, para. 10.35(2).

735 Italy's Reply, para. 7.41, *citing* Statement by Commandant [redacted], Coast Guard Air Enclave Kochi, 19 February 2012, pp 1-2 (**Annex IT-7**).

736 Italy's Reply, para. 7.42, *citing* Statement of [redacted], Assistant Commandant, Coast Guard District HQ 4, Kochi, 18 February 2012, p. 2 (**Annex IT-134**).

737 Italy's Reply, para. 7.52; Hearing Transcript, 10 July 2019, 16:4-10.

738 Hearing Transcript, 10 July 2019, 16:7-10.

739 Italy's Reply, para. 7.46, *citing* Statement of [redacted], Assistant Commandant, Coast Guard District HQ 4, Kochi, 18 February 2012, p. 2 (**Annex IT-134**). *See also* Italy's Memorial, para. 10.35(5).

740 Italy's Reply, para. 7.47, *citing* Letter from the Indian "Dy Director General of Shipping" to the Owners of the *Enrica Lexie*, 16 February 2012 (**Annex IT-5**). *See also* Italy's Memorial, para. 10.35(5).

- The Indian Coast Guard's statement filed with the High Court of Kerala, stating that the "[Coast Guard] escorted the vessel to Kochi under escort of aerial support from [the] Dornier Aircraft".[741]
- A photograph taken from the air of the "Enrica Lexie" under escort.[742]
- The Piroli Report, where Admiral Piroli "inferred that the local Coast Guard was ready to use force to enforce compliance by MV LEXIE, if necessary".[743]

447. Italy argues that Article 111 on the right of hot pursuit, although not applicable to this case, confirms Italy's position that the escort of the "Enrica Lexie" by Indian authorities through the Indian exclusive economic zone both unlawfully impeded its free navigation and constituted an unlawful exercise of jurisdiction. Italy avers that Article 111, paragraph 7, authorises the escort of a vessel that is arrested within the jurisdiction of a State, where circumstances require that the vessel be escorted across some part of the high seas or exclusive economic zone in order to reach a port of the arresting State.[744] Italy asserts that India's claim that Article 111, paragraph 7, only applies where a vessel is already arrested "misses the point".[745]

448. Finally, Italy contends that "no exceptional circumstances [...] could have justified any exercise of authority by India over the *Enrica Lexie*".[746] In support of this contention, Italy cites the following alleged facts:

> (1) India did not seek and obtain the consent of Italy as the flag State.
>
> (2) None of the exceptions provided for under UNCLOS were applicable: the *Enrica Lexie* was not suspected of piracy, the slave trade or unauthorised broadcasting.
>
> (3) India exercised jurisdiction beyond its contiguous zone, and did not do so in connection with the limited jurisdiction afforded to a coastal State in that zone: India was not purporting to prevent the violation of its customs, fiscal, immigration or sanitary laws and regulations in its territorial sea. The *Enrica Lexie* had not entered India's territorial sea and had no intention of doing so.
>
> (4) India was not exercising a right of hot pursuit.
>
> (5) Nor was India exercising any form of authority related to its jurisdiction in its exclusive economic zone over environmental matters.[747]

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741 Italy's Reply, para. 7.48, *citing* Statement filed on behalf of the Coast Guard, Kochi, 28 February 2012, para. 6 (**Annex IT-152**).

742 Italy's Memorial, para. 4.73, Figure 9; Italy's Reply, paras 4.59, Figure 2, 7.49, *referring to* National Maritime Search and Rescue Board, Report, 4 June 2012, p. 11 (**Annex IT-6**).

743 Italy's Reply, para. 7.51, *citing* Piroli Report (Confidential Annex), p. 3-36 (**Annex IT-233**).

744 Italy's Reply, para. 7.9; Hearing Transcript, 10 July 2019, 17:18-18:1.

745 Hearing Transcript, 10 July 2019, 17:1-5, *referring to* India's Rejoinder para. 6.13.

746 Italy's Memorial, para. 10.26. *See also* Italy's Memorial, para. 10.36.

747 Italy's Memorial, para. 10.26. *See also* Italy's Memorial, para. 10.36; Hearing Transcript, 10 July 2019, 18:7-12.

ii. Position of India

449. India disagrees with Italy's interpretation of Article 87, paragraph 1, subparagraph (a). While it "has no issue" with ITLOS' finding in *M/V "Norstar"* that "any act of interference with navigation of foreign ships or any exercise of jurisdiction over such ships on the high seas constitutes a breach of freedom of navigation", India maintains that it has no bearing on this case because the facts in *M/V "Norstar"* "were very different".[748] For example, India points out, the Italian measures found to be in breach of Article 87 in *M/V "Norstar"* targeted a foreign ship – the M/V "Norstar". In this case, by contrast, India notes that "neither [its] investigation into the shooting incident that resulted in the death of two fishermen, nor the Indian court proceedings, targeted the Enrica Lexie".[749] In addition, India observes that the "use of armed force by state agents against a defenceless fishing boat [...] bears no resemblance to legitimate bunkering activities that were at issue in *Norstar*".[750]

450. In addition, India argues that Italy's references to Article 111 are inapposite.[751] According to India, in the context of hot pursuit, "escort outside the territorial sea is necessary to give practical effect to the coastal State's rights with respect to hot pursuit and the enforcement of its laws".[752] Hence "it is a complete *non sequitur* to argue that, just because escort is permitted in a case of hot pursuit, it is a violation of the freedom of navigation in all other circumstances".[753] Moreover, India observes, Article 111, which deals with the situation of hot pursuit in which a ship has already been arrested, and must be escorted to prevent escape, "has nothing to do with the present case".[754] This is because the "Enrica Lexie" had not been arrested in India's exclusive economic zone, was already on a course that it intended to take anyway, and for that reason, was not constrained in any manner.[755]

451. India's principal assertion in response to Italy's claim is that "at no time did India exercise any authority over the *Enrica Lexie* while it was navigating in India's exclusive economic zone".[756]

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748 Hearing Transcript, 12 July 2019, 124:11-20, *citing M/V "Norstar" (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], para. 222.

749 Hearing Transcript, 12 July 2019, 126:5-8, *referring to M/V "Norstar" (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], para. 224.

750 Hearing Transcript, 12 July 2019, 126:17-23. *See also* Hearing Transcript, 12 July 2019, 124:21-125:8, *referring to M/V "Norstar" (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], para. 219.

751 India's Rejoinder, para. 6.9, *citing* Italy's Reply, para. 7.9.

752 India's Rejoinder, para. 6.13. *See also* Hearing Transcript, 12 July 2019, 139:21-140:8.

753 India's Rejoinder, para. 6.14.

754 Hearing Transcript, 12 July 2019, 139:8. *See also* Hearing Transcript, 12 July 2019, 140:9-18.

755 Hearing Transcript, 12 July 2019, 139:2-6, 140:19-141:1.

756 India's Counter-Memorial, para. 6.7. *See also* Hearing Transcript, 20 July 2019, 46:9-12.

India therefore maintains that it did not violate Italy's freedom of navigation.[757] In particular, India claims that there was no "interdiction", and the Master of the "Enrica Lexie" "made his own decision to alter course and head for port",[758] "before the arrival of any Indian vessels on the scene".[759] India offers several arguments in support of its claim.

452. First, India submits that the Master's decision was voluntary and notes Italy's concession that the Captain of the "Enrica Lexie" was not compelled to alter course and was not under any threats or coercion while doing so.[760] According to India, before the Master made his decision to alter course, India "simply requested the *Enrica Lexie* to proceed to port" for information, following which the Master checked the request with senior naval officials in Italy and the shipowner, none of whom raised an objection to the decision to head to port.[761] Subsequently, India claims, the Log Book confirms that he willingly headed to Kochi.[762] In support of this argument, India refers to the following chronology of events:

- At 19:00 IST, MRCC Mumbai first called the "Enrica Lexie" seeking information.[763]
- At 19:35 IST, the Master of the "Enrica Lexie" informed CINCNAV by telephone about MRCC Mumbai's request for the "Enrica Lexie" to proceed to Kochi, and CINCNAV expressed no objection.[764]
- Immediately thereafter, CINCNAV "informed the Operations Room of the Navy General Staff and the JOHQ [Joint Operations Headquarters]" of the request.[765]
- At 19:36 IST, MRCC Mumbai sent the written request.[766]
- At 19:45 IST, the "Enrica Lexie" altered its course towards Kochi upon authorisation of the ship owner.[767]

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757 Hearing Transcript, 20 July 2019, 49:10-11.

758 India's Counter-Memorial, para. 6.7.

759 India's Counter-Memorial, para. 6.15. *See also* India's Rejoinder, paras 6.3, 6.20.

760 Hearing Transcript, 20 July 2019, 49:12-15, *referring to* Hearing Transcript, 18 July 2019, 13:24-14:5.

761 India's Counter-Memorial, para. 6.7. *See also* India's Rejoinder, para. 6.3; Hearing Transcript, 20 July 2019, 50:1-7.

762 India's Counter-Memorial, para. 6.25, *referring to* Log Book of the Master of the "Enrica Lexie", p. 2 (**Annex IT-14**).

763 India's Rejoinder, para. 6.15, *referring to* Piroli Report (Confidential Annex), p. 2-10 (**Annex IT-233**).

764 India's Rejoinder, para. 6.15, *referring to* Piroli Report (Confidential Annex), p. 2-11 (**Annex IT-233**). *See also* India's Counter-Memorial, para. 6.25.

765 India's Rejoinder, para. 6.15, *referring to* Piroli Report (Confidential Annex), p. 2-11 (**Annex IT-233**).

766 India's Rejoinder, para. 6.15, *referring to* E-mail from MRCC Mumbai to the Shipmaster of the "Enrica Lexie", 15 February 2012, 19:36 IST (**Annex IN-34**).

767 India's Rejoinder, para. 6.15, *referring to* Piroli Report (Confidential Annex), pp 2-11-2-12 (**Annex IT-233**); Log Book of the Master of the "Enrica Lexie", p. 2 (**Annex IT-14**).

- After altering course to head to Kochi, Captain Vitelli "did not consider that the vessel's freedom of navigation was being interfered with. He was free to alter course".[768]

453. India submits that "[a]ll of this occurred *before* the Dornier aircraft reached the *Enrica Lexie* and made radio contact with it" at 19:20 SMT/19:50 IST[769] and before the Indian Coast Guard vessel, ICGS "Lakshmibai", encountered the "Enrica Lexie" at 21:00 SMT/21:30 IST.[770] Therefore, India concludes, neither action by India could have caused the Master to alter course for the port.[771]

454. India refutes Italy's argument that Captain Vitelli's view "was irrelevant", arguing that, on the contrary, Captain Vitelli's views are highly relevant in assessing whether any measures of constraint were actually placed on him with respect to the navigation of the vessel.[772]

455. Second, India asserts that Captain Vitelli did not act on the phone call; he did not fall for any "ruse" or "pretext", as alleged by Italy. He requested and received a written message, after which he changed course at 19:15 SMT/19:45 IST, heading towards Kochi.[773] During that 45-minute interval between 19:00 IST and 19:45 IST, there was no interference with the vessel's freedom of navigation. To the contrary, Captain Vitelli and Sergeant Latorre both communicated with Italian naval authorities at CINCNAV, informing them about the "*request* for collaboration" by MRCC Mumbai.[774] There was no mention of any threat by India, and there was no objection from CINCNAV or from the shipowner.[775]

456. India opposes Italy's argument that a pretext or ruse issued by a State's maritime rescue coordination centre is an interference with freedom of navigation.[776] India argues that "regardless of whether there was a ruse or not in the original phone call, when the situation on the Indian side regarding the incident was anything but clear, it makes no difference", as the phone call was

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768 Hearing Transcript, 20 July 2019, 49:16-19.

769 India's Rejoinder, para. 6.16 [emphasis in original], *referring to* Piroli Report (Confidential Annex), p. 2-12 (**Annex IT-233**); Statement of K. Suresh, Adhikari, Coast Guard District HQ 4, Kochi, 18 February 2012 (**Annex IT-132**); Statement by Commandant [redacted] (**Annex IT-7**). *See also* Counter-Memorial, para. 6.25, *citing* Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012 (**Annex IT-131**).

770 India's Rejoinder, para. 6.17; India's Counter-Memorial, para. 6.14.

771 India's Rejoinder, para. 6.14. *See also* Hearing Transcript, 12 July 2019, 147:14-26.

772 Hearing Transcript, 20 July 2019, 48:7-14, *referring to* Hearing Transcript, 18 July 2019, 174:10-16.

773 Hearing Transcript, 12 July 2019, 131:1-9, *referring to* Log Book of the Master of the "Enrica Lexie", p. 2 (**Annex IT-14**).

774 Hearing Transcript, 12 July 2019, 131:17, *citing* Piroli Report (Confidential Annex), p. 2-11 (**Annex IT-233**) [emphasis added by India].

775 Hearing Transcript, 12 July 2019, 131:10-21.

776 Hearing Transcript, 20 July 2019, 50:11-16, *referring to* Hearing Transcript, 18 July 2019, 174:17-20.

overtaken by subsequent events and was never mentioned again.[777] When Captain Vitelli received the written message, it contained no ruse; it was a request, not an order.[778] Further, India questions the credibility of Italy's argument that Italy could only have acquiesced in the original phone call referring to the request for assistance in identifying two pirate vessels, arguing that the phone call was "quickly forgotten"; when the written message arrived, no one from the Italian side suggested that there had been a ruse, or that Captain Vitelli should consider changing his mind.[779]

457. India emphasises that the written message from MRCC Mumbai was simply a request to head for Kochi for further "deposition/clarification". That message, thus, "cannot possibly be construed as an interference with the Enrica Lexie's freedom of navigation or exercise of jurisdiction, any more than the 19.00 phone call".[780]

458. Third, India asserts that since the decision to change course was made at 19:15 SMT/19:45 IST, prior to the arrival of the Dornier at 19:20 SMT/19:50 IST, "the arrival of the Dornier aircraft had nothing to do with the captain's decision to change course and cannot be said to have caused any interference in the Enrica Lexie's navigation".[781]

459. Fourth, India asserts that Italy's contention that India breached its freedom of navigation by "interdicting", "directing", and "escorting" the "Enrica Lexie" is also misguided. In response, India argues that the Captain had already made his decision to change course to Kochi before the arrival of any of the Indian Coast Guard vessels.[782] India adds that, subsequently, India did not interfere with the Captain's decision. According to India, "[i]nterference in a ship's freedom of navigation would, 'at the very minimum', require that the ship is ordered or forced by another state to deviate from its intended course".[783] India argues that nothing done by the Indian authorities caused the "Enrica Lexie" to deviate from its intended course towards Kochi or interfered with Captain Vitelli's decision to do so, which was known by Italian authorities and the shipowner.[784]

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777 Hearing Transcript, 20 July 2019, 50:21-25.

778 Hearing Transcript, 20 July 2019, 50:25-51:3.

779 Hearing Transcript, 20 July 2019, 51:11-52:2.

780 Hearing Transcript, 12 July 2019, 133:19-23.

781 Hearing Transcript, 12 July 2019, 137:1-5.

782 Hearing Transcript, 12 July 2019, 137:14-25, *referring to* Hearing Transcript, 9 July 2019, 51:19-20:1. *See also* Hearing Transcript, 18 July 2019, 240:11-18.

783 Hearing Transcript, 12 July 2019, 137:20-23.

784 Hearing Transcript, 12 July 2019, 138:2-4.

460. Fifth, India submits that "the chronology of events confirms that the escorting of the *Enrica Lexie* was not a use of force which obliged the ship to change her route to Kochi".[785] India argues that the mission of ICGS "Lakshmibai" was to clarify where the firing had occurred but not to exert any pressure on the vessel.[786] According to India, "Italy itself does not claim that the *Lakshmibai* was threatening, let alone using force".[787] Further, with respect to Italy's argument that the "Enrica Lexie" did not consent to the escort, India argues that the shipmaster, and Italy once informed, did not complain or protest about it.[788]

461. India disagrees with Italy's contention that "escorting a vessel is sufficient to constitute an interference with freedom of navigation".[789] India submits that, while the Dornier aircraft and ICGS "Lakshmibai" indeed escorted the "Enrica Lexie" on its already chosen route to Kochi, they did not interfere with the vessel's freedom of navigation since no action had been taken to cause the vessel to alter course.[790] For this reason also, India alleges that Italy's reliance on Article 111, paragraph 7, as an aid to the proper interpretation of Articles 87 and 92 and to demonstrate as impermissible any escort outside of the circumstances envisaged under Article 111, is "a non-starter".[791] India asserts that Article 111 deals with the situation of hot pursuit, which is not relevant to the present case. India also notes that paragraph 7 deals with a situation where a ship has already been arrested in the jurisdiction of the arresting State, which was not the case with the "Enrica Lexie".[792] According to India, Article 111, paragraph 7, does not also stand for the proposition that "all forms of escort except those listed in paragraph 7 are *ipso facto* illegal".[793]

462. Finally, India argues that neither the Master nor the Italian Navy complained that India was in breach of the "Enrica Lexie"'s freedom of navigation between the time that the "Enrica Lexie" turned towards Kochi and when it arrived in port.[794]

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785 India's Counter-Memorial, para. 6.26.

786 India's Counter-Memorial, para. 6.27, *citing* Statement of [redacted], Assistant Commandant, Coast Guard District HQ 4, Kochi, 18 February 2012 (**Annex IT-134**).

787 India's Counter-Memorial, para. 6.27, *referring to* Italy's Memorial, para. 4.71.

788 Hearing Transcript, 12 July 2019, 148:2-22.

789 Hearing Transcript, 12 July 2019, 138:5-7, *citing* Italy's Reply, para. 7.9; Hearing Transcript, 10 July 2019, 16:4-10.

790 India's Rejoinder, paras 6.14, 6.18; Hearing Transcript, 12 July 2019, 26:6-10.

791 Hearing Transcript, 12 July 2019, 138:14-139:1.

792 Hearing Transcript, 12 July 2019, 138:14-140:21.

793 Hearing Transcript, 12 July 2019, 141:2-5.

794 India's Rejoinder, paras 6.5, 6.19-6.20, 6.25-6.26, 6.30; Hearing Transcript, 12 July 2019, 143:5-145:23.

iii. Analysis of the Arbitral Tribunal

463. Italy claims that India, through its conduct, has breached the freedom of navigation stipulated in Article 87, paragraph 1, subparagraph (a), of the Convention, which provides:

> *Article 87*
>
> *Freedom of the high seas*
>
> 1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States:
>
> (a) freedom of navigation;

464. By virtue of Article 58, paragraph 1, of the Convention, the freedoms referred in Article 87, including the freedom of navigation, are extended to exclusive economic zones where all States, whether coastal or land-locked, enjoy such freedoms.

(a) The concept of freedom of navigation

465. The freedom of navigation, as underlined by Italy, imposes an obligation on States other than the flag State not to interfere with its exercise and "involves a positive and a negative aspect: positively, vessels of every State may freely navigate on the high seas"[795] and "negatively, no State may exercise any authority against any vessel sailing under the flag of another State".[796] On that basis, Italy asserts that the legal test for a breach of Italy's freedom of navigation is "simply whether India interfered with the freedom of navigation of the *Enrica Lexie*", arguing that "it could do so by exercises of authority falling far short of boarding it or using or threatening to use force against it".[797]

466. For its part, India believes that there is a higher threshold for a finding of interference, requiring the threat or use of force as a necessary condition.[798] India asserts that "at no time did India exercise any authority over the *Enrica Lexie* while it was navigating in India's exclusive economic zone",[799] or "board or attempt to board the *Enrica Lexie* while it was in India's EEZ".[800]

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795 Italy's Memorial, para. 10.18, *referring to Oscar Chinn (The United Kingdom v. Belgium)*, Judgment of 12 December 1934, P.C.I.J. Series A/B, No. 63, p. 65 at p. 83.

796 Italy's Memorial, para. 10.18, *referring to* Gilbert Gidel, *Le droit international public de la mer: Le temps de paix*, Vol. 1 (Sirey, 1932), p. 236.

797 Italy's Reply, para. 7.13. *See also* Italy's Reply para. 7.6; Hearing Transcript, 10 July 2019, 9:22-10:1.

798 India's Counter-Memorial, paras 6.9-6.13.

799 India's Counter-Memorial, para. 6.7. *See also* Hearing Transcript, 12 July 2019, 122:24-123:5.

800 India's Counter-Memorial, para. 6.9.

467. The Arbitral Tribunal recalls the statement made by the PCIJ in *S.S. "Lotus" (France v. Turkey)* (hereinafter "*S.S. 'Lotus'*")

> that – apart from certain special cases which are defined by international law – vessels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them.[801]

This longstanding rule of customary international law is codified in Article 92 of the Convention, which provides that "[s]hips shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas".

468. Turning now to the question of which acts can constitute a breach of freedom of navigation under Article 87, paragraph 1, of the Convention, the Arbitral Tribunal notes that the right to freedom of navigation "provides ships of any States with the right to traverse the high seas with no or minimal interference from any other State".[802] Accordingly, as stated by ITLOS in *M/V "Norstar"*, "any act of interference with navigation of foreign ships or any exercise of jurisdiction over such ships on the high seas constitutes a breach of the freedom of navigation, unless justified by the Convention or other international treaties".[803] Further, in *Owners of the Jessie, the Thomas F. Bayard and the Pescawha (Great Britain) v. United States*, the arbitral tribunal made it clear that "except by special convention or in time of war, interference by a cruiser with a foreign vessel pursuing a lawful avocation on the high seas is unwarranted and illegal".[804] In that case, such interference was found to constitute "a violation of the sovereignty of the country whose flag the vessel flies".[805]

469. The Arbitral Tribunal observes that interference may take physical or non-physical forms.

470. As observed by ITLOS in *M/V "Norstar"*, "[i]t goes without saying that physical or material interference with navigation of foreign ships on the high seas violates the freedom of

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801 *S.S. "Lotus" (France v. Turkey)*, Judgment of 7 September 1927, P.C.I.J. Series A, No. 10, p. 25.

802 Albert J. Hoffmann, 'Freedom of Navigation' (2011) Max Planck Encyclopedia of International Law, para. 22.

803 *M/V "Norstar" (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], para. 222.

804 *Owners of the Jessie, the Thomas F. Bayard and the Pescawha (Great Britain) v. United States*, Award of 2 December 1921, RIAA Vol. VI, p. 57 at p. 58.

805 *Owners of the Jessie, the Thomas F. Bayard and the Pescawha (Great Britain) v. United States*, Award of 2 December 1921, RIAA Vol. VI, p. 57 at p. 58.

navigation".[806] Interference of a physical nature may include, as stated in the *Arbitration Between the Republic of Croatia and the Republic of Slovenia*, "boarding, arrest, detention, [or] diversion" of a vessel.[807]

471. However, "even acts which do not involve physical interference or enforcement on the high seas may constitute a breach of the freedom of navigation".[808] The arbitral tribunal in *Guyana v. Suriname* thus considered that a demand by a navy vessel to "leave the area in 12 hours" or "the consequences will be yours",[809] constituted "a threat of the use of force in contravention of the Convention, the UN Charter and general international law".[810] Moreover, as stated by Judge Laing in his separate opinion in *M/V "SAIGA" (No. 2)*, the enjoyment of "freedom of the seas" is dependent on freedom from fear, that is, "security and non-interference, in today's language".[811]

472. Accordingly, in the Arbitral Tribunal's view, a breach of freedom of navigation may result from acts including physical or material interference with navigation of a foreign vessel, the threat or use of force against a foreign vessel, or non-physical forms of interference whose effect is that of instilling fear in, or causing hindrance to, the exercise of the freedom of navigation.

473. Additionally, as stated in *M/V "Norstar"*, the exercise of jurisdiction over a foreign ship on the high seas, unless justified by the Convention or other international treaties, is generally agreed to constitute a breach of freedom of navigation.[812] The Arbitral Tribunal will consider Italy's argument that India exercised jurisdiction over the "Enrica Lexie" primarily in its analysis of Italy's claim pursuant to Article 92, paragraph 1, of the Convention.

(b) Examination of India's conduct vis-à-vis the "Enrica Lexie"

474. Italy's claims that "[b]y *directing* the *Enrica Lexie* to proceed to Kochi while it was navigating beyond India's territorial sea, by *interdicting* it, and by *escorting* it to Kochi, India breached

806 *M/V "Norstar" (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], para. 222.

807 PCA Case No. 2012-04: *Arbitration Between the Republic of Croatia and the Republic of Slovenia*, Final Award of 29 June 2017, para. 1129.

808 *M/V "Norstar" (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], para. 223.

809 PCA Case No. 2004-04: *Guyana v. Suriname*, Award of 17 September 2007, PCA Award Series at p. 2, RIAA Vol. XXX, p. 1 at p. 126, para. 433.

810 PCA Case No. 2004-04: *Guyana v. Suriname*, Award of 17 September 2007, PCA Award Series at p. 2, RIAA Vol. XXX, p. 1 at p. 126, para. 445.

811 *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, Separate Opinion of Judge Laing, ITLOS Reports 1999, p. 10 at p. 173, para. 29.

812 *M/V "Norstar" (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], para. 222.

Italy's freedom of navigation under Article 87(1)(a) of UNCLOS".[813] The Arbitral Tribunal will also consider Italy's allegation that India perpetrated a "*ruse*" in order to bring the "Enrica Lexie" into India's territorial waters,[814] and that by doing so, India interfered with Italy's freedom of navigation.[815] These four aspects referred to by Italy will be examined *seriatim*.

(i) Alleged direction

475. Italy claims that India "directed" the "Enrica Lexie" to alter course and proceed to Kochi, both through a communication from MRCC Mumbai and subsequently through the Dornier aircraft and the ICGS "Lakshmibai", and that this direction breached Italy's freedom of navigation.[816]

476. The Arbitral Tribunal observes that, in the Log Book, concerning the 18:30 SMT/19:00 IST telephone call, Captain Vitelli records (with reference to MRCC Mumbai): "they asked me to change course and head toward Cochin (India) to take stock of events and bear witness. I asked for, and received, a written message. At 1915 hrs we changed course, heading toward Cochin".[817] Mr. Gupta stated, referring to the same call, that MRCC Mumbai "instructed the vessel to approach to Cochin Port as they wanted the Master to give his statement and witness".[818] The subsequent e-mail from the MRCC read: "You are requested to head for Kochi and establish communication with Indian Coast Guard [...] for further deposition/clarification".[819]

477. At 19:00 SMT/19:30 IST, Sergeant Latorre called CINCNAV regarding the "request for collaboration" that MRCC Mumbai had submitted via telephone to the Master of the "Enrica Lexie".[820] At 19:05 SMT/19:35 IST, Captain Vitelli also communicated by telephone with CINCNAV.[821] Captain Vitelli forwarded the e-mail from MRCC Mumbai to MSCHOA and UKMTO with a copy to Fratelli D'Amato SpA (the owner of the "Enrica Lexie"). In the covering e-mail, Captain Vitelli noted: "Please be advised that with reference to the below message from

813 Italy's Reply, para. 7.1 [emphases added]. *See also* Hearing Transcript, 10 July 2019, 2:9-18.

814 Hearing Transcript, 18 July 2019, 2:17-20 [emphasis added].

815 Hearing Transcript, 18 July 2019, 174:17-24.

816 Hearing Transcript, 18 July 2019, 164:10-14. *See also* Italy's Memorial, para. 10.15.

817 Log Book of the Master of the "Enrica Lexie", p. 2 (**Annex IT-14**).

818 Declaration of Sahil Gupta, 15 February 2012 (**Annex IT-118**).

819 E-mail from MRCC Mumbai to Master of the "Enrica Lexie", 15 February 2012 (**Annex IT-8**); E-mail from MRCC Mumbai to the Shipmaster of the "Enrica Lexie", 15 February 2012, 19:36 IST (**Annex IN-34**).

820 Piroli Report (Confidential Annex) p. 2-11 (**IT-233**).

821 Piroli Report (Confidential Annex) p. 2-11 (**IT-233**).

MRCC Mumbai, we have altered course and are now proceeding towards Cochin. We will revert when we resume the voyage".[822]

478. Following the telephone call, Captain Vitelli continued on his course, waiting for the written message from MRCC Mumbai. When the vessel was "at 90° angle towards the port of Kochi", at 19:15 SMT/19:45 IST, he changed course towards Kochi. At 19:20 SMT/19:50 IST, the Indian Coast Guard Dornier aircraft located and arrived above the "Enrica Lexie" at 09° 51.6' N 075° 37.5' E, "beyond India's territorial sea".[823] The Dornier aircraft "encircled" and "contacted" the "Enrica Lexie" over VHF in channels 16 and 10.[824] According to the pilot of the Dornier aircraft, DIG [redacted], "[w]e encircled the vessel and contacted it" and "directed them to amend the course and proceed to Kochi harbour".[825] Subsequently, at 19:45 SMT/20:15 IST, the "Enrica Lexie" responded to the ICGS "Lakshmibai"'s VHF call and confirmed that, at about 16:00 SMT/16:30 IST, the vessel had resorted to firing while in transit. The ICGS "Lakshmibai" "also directed the vessel to proceed towards Kochi".[826]

479. As it became clear during the Hearing, Captain Vitelli was not under any compulsion to head to Kochi, nor does Italy (now) allege that he was. According to Captain Vitelli's testimony, the MRCC is "the highest authority in that sea area". He adds, "[h]ow could I ignore such a call? I had to consider that, I had to attach the necessary importance to that".[827] He, however, did not consider his freedom "to change the course again and resume the original course towards Egypt" to be hindered.[828] He testified, "[f]rankly, I didn't give this a thought. The plans had already changed. My task was to provide support to the authorities and to resume our journey as soon as

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822 E-mail from the Shipmaster of the "Enrica Lexie" to MSCHOA and UKMTO dated 15 February 2012 at 19:47 IST (**Annex IN-36**). *See also* E-mail from the Master of the "Enrica Lexie" to MSCHOA and UKMTO, 16:18 (CET), 15 February 2012 (**IT-120**).

823 Statement by Commandant [redacted], Coast Guard Air Enclave Kochi, 19 February 2012 (**Annex IT-7**); Boarding Officer's Report MV "Enrica Lexie", 16-17 February 2012, para. 4 (**Annex IT-9**); Statement of Witness in connection with the NIA investigation, Statement of Shri N.V. Rama Rao, Commandant, Coast Guard, Officer In-Charge, MRCC Mumbai, 16 July 2013, p. 129 (**Annex IT-277**); National Maritime Search and Rescue Board, Report, 4 June 2012, p. 11 (**Annex IT-6**).

824 Statement by Commandant [redacted], Coast Guard Air Enclave Kochi, 19 February 2012, p. 2 (**Annex IT-7**).

825 Statement by Commandant [redacted], Coast Guard Air Enclave Kochi, 19 February 2012, pp 1-2 (**Annex IT-7**).

826 Statement of [redacted], Assistant Commandant, Coast Guard District HQ 4, Kochi, 18 February 2012, p. 2 (**Annex IT-134**).

827 Hearing Transcript, 15 July 2019, 48:2-4.

828 Hearing Transcript, 15 July 2019, 94:5-6.

possible [...] I didn't have the impression that force was being used. I was free to alter the course".[829]

480. Captain Vitelli testified that "[i]n the end, everybody was in agreement: the best thing to do was to head to Kochi".[830] The Arbitral Tribunal has found the testimony of Captain Vitelli in respect of the motivation for the change of course to Kochi credible and has no reason to doubt its veracity.

481. In these circumstances, the MRCC's request for the "Enrica Lexie" to proceed to Kochi cannot be regarded as constituting interference with navigation of the "Enrica Lexie", which could amount to a breach of Italy's freedom of navigation.

482. The same applies to the communication from the Dornier and the ICGS "Lakshmibai", which the Arbitral Tribunal notes took place subsequent to the "Enrica Lexie"'s change of course towards to Kochi. Having considered that the communications from the MRCC Mumbai did not amount to a breach of Italy's freedom of navigation, the Arbitral Tribunal likewise finds that the communication from the Dornier and the ICGS "Lakshmibai" did not, any more than the MRCC's telephone and e-mail communications, violate Italy's freedom of navigation.

(ii) Alleged "ruse"

483. In connection with MRCC Mumbai's communications, Italy also alleges that India perpetrated a "ruse", a "misdirection", and "trickery" in order to bring the "Enrica Lexie" into India's territorial waters,[831] and that this constitutes interference with freedom of navigation.[832] According to Italy, had the ruse not achieved its purpose, the Indian Coast Guard was prepared to compel the "Enrica Lexie" into India's territorial sea as evidenced by the boarding preparations and presence of a police contingent in the ICGS "Lakshmibai".[833] India refutes these allegations.[834]

484. In this regard, the Parties have accorded considerable importance to the precise time of receipt of the e-mail from MRCC Mumbai. India submits that the e-mail was received at 19:06 SMT/19:36

829 Hearing Transcript, 15 July 2019, 94:7-16.

830 Hearing Transcript, 15 July 2019, 80:23-24.

831 Hearing Transcript, 18 July 2019, 2:17-20.

832 Hearing Transcript, 18 July 2019, 174:17-24.

833 Hearing Transcript, 18 July 2019, 46:8-14.

834 Hearing Transcript, 20 July 2019, 26:6-22; Hearing Transcript, 12 July 2019, 10:14-22. *See also* Hearing Transcript, 20 July 2019, 38:23-41:24, *referring to* Hearing Transcript, 18 July 2019, 14:6-11; Hearing Transcript, 16 July 2019, 98:25-102:3.

IST,[835] before the "Enrica Lexie" changed its course at 19:15 SMT/19:45 IST, while Italy submits that the e-mail was received at 20:06 SMT/20:36 IST,[836] after the "Enrica Lexie" had changed its course. Italy accordingly argues that, if Captain Vitelli turned before 19:30 SMT/20:00 IST, it was not the e-mail that prompted the turn, but the earlier telephone call, during which mention was made of a need to identify two suspected pirate skiffs.[837] India, on its part, argues that Captain Vitelli did not act on the telephone call but rather on the e-mail.[838] India further argues that regardless of whether the information provided in the earlier telephone call was accurate, the call was overtaken by subsequent events and was never mentioned again. India adds that the written message that Captain Vitelli received contained no ruse; it was a request, not an order.[839]

485. Italy, as "the litigant seeking to establish a fact",[840] carries the burden of proof with regard to its allegation that the Indian authorities perpetrated a ruse in order to bring the "Enrica Lexie" into India's territorial waters. The Arbitral Tribunal recalls that there is no transcript of the telephone call. The record of the discussion undertaken during the telephone call in the Log Book indicates that MRCC Mumbai "told us that they had been informed about the suspect pirate attack and, as a result, had seized two crafts".[841] Captain Noviello, in his statement before the Deputy Public Prosecutor, stated that "the MRCC of Bombay called and I was first to talk with them. I was told that they had caught two boats suspected to be pirate boats and invited us to return to Cochin to make an identification and provide evidence".[842] This is consistent with the statement of Mr. Gupta, who spoke with the MRCC and who reported that the MRCC had advised that "they came to know that our vessel had a suspected pirate attack and in lieu of this they have caught 2 boats with suspected pirates".[843] It is thus established, in the view of the Arbitral Tribunal, that reference to the capture of two suspected pirate boats was made during the telephone call. The e-

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835 E-mail from MRCC Mumbai to the Shipmaster of the "Enrica Lexie", 15 February 2012, 19:36 IST (**Annex IN-34**).

836 E-mail from MRCC Mumbai to Master of the "Enrica Lexie", 15 February 2012 (**Annex IT-8**).

837 Hearing Transcript, 9 July 2019, 7:6-12.

838 Hearing Transcript, 12 July 2019, 131:1-9, citing Log Book of the Master of the "Enrica Lexie", p. 2 (**Annex IT-14**).

839 Hearing Transcript, 20 July 2019, 50:20-51:3.

840 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 392 at p. 437, para. 101. *See also* Chester Brown, *A Common Law of International Adjudication*, (Oxford University Press, 2007), p. 93, *referring to* Durward Sandifer, *Evidence before International Tribunals*, (2nd ed., University Press of Virginia 1975) pp 127, 468.

841 Log Book of the Master of the "Enrica Lexie", p. 2 (**Annex IT-14**).

842 (Confidential Annex), p. 2 (Annex **IT-261)**. *See also* Hearing Transcript, 15 July 2019, 114:17-20.

843 Declaration of Sahil Gupta, 15 February 2012 (**Annex IT-118**).

mail message following the telephone call, on the other hand, made no reference to the capture of such boats.

486. The Arbitral Tribunal has reviewed the different documentary exhibits containing the e-mail from MRCC Mumbai filed in this Arbitration by the Parties. Italy relies on the time stamp on its exhibit to argue that the e-mail was received by the "Enrica Lexie" at 20:06 SMT/20:36 IST,[844] while India relies on the time stamps on its exhibits, and on the Piroli Report, which in turn had been based on the same exhibits, to argue that the e-mail was received by the "Enrica Lexie" at 19:06 SMT/19:36 IST.[845] In the view of the Arbitral Tribunal, neither piece of evidence is preferable. E-mails may receive time stamps depending on the time zone in which the computer used for sending, receiving, or printing a message is located. The Arbitral Tribunal considers that, in these circumstances, it is not in a position to come to a definitive conclusion on the question of the precise timing of the e-mail on the basis of the documentary evidence.

487. In his oral testimony, Captain Vitelli stated:

> I am adamant about this […] The MRCC's email was received after I changed the course to head towards Kochi. As long as I kept the course, and when I changed the course, I had not received this message. That is why I'm sure about that.[846]

There is, thus, support for Italy's position that the e-mail was received only after the course had been altered for Kochi. If the Arbitral Tribunal had to make a determination in this regard, it would find on a balance of probabilities that the e-mail was received at 20:06 SMT/20:36 IST.

488. In the view of the Arbitral Tribunal, however, the question of the precise timing of the e-mail can remain open since, even if Italy is right that the e-mail played no role in prompting the change of course, Italy has not established that India perpetrated a ruse. The Arbitral Tribunal recalls that Captain Vitelli and the Italian authorities were aware that a shooting incident had occurred, and that it involved the Marines stationed on the "Enrica Lexie" as VPDs. Captain Vitelli and those on board the "Enrica Lexie", conscious that they had received only limited information and that the Indian authorities themselves, at the time of the call, only had limited information, chose not to seek or wait for further clarification but proceeded voluntarily to Kochi. Captain Vitelli testified

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844 E-mail from MRCC Mumbai to Master of the "Enrica Lexie", 15 February 2012 (**Annex IT-8**); Hearing Transcript, 15 July 2019, 85:13-26.

845 Hearing Transcript, 20 July 2019, 30:1-17, *referring to* Hearing Transcript, 18 July 2019, 165:15-23; Piroli Report (Confidential Annex), p. 2-12 (**Annex IT-233**). *See also* E-mail from MRCC Mumbai to the Shipmaster of the "Enrica Lexie", 15 February 2012, 19:36 IST (**Annex IN-34**); E-mail from the Shipmaster of the "Enrica Lexie" to the Shipowner of the "Enrica Lexie" dated 15 February 2012 at 19:46 IST (**Annex IN-35**); E-mail from the Shipmaster of the "Enrica Lexie" to MSCHOA and UKMTO dated 15 February 2012 at 19:47 IST (**Annex IN-36**).

846 Hearing Transcript, 15 July 2019, 85:20-86:4.

that he felt free to alter course so as to return to his original course[847] even after he had received the e-mail, but he "wasn't even considering this".[848] There is no evidence in the conduct of Captain Vitelli following the receipt of the telephone call, and no indication in his oral testimony before the Arbitral Tribunal, that he gave specific thought to the form and scope of the investigation that India intended to conduct. Rather, Captain Vitelli appears to have been focused on what he saw as a seaman's duty to cooperate with the Indian authorities.

489. Finally, the Arbitral Tribunal observes that, while it seems likely that MRCC Mumbai received further information regarding the role of the "Enrica Lexie" and the Marines in the incident after the telephone call, it did not pass such information on to the "Enrica Lexie", by e-mail or otherwise. However, the fact that the "Enrica Lexie" was somewhat left in the dark as to the evolution of the Indian investigations cannot be equated with ruse or trickery. The Arbitral Tribunal, thus, concludes that Italy has not discharged its burden of proof in this respect. Having so concluded, the Arbitral Tribunal finds that India did not interfere with Italy's freedom of navigation by perpetrating a ruse.

(iii) Alleged interdiction

490. Italy further alleges that India interdicted the "Enrica Lexie" in its exclusive economic zone and thus violated Italy's freedom of navigation.

491. In the context of the law of the sea, "interdiction" is generally understood as a State's action of stopping, searching, and arresting foreign flag vessels and crew on the high seas. Interdiction has been taken to denote a "two-step process: first, the boarding, inspection and search of a ship at sea suspected of prohibited conduct; second, where such suspicions prove justified, taking measures including any combination of arresting the vessel, arresting persons aboard or seizing cargo".[849] While a flag State has jurisdiction to interdict vessels flying its flag on the high seas, all other States "may only conduct an interdiction under a permissive rule of international law or with permission from the flag state or the coastal state in whose regulatory zone the vessel is present".[850]

847 Hearing Transcript, 15 July 2019, 94:7-16.

848 Hearing Transcript, 15 July 2019, 94:12.

849 Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea*, (Cambridge University Press, 2009), p. 4.

850 Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea*, (Cambridge University Press, 2009), p. 5.

492. In the present case, the evidence on the record indicates that the Indian Coast Guard dispatched its vessels "for identification/interdiction of suspect vessel",[851] "for interception" of the "Enrica Lexie",[852] "to augment force level",[853] and to "render assistance for apprehension of suspect vessel".[854] At approximately 21:00 SMT/21:30 IST, ICGS "Lakshmibai" "intercepted the vessel at the same location and escorted it till our outer anchorage of Kochi".[855] By this time, the "Enrica Lexie" was already sailing east towards Kochi.[856]

493. In his oral testimony, Captain Noviello stated that when they "saw a helicopter hovering over" the "Enrica Lexie",[857] there was some fear that it could act "forcefully on the vessel",[858] but he was not sure whether that occured when the "Enrica Lexie" was outside or inside the Indian territorial sea.[859] However, when asked whether Indian authorities had issued any threats, his answer was negative.[860]

494. No boarding or arrest of the "Enrica Lexie" took place when the vessel was in India's exclusive economic zone. The Arbitral Tribunal is not prepared to speculate as to whether the Indian Coast Guard might have used force to compel the "Enrica Lexie" to head to Kochi, or boarded the vessel, had this become necessary. According to the evidence before the Arbitral Tribunal, no such instructions had been given,[861] boarding drills were routine on all missions,[862] and the reason for the presence of police officers in the ICGS "Lakshmibai" was that firing had been reported, thus making the incident a police case.[863]

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851 Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 175 (**Annex IT-131**); National Maritime Search and Rescue Board, Report, 4 June 2012, p. 11 (**Annex IT-6**).

852 National Maritime Search and Rescue Board, Report, 4 June 2012, p. 11 (**Annex IT-6**); Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 175 (**Annex IT-131**).

853 "Coast Guard, fishermen made a smart move", The Times of India (Electronic Edition), 18 February 2012 (**Annex IT-39**).

854 Boarding Officer's Report MV "Enrica Lexie", 16-17 February 2012, para. 2 (**Annex IT-9**).

855 Statement of [redacted], Assistant Commandant, Coast Guard District HQ 4, Kochi, 18 February 2012, pp 1-2 (**Annex IT-134**).

856 Hearing Transcript, 16 July 2019, 77:18-25.

857 Hearing Transcript, 15 July 2019, 118:20.

858 Hearing Transcript, 15 July 2019, 133:9-10.

859 Hearing Transcript, 15 July 2019, 119:9-21.

860 Hearing Transcript, 15 July 2019, 133:12-15.

861 Hearing Transcript, 16 July 2019, 177:21-178:13.

862 Hearing Transcript, 16 July 2019, 139:5-21.

863 Hearing Transcript, 16 July 2019, 96:16-26.

495. The Arbitral Tribunal thus finds that there was no interdiction of the "Enrica Lexie" in India's exclusive economic zone, which could be said to have violated Italy's freedom of navigation.

(iv) Alleged escort

496. The Arbitral Tribunal finally turns to Italy's contention that, by escorting the "Enrica Lexie" to Kochi, India breached Italy's freedom of navigation.[864]

497. The Arbitral Tribunal observes that whether the "escort" of the "Enrica Lexie" (a term employed both by the Indian Coast Guard at the time of the incident and by the Parties during the Arbitration) was inconsistent with the freedom of navigation enjoyed by Italy depends on a variety of circumstances, including the form of the escort, its purpose, and the perception of those on board the vessel which is being escorted.

498. With respect to the form of escort, the Arbitral Tribunal notes that, after locating the "Enrica Lexie", the Dornier "contacted [it] continuously over VHF" and "shadowed it to Kochi anchorage till 22.30 hrs".[865] DIG [redacted] testified that "we maintained from 3,000 to 5,000 feet".[866] According to him, "[i]t does not mean that we are very close, encircling the vessel, but we were maintaining around the vessel".[867] At approximately 21:00 SMT/21:30 IST, ICGS "Lakshmibai" located the "Enrica Lexie" and "escorted it till our outer anchorage of Kochi".[868] Commandant [redacted] testified that "we maintained patrolling [...] around that ship only [...] within 5 nautical miles".[869] According to him, from "3 to 5 nautical miles, we can easily see the vessel, we can easily see what course they are doing, we can easily see the aspect of the vessels",[870] while simultaneously maintaining a distance that minimizes chances of a collision with the vessel being escorted.[871] There is no indication that the Dornier and the ICGS "Lakshmibai" sought to influence the movement of the "Enrica Lexie", whether through their own navigation or the displaying of visual or acoustic signals. In the view of the Arbitral Tribunal, the evidence demonstrates, instead, that

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864 Italy's Reply, para. 7.52; Hearing Transcript, 10 July 2019, 16:4-10.

865 Statement by Commandant [redacted], Coast Guard Air Enclave Kochi, 19 February 2012, p. 2 (**Annex IT-7**).

866 Hearing Transcript, 16 July 2019, 20:2.

867 Hearing Transcript, 16 July 2019, 20:12-14.

868 Statement of [redacted], Assistant Commandant, Coast Guard District HQ 4, Kochi, 18 February 2012, pp 1-2 (**Annex IT-134**).

869 Hearing Transcript, 16 July 2019, 80:14-15. *See also* Hearing Transcript, 16 July 2019, 120:22-25.

870 Hearing Transcript, 16 July 2019, 122:26-123:2.

871 Hearing Transcript, 16 July 2019, 123:6-13.

the Dornier and the ICGS "Lakshmibai" were travelling alongside the "Enrica Lexie" at safe distances.

499. Responding to a question at the Hearing regarding his perception of the escort, Captain Vitelli noted that he knew that he was being monitored, both from his experience as a seaman and from the fact that he could see false echoes on the radar. But he did not "have the impression that force was being used".[872] He testified, "I was free to alter the course".[873]

500. The Arbitral Tribunal also considers that the purpose of the escort may be taken into account as a relevant element. The Arbitral Tribunal notes Italy's argument that, "[i]n the absence of the consent of the flag state, [escort] constitutes an interference with freedom of navigation and an unlawful exercise of jurisdiction".[874] According to Italy, "outside the very particular circumstances envisaged and authorised by paragraph 7 of Article 111, escort beyond the territorial sea would be an unlawful interference with freedom of navigation and an unlawful exercise of jurisdiction".[875] In the Arbitral Tribunal's view, that statement must be qualified, as there may be instances where the escort of a foreign vessel by a vessel of the coastal State without the express consent of the flag State is not contrary to the Convention, such as to ensure safety of passage through unknown sea lanes or to prevent environmental harm.

501. More specifically, Italy alleges that the escort of the "Enrica Lexie" occurred in implementation of instructions to "apprehend" the "Enrica Lexie".[876] However, according to the testimony of Commandant [redacted], the reason for escorting the "Enrica Lexie" was "just to facilitate them, just to help them to come to the Kochi".[877] When questioned whether there was any other reason for the escort, Commandant [redacted] stated that "[s]ince this accident had happened, so this was an order from district headquarters, that's why we escorted them".[878] DIG [redacted] testified that the purpose of staying in the vicinity of the "Enrica Lexie" was in order to communicate with it and obtain data about its movement.[879]

872 Hearing Transcript, 15 July 2019, 94:14-15.

873 Hearing Transcript, 15 July 2019, 94:15-16.

874 Hearing Transcript, 10 July 2019, 16:7-10.

875 Hearing Transcript, 10 July 2019, 17:13-17.

876 Hearing Transcript, 18 July 2019, 169:2-24 *referring to* Hearing Transcript, 16 July 2019, 125:14-18; Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 175 (**Annex IT-131**); Boarding Officer's Report MV "Enrica Lexie", 16-17 February 2012, para. 4 (**Annex IT-9**).

877 Hearing Transcript, 16 July 2019, 123:20-21.

878 Hearing Transcript, 16 July 2019, 123:24-26. *See also* Hearing Transcript, 16 July 2019, 176:9-12.

879 Hearing Transcript, 16 July 2019, 19:25-20:5.

502. Commandant [redacted] and DIG [redacted] testimonies are consistent with the evidence of Captain Vitelli, reviewed above, that the "Enrica Lexie" was already turning to Kochi when the Dornier encountered it, and was voluntarily proceeding to Kochi when the "Lakshmibai" began to travel alongside it. As noted above, the question whether force or threat of force would have been used during the escort, had the "Enrica Lexie" failed to proceed to Kochi, cannot be answered conclusively.

503. The Arbitral Tribunal observes that the ICGS "Lakshmibai" had a police contingent on board.[880] Commandant [redacted] testified, however, that "[a]ll the weapons" in the ICGS "Lakshmibai" "were locked in [the] armoury".[881] There is also no indication that the crew of the ICGS "Lakshmibai" made any preparations to threaten or use armed force against the "Enrica Lexie", aside from the boarding drills that were undertaken while setting sail, which, as noted previously, were routine on all missions.[882] Without sufficient evidence to support Italy's allegation that the purpose of the escort was the apprehension of the "Enrica Lexie", there is no basis for the Arbitral Tribunal to so conclude. The Arbitral Tribunal thus finds that the escort of the "Enrica Lexie" by the Dornier aircraft and Indian naval vessels did not amount to a breach of Italy's freedom of navigation.

504. Finally, the Arbitral Tribunal notes Italy's argument that the evidence on the record permits the conclusion that, since the "Enrica Lexie" initially had no intention of proceeding to the Indian coast, there was a "causal effect" of India's intervention on the "Enrica Lexie"'s turn for Kochi.[883] While such a causal effect is undeniable, in the sense that, had the MRCC not requested the "Enrica Lexie" to proceed to Kochi, the "Enrica Lexie" would not have changed course, such effect is too remote to amount to "interference" with Italy's freedom of navigation.

505. For the reasons set out above, the Arbitral Tribunal concludes that India has not interfered with Italy's freedom of navigation, and thus it has not acted in breach of Article 87, paragraph 1, subparagraph (a), of the Convention.

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880 Hearing Transcript, 16 July 2019, 96:3-26.

881 Hearing Transcript, 16 July 2019, 88:3-4. *See also* Hearing Transcript, 16 July 2019, 88:24-25.

882 Hearing Transcript, 16 July 2019, 139:5-21.

883 Italy's Reply, paras 4.11, 4.53, 4.67; Hearing Transcript, 9 July 2019, 10:13-15, *referring to* Statement filed on behalf of the Coast Guard, Kochi, 28 February 2012, para. 7 (**Annex IT-152**); Hearing Transcript, 9 July 2019, 11:16-23, *referring to* National Maritime Search and Rescue Board, Report, 4 June 2012, p. 11 (**Annex IT-6**).

(c) **Interpretation and Application of Article 92 (Flag-State Jurisdiction)**

i. Position of Italy

506. Italy contends that "Article 92 of UNCLOS embodies the fundamental rule of the international law of the sea" – flag-State jurisdiction[884] – and that the purpose of Article 92 is "not to limit or restrict the freedom of the high seas but to safeguard its exercise".[885]

507. According to Italy, it follows from Article 92 that, in light of the absence of territorial sovereignity upon the high seas, no State can exercise any kind of jurisdiction over foreign vessels on the high seas.[886] Italy understands that India has accepted this scope of Article 92.[887] According to Italy, "the consequences of exclusive flag-State jurisdiction are broad", as set out in Article 27, paragraph 5.[888] Italy further argues that Article 92, paragraph 1, makes explicit that the only exceptions to the rule of exclusive flag-State jurisdiction are "exceptional cases expressly provided for in international treaties or in this Convention", not in customary international law.[889]

508. Italy contends that the test for finding a violation of flag-State jurisdiction under Article 92 is not an actual or threatened use of force.[890] Instead, according to Italy, the test is "whether the authority of the Indian State was asserted when the *Enrica Lexie* was beyond its territorial sea".[891]

509. Finally, Italy argues that, contrary to India's assertion, Article 92 concerns not only the vessel but also its crew.[892] According to Italy, Article 27, paragraph 5, confirms this interpretation, "the effect of which is that, even once India had caused the *Enrica Lexie* to enter its territorial waters, it still could not take any steps on board the *Enrica Lexie*".[893]

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884 Italy's Memorial, para. 10.30.

885 Italy's Memorial, para. 10.32, *citing* International Law Commission, 'Report of the International Law Commission Covering the Work of its Seventh Session' (2 May – 8 July 1955) U.N. Doc. A/CN.4/94, p. 19, at p. 22 (commentary to draft Article 2).

886 Italy's Memorial, paras 10.32-10.33, *referring to S.S. "Lotus" (France v. Turkey)*, Judgment of 7 September 1927, P.C.I.J. Series A, No. 10, p. 25; Rüdiger Wolfrum, 'Freedom of Navigation: New Challenges', in Myron H Nordquist, Thong Bee Koh, John Norton Moore (eds.), *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention* (Martinus Nijhoff, 2009) 79, p. 92.

887 Italy's Reply, para. 7.16, *citing* India's Counter-Memorial, para. 6.21.

888 Italy's Memorial, para. 10.34.

889 Italy's Memorial, para. 10.36. *See also* Hearing Transcript, 10 July 2019, 7:18-8:5.

890 Italy's Reply, para. 7.18, *referring to* India's Counter-Memorial, para. 6.26.

891 Italy's Reply, para. 7.18.

892 Italy's Reply, para. 7.19, *referring to* India's Counter-Memorial, para. 6.29. *See also M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10 at p. 48, para. 106.

893 Italy's Reply, para. 7.20.

510. Applying this interpretation to the facts, Italy similarly submits that for the same reasons described with respect to India's alleged breach of Article 87, paragraph 1, subparagraph (a), of the Convention,[894] India breached Article 92 of the Convention by directing, interdicting, and escorting the "Enrica Lexie" while it was in India's exclusive economic zone.[895]

ii. Position of India

511. India acknowledges that Article 92 must be interpreted to mean that "in the high seas, no measures of constraint can be exercised against ships navigating under another State's flag".[896] India submits, however, that Article 92 "does not exclude any kind of contact between the coastal authorities of the neighbouring States and the ships – if only for security matters".[897] According to India, this is common ground between the Parties.[898] India submits that Article 33 of the IMO Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships includes the "[a]ction by coastal/port States" in such cases.[899]

512. Furthermore, India submits that "it is clear from the text of Article 92 that it concerns only the vessel and not its crew", and India "did not exercise any jurisdiction over the vessel in the EEZ".[900]

513. Finally, India responds to Italy's argument that India's interpretation of Article 92 "would go far enough to justify the extension of India's criminal jurisdiction to events occurring beyond India's territorial sea".[901] First, India argues that it did not exercise jurisdiction over the "Enrica Lexie" outside its territorial sea and internal waters. Second, India argues that the application of the Indian Penal Code has nothing to do with Article 92 of the Convention, given that such application does not involve any exercise of jurisdiction over the "Enrica Lexie" but rather over the "St. Antony".[902]

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894 *See* paras 440-448 above.

895 Italy's Reply, para. 7.53.

896 India's Counter-Memorial, para. 6.21.

897 India's Counter-Memorial, para. 6.21.

898 India's Rejoinder, para. 6.21, *citing* Italy's Reply, para. 7.17.

899 India's Counter-Memorial, para. 6.21, *referring to* IMO Resolution A.1025(26), "Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ship", 2 December 2009, Article 3(3).

900 India's Counter-Memorial, para. 6.29.

901 India's Rejoinder, para. 6.27, *citing* Italy's Reply, para. 7.21.

902 India's Rejoinder, paras 6.28-6.29.

514. Applying this interpretation to the facts, India disagrees with Italy's claim that its alleged "direction, interdiction and escort" of the "Enrica Lexie" amounted to a breach of Article 92.[903] According to India, Italy "substitutes assertion for actual proof that fits the contemporary evidence and is relevant for the real issue of causality".[904] India submits that, "other than the original phone call and written message from the MRCC Mumbai, which did no more than request the *Enrica Lexie* to come to port to assist in shedding light on what had happened, none of the communications made by Indian Coast Guard officials to the tanker occurred before the Shipmaster took his decision to alter course for Kochi". Therefore, India concludes, "none of these later communications *caused* the *Enrica Lexie* to proceed to port".[905] Rather, India submits that "[t]he *cause* of that action was Captain Vitelli's decision to change his route with the consent of Italian naval officials and his shipowner",[906] and that any later messages had no influence on the vessel's navigation towards Kochi.[907]

515. In addition, India submits that it did not exercise any jurisdiction over the vessel in its exclusive economic zone either through "physical interference" or "indirect means" and that it therefore could not have violated Article 92.[908] Refuting Italy's argument that India exercised its jurisdiction over the "Enrica Lexie" through the mobilisation of Indian assets for "search", "contact", and "escort", India argues that merely doing so "without applying any measures of constraint or any threats on the vessel, is not and cannot be an exercise of jurisdiction".[909] Moreover, India was entitled to investigate what happened with respect to the "St. Antony" and its crew in India's EEZ, and mobilizing Indian Coast Guard assets for this purpose did not, contrary to Italy's argument, amount to an exercise of jurisdiction over the "Enrica Lexie".[910] India recalls that contrary to Italy's argument, no criminal investigation was underway at the time.[911]

516. India asserts that the "Enrica Lexie" incident bears no resemblance to the situations in *Guyana v. Suriname* or the *South China Sea Arbitration* since, according to India, it never threatened the Master nor harassed or coerced the vessel.[912] India further submits that neither ICGS

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903 India's Rejoinder, para. 6.21, *referring to* Italy's Reply, paras 7.17, 7.34.

904 India's Rejoinder, para. 6.22.

905 India's Rejoinder, para. 6.22 [emphasis added by India].

906 India's Rejoinder, para. 6.22 [emphasis added by India].

907 India's Rejoinder, para. 6.23.

908 Hearing Transcript, 20 July 2019, 46:19-47:6. *See also* India's Counter-Memorial, para. 6.29.

909 Hearing Transcript, 20 July 2019, 48:2-4.

910 Hearing Transcript, 20 July 2019, 47:15-48:4. *See also* Hearing Transcript, 12 July 2019, 132:22-133:4.

911 Hearing Transcript, 12 July 2019, 133:5-7.

912 India's Counter-Memorial, para. 6.13.

"Lakshmibai" nor the Dornier purported to exercise any authority over the vessel,[913] and that there is no evidence to back Italy's assertion that if the "Enrica Lexie" did not comply, it would have been apprehended anyway.[914]

517. According to India, Indian authorities did not board the "Enrica Lexie" until it was anchored in India's territorial sea and they were invited on board.[915] India submits that the *S.S. "Lotus"* case is irrelevant because "[a]t no point did India board or attempt to board the *Enrica Lexie* while it was in India's EEZ".[916] India further submits that, once the ship had anchored, "the investigation on board was led with the authorization and even at the request of the master of the ship".[917]

518. After distinguishing the present case from *M/V "Norstar"*, India adds that, unlike in *M/V "Norstar"*,

> there was no allegation at all that the vessel itself had engaged in any wrongful conduct. It was the actions of the marines that were under scrutiny, marines who were organs of the Italian State, and marines who had no responsibility or role to play with respect to the Enrica Lexie's navigation; that was solely within the domain of the shipmaster.[918]

519. Further, recalling its interpretation that Article 92 concerns only the vessel but not its crew, India argues that it did not exercise any jurisdiction over the vessel in the exclusive economic zone.[919] India argues that, *a fortiori*, Italy's point about the lack of exceptional circumstances to justify an exercise of authority is irrelevant.[920]

520. Finally, India argues that neither the Master nor the Italian Navy complained that India was illegally exercising jurisdiction over the "Enrica Lexie" between the time it turned towards Kochi and the time it arrived in port.[921]

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913 India's Counter-Memorial, para. 6.14.

914 Hearing Transcript, 20 July 2019, 48:15-49:2, *referring to* Hearing Transcript, 18 July 2019, 171: 6-7. *See also* Hearing Transcript, 20 July 2019, 49:20-24.

915 India's Counter-Memorial, para. 6.9.

916 India's Counter-Memorial, para. 6.9.

917 India's Counter-Memorial, para. 6.28.

918 Hearing Transcript, 12 July 2019, 126:8-15.

919 India's Counter-Memorial, para. 6.29.

920 India's Counter-Memorial, para. 6.16.

921 India's Rejoinder, paras 6.5, 6.19-6.20, 6.25-6.26, 6.30; Hearing Transcript, 12 July 2019, 143:5-145:23.

iii. Analysis of the Arbitral Tribunal

521. Italy claims that India breached Article 92, paragraph 1, of the Convention by exercising jurisdiction over the "Enrica Lexie" while it was in India's exclusive economic zone.[922]

522. Article 92, paragraph 1, concerning status of ships reads as follows:

> *Article 92*
>
> *Status of ships*
>
> 1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.

523. Article 92 applies to the exclusive economic zone by virtue of Article 58, paragraph 2, of the Convention, which extends Articles 88 to 115 to the exclusive economic zone.

(a) The concept of exclusive jurisdiction of the flag State

524. The principle of exclusive flag State jurisdiction has been recognised as an "essential adjunct[] to the principle of the freedom of the seas"[923] or a "corollary of the open and free status of the high seas".[924]

525. The concept of "jurisdiction", derived from the Latin *juris dicere* (literally: "to speak the law"), while broadly used in international law, remains largely undefined in the case law of international courts and tribunals.

526. One may distinguish between prescriptive jurisdiction, adjucative jurisdiction, and enforcement jurisdiction.[925] Prescriptive jurisdiction is the authority of a State to make laws in relation to persons, property, or conduct; adjudicative jurisdiction is the authority of a State to apply law to persons or things; and enforcement jurisdiction is the authority of a State to exercise its power to

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922 Italy's Reply, para. 7.53.

923 International Law Commission, "Articles Concerning the Law of the Sea with Commentaries" in *Yearbook of the International Law Commission*, Vol. II, p. 265 at p. 279 (commentary to Article 30, para. 1) (1956).

924 *M/V "Norstar" (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], para. 216. *See also* Bernard H. Oxman, 'Jurisdiction of States' (2007) Max Planck Encyclopedia of International Law, para. 30.

925 Some scholars favour the three-prong jurisdiction approach. The terminology varies slightly, as some authors refer to legislative, judicial, and executive jurisdiction. *See* Rain Liivoja, 'The Criminal Jurisdiction of States: a Theoretical Primer' (2010) 7 NoFo 25, at p. 29; Philip C. Jessup, 'Jurisdiction' (1980) 61 Int'l L Stud Ser US Naval War Col 303, at 303; Cedric Ryngaert, *Jurisdiction in International Law* (2nd ed., Oxford Monographs in International Law 2015), p. 9; Bernard H. Oxman, 'Jurisdiction of States' (2007) Max Planck Encyclopedia of International Law, para. 3.

compel compliance with law. Under international law, the exercise of jurisdiction by a State entails an element of prescribing laws, rules, or regulations over conduct, or applying or enforcing such laws, rules, or regulations over persons or property.

527. It follows from the above analysis that the principle of exclusive flag State jurisdiction under the Convention is violated when a State other than the flag State seeks to prescribe laws, rules, or regulations over a ship of the flag State, or applies or enforces such laws, rules, or regulations in respect of such a ship. The Arbitral Tribunal also recalls in this respect the observation of ITLOS in *M/V "Norstar"* that the principle of exclusive flag State jurisdiction "prohibits not only the exercise of enforcement jurisdiction on the high seas by States other than the flag State but also the extension of their prescriptive jurisdiction to lawful activities conducted by foreign ships on the high seas".[926]

(b) Examination of India's conduct vis-à-vis the "Enrica Lexie"

528. The Arbitral Tribunal now turns to Italy's claim that "[b]y *directing* the *Enrica Lexie* to proceed to Kochi while it was navigating beyond India's territorial sea, by *interdicting* it, and by *escorting* it to Kochi, India [...] breached Italy's right to exclusive jurisdiction over the *Enrica Lexie* under Article 92(1) of UNCLOS".[927]

529. The Arbitral Tribunal recalls its factual findings made in the context of its analysis of Article 87, paragraph 1, subparagraph (a). In particular, the Arbitral Tribunal recalls that at 18:30 SMT/19:00 IST, MRCC Mumbai requested the "Enrica Lexie" to proceed to Kochi "to take stock of events and bear witness".[928] According to Mr. Gupta, the "Enrica Lexie" was requested to "approach to Cochin Port as they wanted the Master to give his statement and witness".[929] This request was followed by a written message stating: "You are requested to head for Kochi and establish communication with Indian Coast Guard [...] for further deposition/clarification".[930] In the view of the Arbitral Tribunal, it is possible to interpret the communications from MRCC Mumbai, as their wording indeed suggests, as mere requests.

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926 *M/V "Norstar" (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], para. 225.

927 Italy's Reply, para. 7.1 [emphases added]. *See also* Hearing Transcript, 10 July 2019, 2:9-18.

928 Log Book of the Master of the "Enrica Lexie", p. 2 (**Annex IT-14**).

929 Declaration of Sahil Gupta, 15 February 2012 (**Annex IT-118**).

930 E-mail from MRCC Mumbai to Master of the "Enrica Lexie", 15 February 2012 (**Annex IT-8**); E-mail from MRCC Mumbai to the Master of the "Enrica Lexie", 16:10 (CET), 15 February 2012 (**Annex IT-123**).

530. This interpretation was ostensibly shared by Captain Vitelli, the primary addressee on the "Enrica Lexie" of the requests from the MRCC. As noted above, he testified that he was not under any compulsion to head to Kochi: he did not "have the impression that force was being used".[931] He changed course towards Kochi at 19:15 SMT/19:45 IST,[932] but he did not consider his freedom "to change the course again and resume the original course towards Egypt" to be hindered.[933] He added that, having informed CINCNAV, MSCHOA, UKMTO, and Fratelli D'Amato SpA, "[i]n the end, everybody was in agreement: the best thing to do was to head to Kochi".[934]

531. In the view of the Arbitral Tribunal, Italy has not discharged its burden of proving that the requests from the MRCC were in fact directions or orders, having an element of enforcement jurisdiction.

532. Additionally, while the Indian Coast Guard deployed an aircraft and naval vessels to "conduct search for suspected vessel between Kollam and Kadungalloor",[935] to "render assistance for apprehension of suspect vessel",[936] and to "interrogate/identify all the merchant vessels in the area" in search of the vessel involved in the firing,[937] the aircraft and vessels did not, in fact, carry out any enforcement measures, such as boarding or detention, while the "Enrica Lexie" was in India's exclusive economic zone. Rather, at 19:20 SMT/19:50 IST, the Dornier aircraft located and arrived above the "Enrica Lexie" and "directed them to amend the course and proceed to Kochi harbour".[938] Subsequently, at 19:45 SMT/20:15 IST, the "Enrica Lexie" responded to the ICGS "Lakshmibai"'s VHF call and the ICGS "Lakshmibai" "also directed the vessel to proceed towards Kochi".[939]

533. The Arbitral Tribunal further recalls its finding that, after the Dornier aircraft and ICGS "Lakshmibai" located the "Enrica Lexie", they travelled alongside the "Enrica Lexie" at safe

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931 Hearing Transcript, 15 July 2019, 94:14-15.

932 Log Book of the Master of the "Enrica Lexie", p. 2 (**Annex IT-14)**.

933 Hearing Transcript, 15 July 2019, 94:5-6.

934 Hearing Transcript, 15 July 2019, 80:23-24.

935 Statement by Commandant [redacted], Coast Guard Air Enclave Kochi, 19 February 2012, p. 1 (**Annex IT-7**). *See also* Italy's Reply, para. 4.44; Boarding Officer's Report MV "Enrica Lexie", 16-17 February 2012, para. 2 (**Annex IT-9**). *See also* Hearing Transcript, 16 July 2019, 16:10-14, 16:17-21.

936 Boarding Officer's Report MV "Enrica Lexie", 16-17 February 2012, para. 1 (**Annex IT-9**). *See also* Hearing Transcript, 16 July 2019, 137:6-20.

937 Statement of [redacted], Assistant Commandant, Coast Guard District HQ 4, Kochi, 18 February 2012, p. 46 (**Annex IT-134**). *See also* Italy's Reply, para. 7.56; Hearing Transcript, 16 July 2019, 89:16-90:1, 90:14-24.

938 Statement by Commandant [redacted], Coast Guard Air Enclave Kochi, 19 February 2012, pp 1-2 (**Annex IT-7**). *See also* Italy's Memorial, para. 4.66; Statement of Witness in connection with the NIA investigation, Statement of Commandant [redacted], Coast Guard, 750 Squadron, Coast Guard Air Station, Daman, 19 September 2013, p. 37 (**Annex IT-279**).

939 Statement of [redacted], Assistant Commandant, Coast Guard District HQ 4, Kochi, 18 February 2012, p. 2 (**Annex IT-134**).

distances: the Dornier aircraft "maintained from 3,000 to 5,000 feet",[940] while the ICGS "Lakshmibai" "maintained patrolling [...] within 5 nautical miles".[941] According to the testimony of Commandant [redacted], the reason for escorting the "Enrica Lexie" was "just to facilitate them, just to help them to come to the Kochi".[942] DIG [redacted] testified that the purpose of staying in the vicinity of the "Enrica Lexie" was to communicate with it and obtain data about its movement.[943]

534. The Arbitral Tribunal finally recalls that it cannot answer conclusively, on the evidentiary record before it, whether the Indian Coast Guard might have had recourse to force or the threat of force to compel the "Enrica Lexie" to head to Kochi, had it not pursued that course voluntarily.

535. In the view of the Arbitral Tribunal, Italy has not discharged its burden of proving that the Indian Coast Guard, by "interdicting" and "escorting" the "Enrica Lexie", exercised enforcement jurisdiction.

536. In conclusion, the conduct of the Indian authorities while the "Enrica Lexie" was in India's exclusive economic zone did not amount to an exercise of jurisdiction. The Arbitral Tribunal accordingly finds that India did not violate Article 92, paragraph 1, of the Convention.

2. Alleged Breaches by India of Article 97 of UNCLOS

537. The Parties also differ over the interpretation and application of Article 97 of the Convention, which, by virtue of Article 58, applies in the exclusive economic zone. Article 97 provides:

> *Article 97*
>
> *Penal jurisdiction in matters of collision or any other incident of navigation*
>
> 1. In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national.
>
> 2. In disciplinary matters, the State which has issued a master's certificate or a certificate of competence or licence shall alone be competent, after due legal process, to pronounce the withdrawal of such certificates, even if the holder is not a national of the State which issued them.
>
> 3. No arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag State.

940 Hearing Transcript, 16 July 2019, 20:2.

941 Hearing Transcript, 16 July 2019, 80:14-15.

942 Hearing Transcript, 16 July 2019, 123:20-21.

943 Hearing Transcript, 16 July 2019, 19:25-20:5.

538. In particular, the Parties disagree as to whether Article 97, paragraphs 1 and 3, applies to the facts of this dispute, and further whether India has breached these provisions by exercising jurisdiction over the Marines and the "Enrica Lexie".

539. Instead of Article 97 of the Convention, India contends that the residual clause in Article 59 of the Convention applies. Italy disputes this claim. Article 59 of the Convention provides:

> *Article 59*
>
> *Basis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the exclusive economic zone*
>
> In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

540. Since the Parties' claims turn on findings with regard to a common set of contested facts, namely those surrounding the risk of a collision between the "Enrica Lexie" and the "St. Antony", the Arbitral Tribunal will first summarise the Parties' positions in respect of these facts. Thereafter, the Arbitral Tribunal will proceed to summarise the Parties' arguments under Article 97, paragraphs 1 and 3, and Article 59 of the Convention.

(a) Risk of Collision between the "Enrica Lexie" and the "St. Antony"

541. The Parties disagree as to whether there was a risk of collision between the "Enrica Lexie" and the "St. Antony" and, if so, whether the "Enrica Lexie" changed course to avoid possible collision.

i. Navigation of the "Enrica Lexie" and the "St. Antony"

(a) Position of Italy

542. Italy asserts that the Master of the "Enrica Lexie" identified a risk of collision between the "Enrica Lexie" and the "St. Antony", leading to a range of "escalating steps" by the Captain, the VPD, and the crew.[944] Italy asserts that the crew's apprehension of the risk of collision and the steps taken thereafter in response are supported by the following evidence.

[944] Italy's Memorial, para. 4.105. *See also* Hearing Transcript, 8 July 2019, 155:3-4; Hearing Transcript, 18 July 2019, 44:20-26, 45:9-12, 126:3-4.

543. According to a statement by Captain Noviello, upon spotting the craft, he informed the Second Officer, Sahil Gupta, that there was "a vessel on a collision course with the *Enrica Lexie*".[945] Captain Noviello states that, in order to avert this "perceived collision and threat to the safe navigation of the vessel",[946] the Second Officer put the "Enrica Lexie" on manual steering from automatic steering and "altered course [...] to port to avoid a collision",[947] while the VPD took a range of dissuasive measures. The crew took refuge in the citadel.[948] Italy contends therefore that "[f]or 75 minutes", the "Enrica Lexie" was under "exceptional navigational constraint".[949]

544. Captain Vitelli testified that "anything I do, I risk having a collision with the skiff",[950] while Captain Noviello stated that "I am 99% convinced that we would have had a collision if they hadn't altered their course, once the riflemen fired shots into the water".[951]

545. Captain Noviello also testified that Second Officer Gupta "changed the course in effect by only 2° to port because [...] the second officer thought that 'in this way a collision could be avoided'."[952] Italy recognises that "Captain Noviello thought that the turn implemented by Second Officer Gupta was in the wrong direction and was not significant enough".[953] In view of this, Italy contends that the key point is that "Captain Noviello confirmed that Second Officer Gupta did change the course of the Enrica Lexie, and that he did so to avoid a collision".[954]

546. Italy alleges that, in addition to the first turn undertaken by Second Officer Gupta, once Captain Vitelli became involved, he changed course again, seeking to avoid a collision. As evidence, Italy refers to Captain Vitelli's testimony that "I had to avert the collision. … So first of all, I pulled to the starboard side".[955]

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945 Italy's Memorial, para. 4.14, *referring to* (Confidential Annex) (**Annex IT-261**); Statement of Narandra Fulbaria, 19 February 2012 (**Annex IT-139**). *See also* Italy's Reply, para. 4.18.

946 Italy's Memorial, para. 4.105.

947 Italy's Memorial, para. 4.14, *referring to* (Confidential Annex) (**Annex IT-261**); Statement of Sahil Gupta, 19 February 2012 (**Annex IT-140**). *See also* Italy's Reply, para 4.22.

948 Italy's Memorial, para. 4.105.

949 Italy's Memorial, para. 4.105.

950 Hearing Transcript, 18 July 2019, 134:4-5, *citing* Hearing Transcript, 15 July 2019, 35:14-15. *See also* Hearing Transcript, 18 July 2019, 134:7-8, *referring to* Hearing Transcript, 15 July 2019, 89:4-5.

951 Hearing Transcript, 18 July 2019, 134:14-16, *citing* Hearing Transcript, 15 July 2019, 137:24-138:1.

952 Hearing Transcript, 18 July 2019, 135:20-136:2, *citing* Hearing Transcript, 15 July 2019, 123:22-23.

953 Hearing Transcript, 18 July 2019, 135:14-16, *referring to* Hearing Transcript, 15 July 2019, 123:9-11, 124:14-18.

954 Hearing Transcript, 18 July 2019, 135:16-19. *See also* Hearing Transcript, 15 July 2019, 137:24-26.

955 Hearing Transcript, 18 July 2019, 136:13-14, *citing* Trancript Day 7, 36:23-26.

547. Italy submits that, as the craft approached the "Enrica Lexie" from approximately 800 metres, the Marines implemented various visual signals to warn the craft, including flashing a search light[956] and showing their weapons above their heads, in order to "signal the presence of military personnel onboard".[957] Nevertheless, Italy contends, the small craft continued to approach the "Enrica Lexie".[958]

548. Italy submits that India has accepted that the two vessels came within 100 metres of each other. Accordingly, Italy argues that, in such circumstances, "it is not tenable for India to maintain that there was no genuine risk of collision".[959] Italy also submits that the craft approached until it was approximately 30 metres away from the "Enrica Lexie", where, after the third burst of shots was fired by the Marines, it "changed course" away from the "Enrica Lexie".[960] Italy concludes that these facts demonstrate that this was "by any measure a close quarters situation involving imminent risk of a collision".[961]

549. Italy further refers to Captain Fredy's testimony that he woke up from sleep after "hearing noise of firing" and saw that his boat was "running at a high speed and was dangerously approaching another vessel".[962] According to Captain Fredy, the boat had "reached dangerously close" to the vessel, while a "person unqualified to be at the helm [of the boat] 'went off to sleep while driving'."[963] Captain Fredy stated that he immediately took charge of the boat and navigated to

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956 Italy's Memorial, para. 4.18, *referring to* (Confidential Annex), p. 1 (**Annex IT-236**); Statement of Carlo Noviello, 19 February 2012 (**Annex IT-142**); Declaration of Carlo Noviello, 19 February 2012 (**Annex IT-138**).

957 Italy's Memorial, para 4.19, *citing* (Confidential Annex), p. 1 (**Annex IT-236**). *See also* (Confidential Annex) (**Annex IT-237**); Declaration of Carlo Noviello, 19 February 2012 (**Annex IT-138**); Log Book of the Master of the "Enrica Lexie", p. 2 (**Annex IT-14**).

958 Italy's Memorial, para. 4.19, *referring to* Log Book of the Master of the "Enrica Lexie", p. 2 (**Annex IT-14)**; (Confidential Annex) (**Annex IT-237**).

959 Hearing Transcript, 8 July 2019, 160:1-10, *referring to* India's Counter-Memorial, para. 2.27; India's Counter-Memorial, Annex to Chapter 2, p. 33; India's Rejoinder, "Timeline of Key Events on 15 February 2012", p. 60.

960 Italy's Memorial, para. 4.25, *referring to* (Confidential Annex) (**Annex IT-261**); (Confidential Annex) (**Annex IT-236**); Commander in Chief of the Naval Squadron (CINCNAV) Flash Report no. 07/2012, 13:00 (CET), 15 February 2012, p. 2 (**Annex IT-109**); Declaration of Carlo Noviello, 24 February 2012 (**Annex IT-148**); Log Book of the Master of the "Enrica Lexie", p. 2 (**Annex IT-14**). *See also* Hearing Transcript, 8 July 2019, 160:3-4, *referring to* (Confidential Annex) (**Annex IT-261**).

961 Italy's Memorial, para. 4.25.

962 Italy's Memorial, para. 4.27, *citing* Affidavit of Fredy J., 27 April 2012 (**Annex IT-168**). *See also* Italy's Reply, para. 4.25.

963 Italy's Memorial, para. 4.27, *citing* Affidavit of Fredy J., 27 April 2012 (**Annex IT-168**).

the high seas, adding that, "had [he] not intervened, there was a risk of collision between the said Boat and the other vessel".[964]

550. Italy questions the statement of Second Officer Gupta to the NIA that "I checked the position of the boat on the Radar and I was sure that the boat will clearly [be] passing without any collision".[965] First, Italy argues that Officer Gupta "does not say, however, that there was no risk of collision".[966] Second, Italy adds, when read "in context, it is clear that Mr Gupta was describing the situation as he perceived it when the small craft was first spotted". Third, Italy contends that it appears that Officer Gupta's opinion changed as the two vessels came closer together, and hence in the same statement, Officer Gupta explains that he changed the course of the "Enrica Lexie".[967] Fourth, Italy alleges that the credibility of Second Officer Gupta's statement is compromised by a contemporaneous statement he had given to the Kerala police on 19 February 2012, which records that at the time of the incident he was "busy with the changing of the course of the ship to the Port side".[968]

551. Italy also clarifies Captain Noviello's statement that the small craft "was just clearing the stern of the vessel".[969] Italy argues that first, this statement suggests that "there was a genuine risk of collision".[970] Second, Italy argues that this sentence ought to be read in the context of the full statement, in which Captain Noviello states that he "saw one target on the radar screen at about 2,8 miles on nearly collision course".[971] Third, Italy submits that the statement ought to be read in the context of earlier and later statements made by Captain Noviello, in which he is clear about the risk of collision.[972]

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964 Italy's Memorial, para. 4.27, *citing* Affidavit of Fredy J., 27 April 2012 (**Annex IT-168**). *See also* Italy's Reply, para. 4.26.

965 Hearing Transcript, 8 July 2019, 161:12-14, *referring to* India's Rejoinder, para. 4.16, *citing* Statement of Witness in connection with the NIA Investigation, Statement of Shri Sahil Gupta, p. 60 (**Annex IN-30**).

966 Italy's Reply, para. 4.18.

967 Hearing Transcript, 8 July 2019, 161:15-162:23, *referring to* Statement of Witness in connection with the NIA Investigation, Statement of Shri Sahil Gupta, p. 60 (**Annex IN-30**).

968 Italy's Reply, para. 4.18, *citing* Statement of Sahil Gupta, 19 February 2012, p. 2 (**Annex IT-140**). *See also* Hearing Transcript, 8 July 2019, 163:1-164:14.

969 Hearing Transcript, 8 July 2019, 164:22-23, *referring to* India's Rejoinder, para 4.16, *citing* Declaration of Carlo Noviello, 24 February 2012 (**Annex IT-148**).

970 Hearing Transcript, 8 July 2019, 165:3-4.

971 Hearing Transcript, 8 July 2019, 166:4-6, *referring to* India's Rejoinder, para 4.16, *citing* Declaration of Carlo Noviello, 24 February 2012 (**Annex IT-148**).

972 Hearing Transcript, 8 July 2019, 167:8-169:5, *referring to* Declaration of Carlo Noviello, 19 February 2012 (**Annex IT-138**); (Confidential Annex) (**Annex IT-261**).

552. Italy also points to Captain Vitelli's statement that "[i]f I turned the ship to starboard side it will be very near to boat or collide. If I moved the ship to the portside [it will] definitely collide".[973] Italy submits that this confirms the apprehension of a serious threat of collision.

553. Italy notes that India contends that it was "only *afterwards* that Captain Vitelli instituted a change of course", that "a change [in course] at the last minute [...] would have been far too late", and that after the firing "the ship had turned very slightly to the *starboard* side". Italy submits that these statements amount to acknowledgements that the "Enrica Lexie" did change its course in response to the situation. Italy argues that the time the change was made is "not [...] material".[974]

(b) Position of India

554. For its part, India asserts that there was no actual risk of collision between the "St. Antony" and the "Enrica Lexie" and that the "Enrica Lexie" was not under any "exceptional navigational constraint".[975] In support of this claim, India relies on the following statement by Second Officer Gupta:

> At about 1545 hrs my watch duty Naren Fulbaria reported that he noticed a fishing boat. I asked him to monitor it. I checked the position of the boat on the Radar and I was sure that the boat will clearly [be] passing without any collision.[976]

555. Moreover, Captain Noviello's declaration stated that he saw the "target" on the radar screen, and the vector of the craft "was just clearing the stern".[977]

556. India asserts that the "Enrica Lexie" had a top speed of 14 knots, while the small craft was "loitering at slow speed" of not more than 10 knots while approaching the "Enrica Lexie".[978] Further, according to the Piroli Report, the craft was "sailing at 5-7 knots (definitely not more than 10 knots)".[979] Approximately 25-35 minutes passed between when it was first spotted and when it reached the vicinity of the "Enrica Lexie".[980] Accordingly, India argues that had there

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973 Hearing Transcript, 15 July 2019, 36:8-11, *citing* Additional Statement of Umberto Vitelli, 27 February 2012, p. 86 (**Annex IT-150**).

974 Italy's Rejoinder, paras 2.16-2.18, *citing* India's Rejoinder, paras 4.29, 4.36, 4.38 [emphases added by Italy and India].

975 India's Counter-Memorial, para. 2.44, *citing* Italy's Memorial, para. 4.105.

976 India's Counter-Memorial, para. 2.14, *citing* Statement of Witness in connection with the NIA Investigation, Statement of Shri Sahil Gupta, p. 60 (**Annex IN-30**). *See also* Hearing Transcript, 11 July 2019, 71:11-17.

977 India's Rejoinder, para. 4.16, *citing* Declaration of Carlo Noviello, 24 February 2012 (**Annex IT-148**).

978 India's Counter-Memorial, para. 2.4, *citing* Piroli Report (Confidential Annex), pp 2-14, 3-14 (**Annex IT-233**).

979 India's Counter-Memorial, para. 2.16, *citing* Piroli Report (Confidential Annex), p. 2-14 (**Annex IT-233**).

980 India's Counter-Memorial, para. 2.16. *See also* Hearing Transcript, 11 July 2019, 66:23-67:19.

been a risk of collision, the "Enrica Lexie" could "easily have turned and outrun the small boat and avoided the incident altogether".[981]

557. India asserts that, had there been a risk of collision when the small craft did not alter its course (which, according to India, "it was under no obligation to do since it had the right of way"), the shipmaster of the "Enrica Lexie" could have changed course to avoid the boat. According to India, in the end, he "took no such action".[982]

558. India submits that Captain Vitelli has previously provided witness statements indicating that the "Enrica Lexie" did not change course during the "incident".[983] India further submits that, in his testimony before the Rome Prosecutor on 15 May 2012, Captain Vitelli stated:

> All I could do and did was to increase the speed, since, being a large ship, I would have overthrown the fishing boat or I could have gone too near if altered the route.[984]

559. India notes that this testimony is supported by the finding in the Piroli Report that:

> during the entire incident, the kinematic parameters of MV LEXIE *did not change* (course: 335 degrees, speed: 13 knots), apart from a one-knot increase in speed in the final phases of the incident.[985]

560. While the Piroli Report noted that "changing course was assessed to be unfeasible [...] due to the high traffic", India asserts that the Report adds that "it would have sufficed to turn a few degrees".[986]

561. India disputes the statement of Second Officer Gupta that:

> I heard firing shots and I took the vessel on hand steering and altered the course of the ship to western side […] As and when I heard firing I took the vessel on hand steering from automatic steering. Fulbariya came and he took over the wheel from me and meantime master came in and pressed the emergency alarm and addressed in the PA system that this is not a

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981 India's Counter-Memorial, para. 2.4.

982 India's Counter-Memorial, para. 2.4. *See also* Hearing Transcript, 11 July 2019, 72:5-10; Hearing Transcript, 20 July 2019, 7:2-13.

983 India's Rejoinder, para. 4.28. *See also* Hearing Transcript, 11 July 2019, 74:1-14 *referring to* Additional Statement of Umberto Vitelli, 27 February 2012 (**Annex IT-150**); Statement of Umberto Vitelli (**Annex IT-216**); (Confidential Annex), p. 1 (**Annex IT-262**).

984 India's Rejoinder, para. 4.28, *citing* (Confidential Annex), p. 1 (**Annex IT-262**).

985 India's Counter-Memorial, para. 2.14, *citing* Piroli Report (Confidential Annex), p. 2-14 (**Annex IT-233**) [emphasis added by India]; Hearing Transcript, 11 July 2019, 66:23-1, *referring to* Declaration of Carlo Noviello, 24 February 2012 (Annex **IT-148**).

986 India's Rejoinder, para. 4.30, *citing* Piroli Report (Confidential Annex), p. 3-14 (**Annex IT-233**). See also, Hearing Transcript, 11 July 2019, 75:17-23; 76:16-78:3.

> drill, everybody to go to the Engine Control Room, we are under a pirate attack. […] When I heard the firing, the boat was about 200 mtrs away from the ship.[987]

562. First, India submits that Second Officer Gupta testified to have changed course when he heard the firing shots, that is, during the final stages of the incident, at approximately 16:15 SMT/16:45 IST, when the boat was within 200 metres from the "Enrica Lexie". At this time, India submits, it would have been "far too late and essentially meaningless to alter course". Second, according to India, the testimony that Second Officer Gupta altered course by 10 degrees to portside when the fishing boat was 200 metres away is "inconsistent" with Captain Vitelli's statement that he "only increased speed by one knot, but did not change course".[988] Third, India submits that, at 16:23 SMT/16:53 IST, just after the fishing boat had veered off, Captain Vitelli activated the SSAS, which noted the course of the "Enrica Lexie" to be 331 degrees. India asserts that this account is "impossible to reconcile" with the statement of Second Officer Gupta that he "turned the ship 10 degrees *to port*".[989]

563. Additionally, India disputes the allegation that the "Enrica Lexie" failed to alter its course "due to the intense traffic of small boats in the area".[990] India asserts that there is no evidence of any other small craft on the radar of the "Enrica Lexie" or in its way throughout the incident that might have prevented the vessel from altering course to avoid the boat.[991] India asserts that this position is further supported by the testimony of Captain Noviello at the Hearing that the "Enrica Lexie" did in fact change course by eight degrees to portside shortly before the "St. Antony" was spotted.[992]

564. Finally, India argues that Italy's "theory" that the "Enrica Lexie" could have first turned to port then to starboard during these very few minutes is "not only speculation", but also implausible in light of Italy's statement that "the speed and direction of an oil tanker the size of Enrica Lexie are not easily and quickly adjusted".[993]

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987 India's Rejoinder, para. 4.35, *citing* Statement of Witness in connection with the NIA investigation, Statement of Shri Sahil Gupta, p. 60 (**Annex IN-30**); Statement of Sahil Gupta, 19 February 2012, p. 166 (**Annex IT-140**).

988 India's Rejoinder, paras 4.36-4.37; Hearing Transcript, 11 July 2019, 79:17-80:5.

989 India's Rejoinder, para. 4.38; Hearing Transcript, 11 July 2019, 80:8-14.

990 India's Counter-Memorial, para. 2.15, *citing* Statement of Witness in connection with the NIA investigation, Statement of Shri Sahil Gupta, p. 60 (**Annex IN-30**).

991 India's Counter-Memorial, para. 2.15.

992 Hearing Transcript, 20 July 2019, 6:16-7:1, *referring to* Hearing Transcript, 15 July 2019, 124:14-25.

993 Hearing Transcript, 11 July 2019, 80:15-81:2, *citing* Hearing Transcript, 8 July 2019, 68:1-2.

ii. Compliance with International Regulations

565. Italy and India are both parties to the Convention on the International Regulations for Preventing Collisions at Sea, 20 October 1972 (hereinafter "COLREGS"), which set out "globally accepted" regulations and rules regarding navigation.[994]

566. India submits that the arbitral tribunal in the *South China Sea Arbitration* observed that "the COLREGS comprise one of the most widely adopted multilateral conventions in force"[995] and that Article 94 of UNCLOS incorporates the COLREGS into UNCLOS, such that a violation of the COLREGS constitutes a violation of UNCLOS.[996]

567. Rule 2 of COLREGS provides:

> (a) Nothing in these Rules shall exonerate any vessel, or the owner, master or crew thereof, from the consequences of any neglect to comply with these Rules or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.
>
> (b) In construing and complying with these Rules due regard shall be had to all dangers of navigation and collision and to any special circumstances, including the limitations of the vessels involved, which may make a departure from these Rules necessary to avoid immediate danger.[997]

568. Rule 14 of COLREGS, which deals with a "head-on situation", provides:

> When two power-driven vessels are meeting on reciprocal or nearly reciprocal courses so as to involve risk of collision each shall alter her course to starboard so that each shall pass on the port side of the other… When a vessel is in any doubt as to whether such a situation exists she shall assume that it does exist and act accordingly.[998]

569. Rule 15 of COLREGS, which governs "crossing situation[s]",[999] provides:

> When two power-driven vessels are crossing so as to involve risk of collision, the vessel which has the other on her own *starboard side* shall keep out of the way and shall, if the circumstances of the case admit, avoid crossing ahead of the other vessel.[1000]

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994 India's Counter-Memorial, para. 2.18.

995 Hearing Transcript, 11 July 2019, 68:17-18, *citing* PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Award of 12 July 2016, para. 1081.

996 Hearing Transcript, 11 July 2019, 68:19-69:1, *referring to* PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Award of 12 July 2016, para. 1083.

997 International Regulations for Preventing Collisions at Sea, 1972, Rule 2 (**Annex IN-17**).

998 Rule 14, International Regulations for Preventing Collisions at Sea, 1972, Rule 14 (**Annex IN-17**). *See also* Hearing Transcript, 18 July 2019, 148:1-11.

999 Hearing Transcript, 20 July 2019, 7:19-8:14, *referring to* Hearing Transcript, 18 July 2019, 145:12-149:2.

1000 India's Counter-Memorial, para. 2.18, n. 67, *citing* International Regulations for Preventing Collisions at Sea, 1972, Rule 15 (**Annex IN-17**) [emphasis added by India]. *See also* Hearing Transcript, 20 July 2019, 8:10-23.

570. Further, Rule 17, paragraph a, subparagraph (i), of COLREGS provides that "[w]here one of two vessels is to keep out of the way the other shall keep her course and speed",[1001] unless, "it comes so close that action is required to avoid collision".[1002]

571. According to Italy, Rule 2 of COLREGS contains a "general prudential principle" that "always applies".[1003] Italy submits that the "Enrica Lexie" was required to exercise prudence in its assessment of the immediacy of the collision and respond accordingly. Italy also submits that, under the same standard, the "St. Antony" should have been "under the control of a licensed, alert driver, operating in a manner that would be characterised as 'seamanlike'."[1004] Italy further asserts that, had it followed this rule, the "St. Antony" would have "slowed down: it would have gone astern, in the face of the continuing closing on a 244-metre oil tanker".[1005]

572. Italy alleges that, under Rule 14, both the "Enrica Lexie" and the "St. Antony" would have been required to turn to starboard to avoid collision if there was such risk.[1006] According to the testimony of Captain Vitelli and Captain Noviello, their understanding of international regulations would have required, as is required under Rule 14, *both* the "Enrica Lexie" *and* the "St. Antony" to turn to the starboard side.[1007] Italy submits that, whether or not it was a "head-on situation" when the "St. Antony" first appeared on the radar, as the two vessels moved closer together, the incident "may have developed into effectively a head-on" situation, which is governed by Rule 14 of the COLREGS and requires both vessels to turn to starboard "in ample time".[1008] According to Italy, neither of the vessels appears to have done what was required by the COLREGS.[1009]

573. According to India, under Rule 15, the "Enrica Lexie" would have had the obligation to take measures to avoid a collision with the "St. Antony" if there was such risk.[1010] India submits that

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1001 Rule 17, International Regulations for Preventing Collisions at Sea, 1972.

1002 India's Counter-Memorial, para. 2.20, *citing* International Regulations for Preventing Collisions at Sea, 1972, Rule 17, paragraph a, subparagraph (i) (**Annex IN-17**). *See also* Hearing Transcript, 11 July 2019, 69:16-23; Hearing Transcript, 20 July 2019, 109:20-110:17.

1003 Hearing Transcript, 18 July 2019, 149:3-4.

1004 Hearing Transcript, 18 July 2019, 149:6-8.

1005 Hearing Transcript, 18 July 2019, 149:9-10.

1006 Hearing Transcript, 18 July 2019, 148:12-18.

1007 Hearing Transcript, 18 July 2019, 146:11-147:23, *referring to* Hearing Transcript, 15 July 2019, 73:1-3, 73:9-11, 109:14-17.

1008 Hearing Transcript, 18 July 2019, 147:7-8. *See also* Hearing Transcript, 18 July 2019, 147:24-149:2, *referring to* International Regulations for Preventing Collisions at Sea, 1972, Rule 14, paragraph a, Rule 8, paragraph c (**Annex IN-17**).

1009 Hearing Transcript, 18 July 2019, 148:20-22.

1010 India's Counter-Memorial, para. 2.18, *referring to* International Regulations for Preventing Collisions at Sea, 1972, Rule 7, paragraph a (**Annex IN-17**), which provides: "Every vessel shall use all available

the small craft had the right of way, given that it was on the starboard side and that the "Enrica Lexie", as the "give-way" vessel, had ample time to alter course, avoid a collision ("if there had genuinely been such a risk"), and "outrun the craft if it considered the craft to be threatening (which it never was)". India states that none of these "elementary measures were taken by the Shipmaster of the vessel or suggested by the Marines".[1011] It quotes from the Piroli Report:

> Considering that the craft was loitering at slow speed while approaching the ship from the forward starboard side (approx. 20 to 30 deg. Starboard), it would have sufficed to turn a few degrees (to starboard or portside) in order to get away from a near collision course and to give way to the craft which, under the circumstances, had the right of way in compliance with universally accepted rules to prevent collisions at sea.[1012]

574. India submits that during the "Enrica Lexie" incident, the "St. Antony", being the "stand-on" vessel, maintained its course and speed until the last moment when it took evasive action. India contends that Rule 17 of COLREGS "does not relieve the give-way of her obligation to keep out of the way".[1013] India submits that a "small adjustment to the wrong side, or an increase of speed of just 1 or 2 knots, scarcely satisfied this requirement", adding that, under Rule 8, paragraph b, of COLREGS, "a series of small alterations of course and/or speed should be avoided".[1014] India concludes that the conduct of the Shipmaster of the "Enrica Lexie" was in breach of the COLREGS, which the Piroli Report emphasises are "universally accepted rules to prevent collisions at sea".[1015] Further, as the actions of Second Officer Gupta were characterised by Captain Noviello as a "big mistake", any responsibility for any risk of collision, if there was such a risk, "lies entirely in the hands of those navigating on the Enrica Lexie".[1016]

575. Italy asserts that the breach of the COLREGS alleged by India, presupposes a risk of collision.[1017] According to Italy, whether there was any breach of the COLREGS is not in issue in these proceedings; it is only significant that India's argument concerning the COLREGS can only proceed on the basis that there was a risk of collision. Italy submits that, in accordance with

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means appropriate to the prevailing circumstances and conditions to determine if risk of collision exists. If there is any doubt such risk shall be deemed to exist".

1011 India's Counter-Memorial, paras 2.17-2.19, in fn. 69, *citing* International Regulations for Preventing Collisions at Sea, 1972, Rule 16 (**Annex IN-17**): "Every vessel which is directed to keep out of the way of another vessel shall, so far as possible, take early and substantial action to keep well clear". *See also* Hearing Transcript, 11 July 2019, 69:2-15; Hearing Transcript, 20 July 2019, 8:24-9:5.

1012 India's Counter-Memorial, para. 2.17, *citing* Piroli Report (Confidential Annex), p. 3-14 (**Annex IT-233**).

1013 India's Counter-Memorial, para. 2.20, *citing* International Regulations for Preventing Collisions at Sea, 1972, Rule 17, paragraph d (**Annex IN-17**). *See also* Hearing Transcript, 11 July 2019, 69:24-70-2; Hearing Transcript, 20 July 2019, 110:22-26.

1014 Hearing Transcript, 20 July 2019, 9:12-17.

1015 India's Counter-Memorial, para. 2.21, *citing* Piroli Report (Confidential Annex), p. 3-14 (**Annex IT-233**).

1016 Hearing Transcript, 20 July 2019, 9:18-24.

1017 Italy's Reply, para. 4.18.

Rule 7, paragraph a, of COLREGS, "[i]f there is any doubt such risk [of collision] shall be deemed to exist".[1018] Italy adds that in this case there was "no need for any deeming, because the contemporaneous evidence demonstrates that there was a risk of collision".[1019]

(b) Interpretation and Application of Article 97, paragraph 1 (Penal Jurisdiction)

i. Position of Italy

576. Italy submits that India breached Article 97, paragraph 1, by instituting penal proceedings against the Marines who, according to Italy, were persons "in the service of the ship" during a "collision or any other incident of navigation".[1020] According to Italy, only Italy had the authority to institute penal or disciplinary proceedings pursuant to Article 97, paragraph 1, as either the flag State of the ship or the Marines' State of nationality.[1021] In Italy's view, India thus breached Article 97, paragraph 1, by violating Italy's exclusive jurisdiction to prosecute the Marines.[1022]

(a) Interpretation and application of "incident of navigation" under Article 97

577. According to Italy, Article 97 applies to the "Enrica Lexie" incident as an "incident of navigation" within the meaning of that Article. In support of its claim, Italy submits that the two vessels were on or near a collision course and, at one point, were only 30 metres from each other; that the Marines fired warning shots out of a fear of a pirate attack; that both vessels altered their course; that at least one of the vessels changed its speed to avoid collision; and that the near collision and warning shots endangered the safe navigation of both vessels.[1023]

578. Italy submits that regardless of its own interpretation of Article 97 of the Convention, even on India's and the High Court of Kerala's proposed definition of the phrase "incident of navigation", the above facts, which include the actions of the Marines, fall within that definition.[1024]

579. According to Italy, India initially defined an "incident of navigation" as "an event that is either unpleasant or unusual", "which occurs in relation with the movement of the ship",[1025] and

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1018 Italy's Rejoinder, para. 2.24, *citing* International Regulations for Preventing Collisions at Sea, 1972, Rule 7, paragraph a (**Annex IN-17**). *See also* Hearing Transcript, 8 July 2019, 169:16-170:1.

1019 Hearing Transcript, 8 July 2019, 170:2-5.

1020 Italy's Memorial, paras 10.55-10.58, *citing* Article 97(1) of UNCLOS.

1021 Italy's Memorial, para. 10.57.

1022 Italy's Memorial, para. 10.58.

1023 Italy's Reply, para. 7.80; Hearing Transcript, 9 July 2019, 159:25-160:19.

1024 Italy's Reply, paras 7.63, 7.78-7.80; Hearing Transcript, 9 July 2019, 174:13-17.

1025 Hearing Transcript, 9 July 2019, 162:1-4, *citing* India's Counter-Memorial, para. 6.37. *See also* Italy's Reply, paras 7.65-7.66.

similarly, the High Court of Kerala defined it as "an event that has a bearing on the navigation".[1026] Based on this definition, since the "Enrica Lexie" incident was "plainly unpleasant and unusual", Italy submits that the only question is whether the incident occurred in relation with the movement of the ship and with a bearing on navigation.[1027] Italy contends that this question must be answered in the affirmative because "the incident concerned the movement of the Enrica Lexie and of the St Antony in respect of each other".[1028]

580. In support of this claim, Italy argues that, instead of "mak[ing] findings about each individual fact comprising that overall incident", "[t]he incident must be viewed as a composite whole".[1029] Specifically, Italy cites what it asserts to be "the sequence of events that occurred from 15:45 on 15 February 2012, when the Master [...] saw an unidentified craft on the ship's radar heading towards [it] on a collision course, to 17:00, when Captain Vitelli ended the piracy attack alert, and Sergeant Latorre 'declared the incident closed'."[1030] Italy states that this was an incident of navigation and the salient elements to be taken into account for this purpose include the following:

- Two vessels were on a collision course.[1031]
- The small craft had fenders out some 21 nautical miles out to sea with intention of a hostile boarding.[1032]
- Those on the "Enrica Lexie" apprehended that they were the subject of a pirate attack.[1033]
- The "Enrica Lexie" switched from automatic to manual steering, changed its direction, and increased to its maximum speed to avoid a collision or being boarded.[1034]
- The Marines delivered visual warnings and fired warning shots to cause the small craft to desist from its collision course and the apprehended attempt to board.[1035]

1026 Italy's Reply, paras 7.72, *citing* Judgment of the High Court of Kerala, 29 May 2012, para. 26 (**Annex IT-17**) [emphasis by Italy omitted].

1027 Hearing Transcript, 9 July 2019, 162:5-8.

1028 Hearing Transcript, 9 July 2019, 162:12-14.

1029 Italy's Memorial, para. 10.51.

1030 Italy's Memorial, para. 10.50 [emphases omitted], *referring to* E-mail from the Master of the "Enrica Lexie" to Fratelli D'Amato SpA, 13:47 (CET), 15 February 2012 (**Annex IT-111**); Log Book of the Master of the "Enrica Lexie", p. 2 (**Annex IT-14**); and *citing* (Confidential Annex), p. 3 (**Annex IT-236**).

1031 Italy's Memorial, para. 10.51(1); Italy's Reply, para. 7.77.

1032 Italy's Memorial, para. 10.51(2).

1033 Italy's Memorial, para. 10.51(3).

1034 Italy's Memorial, para. 10.51(4).

1035 Italy's Memorial, para. 10.51(5).

- The Master sent most crew to the "citadel", leaving the "Enrica Lexie" manned by few;[1036] the small craft continued to make attempts to approach the "Enrica Lexie".[1037]
- The captain of the "St. Antony" described the negative effect on the navigation of his vessel.[1038]

581. In summary, Italy submits that contemporaneous documentary evidence demonstrates that (i) "the St Antony and the Enrica Lexie were navigating so as to bring them closer together on the open seas";[1039] (ii) "having attempted other measures intended to dissuade the St Antony from continuing its approach towards the Enrica Lexie, the marines fired shots in a further attempt to dissuade the St Antony from continuing its approach";[1040] and (iii) "following these shots, the St Antony ultimately did change its course to move away from the Enrica Lexie".[1041]

582. Regarding these facts, Italy emphasises that the shots fired by the Marines form part of the incident of navigation.[1042] Unlike a situation where two ships passed at sea at a safe distance and, for reasons unrelated to navigation, an assassin on one ship shot a passenger on another ship, the facts of this case, as corroborated by witness testimony during the Hearing, clearly show that the shots fired by the Marines are closely related to the safe navigation of both ships and therefore form part of the incident.[1043]

583. In addition, Italy contends, India's own written pleadings and the Investigation Report of the NIA in RC No 04/2013/NIA/DLI, dated 4 April 2013 (hereinafter the "NIA Report") belie their claim that the incident was "totally unrelated to navigation".[1044] For example, India stated in its Written Observations on Italy's Request for the Prescription of Provisional Measures that the "incident caused serious damage to the boat endangering the safe navigation of the fishing vessel",[1045] and

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1036 Italy's Memorial, para. 10.51(6).

1037 Italy's Memorial, para. 10.51(7).

1038 Italy's Memorial, para. 10.51(8).

1039 Hearing Transcript, 9 July 2019, 163:22-164:1. *See also* Hearing Transcript, 9 July 2019, 164:16-165:17, 166:20-22, 167:24.

1040 Hearing Transcript, 9 July 2019, 164:1-5. *See also* Hearing Transcript, 9 July 2019, 165:22-166:7, 166:23-167:13, 167:25-168:1.

1041 Hearing Transcript, 9 July 2019, 164: 6-8. *See also* Hearing Transcript, 9 July 2019, 166:8-20, 168:1-20, *referring to* Commander in Chief of the Naval Squadron (CINCNAV) Flash Report no. 07/2012, 13:00 (CET), 15 February 2012 (**Annex IT-109**); Action Report from Massimiliano Latorre to the Commander in Chief of the Naval Squadron (CINCNAV), 19:30 (IST - 0.5 hours), 15 February 2012 (**Annex IT-108**); Log Book of the Master of the "Enrica Lexie", p. 2 (**Annex IT-14**).

1042 Hearing Transcript, 18 July 2019, 124:12-17, 125:8-12.

1043 Hearing Transcript, 18 July 2019, 124:18-126:8.

1044 Hearing Transcript, 9 July 2019, 168:21-169:4, *citing* India's Rejoinder, para. 6.45.

1045 Hearing Transcript, 9 July 2019, 169:9-11, *citing* India's Written Observations on Italy's Request for the Prescription of Provisional Measures, para. 2.10 [emphasis omitted].

acknowledged in its Counter-Memorial and Rejoinder that the firing of shots led the "St. Antony" to change course.[1046] Similarly, the NIA Report states that the Marines' firing of shots "endanger[ed] the safe navigation of the ship" and that, thereafter, the "St. Antony" "immediately turned away and started sailing towards the coast".[1047] Furthermore, according to Italy, India alleges that the whole incident was due to the "Enrica Lexie" Master's breach of the COLREGS;[1048] Italy submits without prejudice that the obligation under Rule 15 of the COLREGS applies only where there is a risk of collision.[1049]

584. This evidence, Italy submits, demonstrates that the incident was clearly related to navigation, and therefore fell within India's initial definition of "incident of navigation" because "the foundation of the entire incident was the trajectory of the two vessels, starting from when Captain Noviello first saw the small craft on a radar screen", followed by the "Enrica Lexie" increasing speed to avoid the approaching craft, the firing of the shots by the Marines as a result of the approaching crafts, and ultimately to the change in the "St. Antony"'s course.[1050]

585. Italy claims that, at the Hearing, India submitted for the first time a new proposed definition of "incident of navigation" – namely that it must be an incident "caused either by the execution or non-execution of a manoeuvre or by the non-observance of regulations, even if no collision has taken place".[1051] Notwithstanding Italy's disagreement with India's new proposed definition, which it considers overly narrow, Italy maintains that the facts of the present case would still fall within its scope.[1052]

586. Italy submits that the incident was caused by the non-execution of manoeuvres and the non-observance of regulations by at least one, if not both, vessels during the incident when they were on a collision course.[1053] According to Italy, India contends that the "Enrica Lexie" breached the COLREGS by failing to take early and substantial action to steer clear of the "St. Antony".[1054] However, Captains Vitelli and Noviello consider that both vessels should have turned to starboard

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1046 Hearing Transcript, 9 July 2019, 169:19-170:15, *referring to* India's Counter-Memorial, para. 8.20; India's Rejoinder, para. 1.12.

1047 Hearing Transcript, 9 July 2019, 170:16-172:23, *citing* NIA Report (Confidential Annex), paras 9.1, 11.3, 11.25, 12.2(iv) (**Annex IN-27**).

1048 Italy's Reply, para. 7.78, *referring to* India's Counter-Memorial, paras 1.7, 2.18-2.21.

1049 Italy's Reply, para. 7.79, *referring to* International Regulations for Preventing Collisions at Sea, 1972, Article 15 (**Annex IN-17**).

1050 Hearing Transcript, 9 July 2019, 173:24-174:12.

1051 Hearing Transcript, 18 July 2019, 144:23-145:4, *citing* Hearing Transcript, 12 July 2019, 16:1-4.

1052 Hearing Transcript, 18 July 2019, 145:5-11.

1053 Hearing Transcript, 18 July 2019, 145:9-11.

1054 Hearing Transcript, 18 July 2019, 145:12-18, *referring to* Hearing Transcript, 11 July 2019, 69:2-70:6, 79:24-80:7.

because the "St. Antony" was approaching the "Enrice Lexie" from its starboard side.[1055] Even if the two vessels were approaching each other in a head-on situation, they would both also have had to turn to starboard under the COLREGS.[1056] Regardless of which situation actually applied, Italy observes that it is clear that neither vessel appears to have turned to starboard in ample time, nor done what was required by the COLREGs, therefore resulting in the warning shots fired, the near collision, and the final veering away of the "St. Antony" to its port side to avert the collision.[1057] Therefore, in Italy's view, the incident "only occurred because the two vessels did not execute the manoeuvres required of them under the COLREGs".[1058]

587. For these reasons, Italy submits that even on India's own proposed definitions, as they evolved over the course of the proceeding, this was an incident of navigation, and that the actions of the Marines formed part of that incident.[1059]

588. While Italy considers that its argument stands even under India's increasingly narrow definitions of "incident of navigation", it cautions that, if accepted, such narrow definitions would have manifest implications, including significantly reducing the range of incidents over which the Convention allocates exclusive jurisdiction to the flag State, and going against the broad approach to the protection of freedom of navigation under the Convention.[1060]

589. Notwithstanding the above, Italy notes its disagreement with India's proposed definition, which it considers too narrow, and maintains that the phrase "incident of navigation" is broader, when interpreted in accordance with the normal canons of treaty interpretation, as reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (hereinafter "VCLT").[1061]

590. Beginning with the ordinary meaning of the phrase, Italy submits that "incident of navigation" has a broad meaning which includes events other than collisions, such as incidents at sea in response to a perceived pirate attack; otherwise, Italy argues, the words "[i]n the event of *a collision or any other incident of navigation*" would have no meaning.[1062] In particular, Italy contends that when those aboard a ship perceive that they are under pirate attack from another ship, and take measures to deter the attack, as was the case with the Marines on the "Enrica Lexie",

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1055 Hearing Transcript, 18 July 2019, 145:19-147:2, *citing* Hearing Transcript, 15 July 2019, 72:16-75:23.

1056 Hearing Transcript, 18 July 2019, 147:3-148:22.

1057 Hearing Transcript, 18 July 2019, 148:20-149:21.

1058 Hearing Transcript, 18 July 2019, 149:22-24.

1059 Hearing Transcript, 9 July 2019, 174:13-17.

1060 Hearing Transcript, 18 July 2019, 150:4-152:1.

1061 Italy's Memorial, para. 10.41.

1062 Italy's Memorial, para. 10.42, *citing* UNCLOS, Article 97(1) [emphasis added by Italy]. *See also* Hearing Transcript, 9 July 2019, 175:3-24.

such an incident "is sufficiently connected to 'navigation', and in particular to the safety of navigation, to constitute an 'incident of navigation'" under Article 97.[1063]

591. In this regard, Italy maintains that whether or not the Marines were correct in their perception of a pirate attack is irrelevant because "Article 97 must be capable of application promptly after an incident occurs" and "with all of the uncertainty that will often come before the disciplinary or penal proceedings that Article 97 envisages have occurred".[1064] The key and relevant matter in this case, Italy submits, is that the evidence clearly establishes that the Marines thought that they were experiencing a pirate attack and fired shots precisely for that reason. This is because a small craft which appeared not to be a regular fishing boat was approaching the vessel; the small craft was not reacting to any of the measures taken on the "Enrica Lexie"; India's own Ministry of Shipping took the position that the Marines perceived that the "Enrica Lexie" had been approached by pirates; and the boats were on a collision course.[1065]

592. Moreover, Italy submits, the relevant context of the phrase, which, other than in Article 97, also appears in Article 94, paragraph 7, and Article 221, paragraph 2, of the Convention, supports its broad interpretation.[1066] Specifically, Italy argues that the fact that Article 94, paragraph 7, deals with "incidents of navigation" "causing the loss of life or serious injury to nationals of another State", shows that the Convention envisages that such incidents may cause serious consequences.[1067] It is for this reason that Italy also rejects India's claim that the "Enrica Lexie" incident cannot constitute an "incident of navigation" because it involves an alleged murder.[1068]

593. Article 221, paragraph 2, defines a "maritime casualty" as "a collision of vessels, stranding or other incident of navigation". According to Italy, the use of the word "other" in this definition demonstrates that collisions and strandings are but two examples of events that can fall within the broader definition of an "incident of navigation" and, conversely, that an "incident of navigation" does not have to involve either a collision or a stranding.[1069] Italy further contends that the *travaux*

1063 Hearing Transcript, 9 July 2019, 175:18-21.

1064 Hearing Transcript, 9 July 2019, 177:3-11.

1065 Hearing Transcript, 18 July 2019, 126:18-136:15, *referring to* E-mail from the Master of the "Enrica Lexie" to Fratelli D'Amato SpA, 13:47 (CET), 15 February 2012 (**Annex IT-111**); Hearing Transcript, 15 July 2019, 67:2-13, 110:8-114:8, 125:1-26; Hearing Transcript, 11 July 2019, 82:23-83:18; Government of India, Ministry of Shipping Notice No. 7, 7 March 2012 (**Annex IN-9**); (Confidential Annex) (**Annex IT-261**).

1066 Italy's Memorial, para. 10.43. *See also* Hearing Transcript, 9 July 2019, 178:26-181:8.

1067 Hearing Transcript, 9 July 2019, 179:4-180:9, *citing* UNCLOS, Article 94(7).

1068 Italy's Memorial, para. 10.52; Italy's Reply, paras 7.81-7.82.

1069 Italy's Memorial, para. 10.43; Italy's Reply, paras 7.84-7.87. In response to India's assertion that Italy's reading of Article 221 is not genuine, Italy argues that "'incidents of navigation' are one type of occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo", and that India already acknowledged that the facts giving rise to this case

préparatoires of Article II, paragraph 1, of the 1969 International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, which is almost identical to Article 221, paragraph 2, of the Convention, demonstrates that the phrase "'incident of navigation' is not a specific term of art, capable of precise definition", but rather a "general expression, intended by the drafters of UNCLOS to cover a broad range of occurrences".[1070]

594. Italy further contends that a broad interpretation is consistent with the function as well as the *travaux préparatoires* of Article 97, as reflected in the records and commentary of the International Law Commission (hereinafter the "ILC"), confirm that "'incident of navigation' has a broad meaning, covering incidents of loss of life occurring without a collision".[1071]

595. Italy also submits that the purpose of Article 97 is to "reverse the finding in the *Lotus* case"[1072] and "prevent foreign prosecutions relating to collisions and any other incidents of navigation" on the basis that they constitute an "intolerable interference with international navigation".[1073] Since the foreign penal proceedings against the Marines in India caused an intolerable interference with the international navigation of the Italian-flagged "Enrica Lexie" by causing it to divert from its course and be detained for ten weeks, Italy submits that the events in this case are exactly of the type that Article 97 was designed to prohibit.[1074]

596. Finally, Italy rejects India's position that Article 97 only applies to accidental conduct, and maintains that it also applies to deliberate conduct. Referring to the case of collisions, which clearly fall within the scope of Article 97, as an example, Italy notes that it clearly includes both deliberate and accidental collisions.[1075] Moreover, Article 97 must be capable of functioning

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constituted an "incident", hence the only question is whether it was one "of navigation", the answer to which is positive. Italy's Reply, para. 7.86.

1070 Hearing Transcript, 9 July 2019, 188:18-22. *See also* Hearing Transcript, 9 July 2019, 186:17-188:22, *referring to* Francesco Berlingieri, *International Maritime Conventions (Volume III): Protection of the Marine Environment* (Informa Law from Routledge, 2015), p. 5.

1071 Italy's Memorial, paras 10.46, *referring to* International Law Commission, "Articles Concerning the Law of the Sea with Commentaries" in *Yearbook of the International Law Commission*, Vol. II, p. 265 at p. 281 (commentary to Article 35, para. 1) (1956); *Yearbook of the International Law Commission*, Vol. I, 286th meeting, 6 May 1955, p. 22, paras 37-38 (1955); *Yearbook of the International Law Commission*, Vol. I, 121st meeting, 10 July 1951, p. 336, paras 148, 150-151 (1951). *See also* Italy's Reply, paras 7.74-7.76.

1072 Hearing Transcript, 9 July 2019, 183:3-4.

1073 Hearing Transcript, 9 July 2019, 182:16-22, *citing* International Law Commission, "Articles Concerning the Law of the Sea with Commentaries" in *Yearbook of the International Law Commission*, Vol. II, p. 265 at p. 281 (commentary to Article 35, para. 1) (1956). *See also* Italy's Memorial, para. 10.48.

1074 Hearing Transcript, 9 July 2019, 184:7-186:16.

1075 Hearing Transcript, 9 July 2019, 189:16-24.

promptly once an incident occurs, at a time when it would be difficult to ascertain what actions were deliberate or accidental.[1076]

(b) Interpretation and application of "person in the service of the ship" under Article 97, paragraph 1

597. Italy submits that Article 97, paragraph 1, applies not only to the Master and crew of the ship, but also to "any other person in the service of the ship" and that the Marines fall within the latter category.[1077] Since India does not deny that Article 97, paragraph 1, applies to both the crew and "other person[s] in the service of the ship", Italy contends that the only point dividing the Parties is "whether 'in the service of' a ship means forming part of the crew of a ship".[1078]

598. According to Italy, persons "in the service of the ship" mean anyone other than its "passengers" and therefore constitute a category inclusive of, but broader than, the crew.[1079] Italy submits that this interpretation accords with the *travaux préparatoires* of Article 97, the context of the Convention, and relevant provisions in other conventions.

599. The dictionary meaning of "crew", Italy observes, refers to persons who "work on and operate a ship", while the definition of "service" involves, "more broadly, 'helping or doing work for someone'."[1080] Similarly, Italy submits that since the term "crew" is used in many other instances in the Convention where they intended to refer only to the crew, the use of a different phrase here implies a broader category.[1081] Furthermore, Italy submits that Article 6 of the 1910 International Convention for Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea also uses "persons *in the service* of each salving vessel" instead of "crew".[1082] According to Italy,

1076 Hearing Transcript, 9 July 2019, 190:2-26.

1077 Italy's Reply, paras 7.89, 7.98. *See also* Italy's Memorial, paras 10.55-10.58.

1078 Hearing Transcript, 9 July 2019, 191:21-192:10. *See also* Italy's Reply, para. 7.90.

1079 Hearing Transcript, 9 July 2019, 192:11-13. *See also* Italy's Reply, paras. 7.93-7.94.

1080 Hearing Transcript, 9 July 2019, 192:24-193:3, *citing* Lexico.com, "Crew", Lexico English Dictionary, Thesaurus, & Grammar Help, available at <https://www.lexico.com/definition/crew>; Lexico.com, "Service", Lexico English Dictionary, Thesaurus, & Grammar Help, available at <https://www.lexico.com/definition/service>.

1081 Italy's Reply, para. 7.95, *referring to* Articles 27(3), 29, 73(2), 94(2)-(4), 98(1), 101(a), 102, 292(1), 292(3), 292(4) of UNCLOS. *See also* Hearing Transcript, 9 July 2019, 192:13-20, 194:7-23.

1082 Italy's Reply, para. 7.96, *citing* Article 6 of International Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea (1910) [emphasis added by Italy].

this demonstrates the drafters' intent "to extend the scope of application of the national law to the apportionment amongst *persons 'in the service of the ship' who are not members of the crew*".[1083]

600. Italy submits that the Marines were "in the service of" the "Enrica Lexie" under Article 97, paragraph 1, because, according to Italy, the Marines were "tasked as they were with protecting the *Enrica Lexie*, including by identifying emergency routes in case of attack and countering any attack for the benefit of the ship, its crew and its cargo".[1084] Italy submits that Italian documents quoted by India – including the Template Agreement between the Ministry of Defence of Italy and the Ship Owner (hereinafter the "Template Agreement") and the Manual for Vessel Protection Detachments on Board Italian Merchant Vessels, 2011 (hereinafter the "VPD Manual") – list these tasks.[1085]

601. Even if "persons in service of a ship" refers only to crew and the only categories of persons on a ship are masters, crew, and passengers, as India contends, Italy maintains that its claim still stands. This is because the Marines are neither passengers nor masters, so they must be crew, as demonstrated by the fact that they were listed on the crew list of the "Enrica Lexie".[1086]

ii. Position of India

602. India denies that it breached Article 97, paragraph 1, of the Convention, and instead maintains that the provision does not apply to this dispute because it did not involve an "incident of navigation" and the Marines were not "persons in the service of the ship".

(a) Interpretation and application of "incident of navigation" under Article 97

603. India rejects Italy's interpretation of "incident of navigation" under Article 97. According to India, the phrase must not be interpreted narrowly or broadly, as Italy urges, but "in accordance with its terms".[1087] This is particularly important in this case, India contends, because the "'system of

1083 Italy's Reply, para. 7.96, *citing* Francesco Berlingieri, *International Maritime Conventions (Volume II): Navigation, Securities, Limitation of Liability and Jurisdiction* (Informa Law from Routledge, 2015), pp 66-67 [emphasis added by Italy]. *See also* Hearing Transcript, 9 July 2019, 195:5-196:6.

1084 Italy's Reply, para. 7.98 [emphases omitted]. *See also* Hearing Transcript, 9 July 2019, 193:7-11.

1085 Italy's Reply, para. 7.97, *citing* Template Agreement between the Ministry of Defence of Italy and the Ship Owner, Article 4.1 (**Annex IT-95(b)**); VPD Manual (Confidential Annex), pp 18-19 (**Annex IT-234**). *See also* Hearing Transcript, 9 July 2019, 193:12-194:2.

1086 Hearing Transcript, 18 July 2019, 152:13-153:9.

1087 Hearing Transcript, 12 July 2019, 152:22-153:5. *See also* India's Counter-Memorial, para. 6.35.

UNCLOS' is a delicately crafted one" and "the outcome of multiple compromises", which should be duly considered in the interpretative process.[1088]

604. India submits that the ordinary meaning of "incident" is that of a "particular occurrence, especially one of minor importance".[1089] While India maintains that the "shooting at another boat and the killing of two people clearly does not fit this definition"; even if it did, it would not trigger the application of Article 97 because it applies not just to incidents, but incidents of navigation.[1090] The term "navigation", India submits, refers to "the act or process of navigating", and "the process and business of directing the course of a vessel", while the verb "to navigate" means "to move on water, over, or through … in a ship or aircraft" and "to direct or manage [a ship] on its course".[1091] Thus to be "of navigation", an incident must "occur[] in relation with the movement of the ship", excluding "events not linked with the movement of the ship".[1092] Accordingly, India submits that for Article 97 to apply, "the 'penal or disciplinary responsibility' involved in an incident of navigation should arise from the operation of the ship" and a "navigational manoeuvre should be the cause of the damage suffered" such that "navigation [is] at the core of the incident".[1093]

605. In addition, India considers that the phrase "incident of navigation" refers only to "an *unintended and accidental* eventuality"[1094] and "does not include a deliberate act or omission, with the intention to cause harm to the safety of a ship, an individual or the environment".[1095] India submits that, in any event, Article 97 "does not apply to the deliberate and reckless disproportionate use of force".[1096]

606. India also submits that Article 94, paragraph 7, and Article 221, paragraph 2, of the Convention, both of which refer to "incidents of navigation", confirm the limited scope of Article 97.[1097] India

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1088 Hearing Transcript, 12 July 2019, 153:9-13.

1089 Hearing Transcript, 12 July 2019, 156:6-8, *citing* Collins English Dictionary, Harper Collins Publishers, 12th ed., 2014.

1090 Hearing Transcript, 12 July 2019, 156:9-14.

1091 Hearing Transcript, 12 July 2019, 156:16-157:5, *referring to* India's Counter-Memorial, para. 6.36.

1092 India's Counter-Memorial, paras 6.37, 6.39; India's Rejoinder, para. 6.36. *See also* Hearing Transcript, 12 July 2019, 157:6-8.

1093 Hearing Transcript, 12 July 2019, 157:8-14.

1094 India's Counter-Memorial, para. 6.38, *citing* C.R. Symmons, 'Embarking Vessel Protection Detachments and Private Armed Guards on Board Commercial Vessels: International Legal Consequences and Problems under the Law of the Sea' (2012) 51 Military Law and Law of War Review 21, at 54 [emphasis added by India].

1095 India's Rejoinder, para. 6.44, *citing* IMO Resolution MSC.255(84), "Adoption of the Code of the International Standards and Recommended Practices for a Safety Investigation into a Marine Casualty or Marine Incident", 16 May 2008, para. 2.10.

1096 India's Counter-Memorial, para. 6.46.

1097 Hearing Transcript, 12 July 2019, 157:15-20.

considers that Article 94, paragraph 7, is broader in scope than Article 97 because it applies not only to incidents of navigation, but also to marine casualties, which are different from, and constitute a larger category than, incidents of navigation.[1098] In addition, India agrees with Italy that this provision shows that the Convention envisages that an incident of navigation may "cause 'loss of life or serious injury to nationals of another State'."[1099] However, India maintains that since other types of incidents occurring at sea may have such consequences as well, it does not assist the Arbitral Tribunal in determining whether an incident of navigation has occurred in this case.[1100] To India, Italy has "conflate[d] the incident itself and its consequences".[1101]

607. Similarly, India submits that Article 221, paragraph 2, does not, as Italy claims, show that "incidents of navigation" include "occurrence[s] on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo".[1102] Rather, India submits that this provision is broader in scope than Article 97 because "collisions of vessels, stranding or other incident of navigation" and "occurrences on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo" are separated with a comma and "or" and are therefore distinguished from one another.[1103] In India's view, Article 221 thus refers to two different scenarios, of which Article 97 only applies to the former, and in any event, there was "no imminent threat to the *Enrica Lexie* or its cargo".[1104]

608. India further disagrees with Italy's submission that Article 97 should be interpreted broadly because, in accordance with its object and purpose, it must be capable of functioning the moment an incident occurs, before anything is known about its specific details, so as to determine which State is competent to investigate the incident.[1105] To the contrary, India argues, Article 94, paragraph 7, demonstrates that any State having a ship flying its flag involved in an incident of navigation has the obligation to conduct an inquiry.[1106] Therefore, India submits that the purpose of Article 97 is not "to determine which State is competent to *investigate the incident*", but rather

1098 Hearing Transcript, 12 July 2019, 159:3-14. *See also* India's Counter-Memorial, para. 6.44.
1099 Hearing Transcript, 12 July 2019, 158:17-20. *See also* Hearing Transcript, 12 July 2019, 158:11-15.
1100 Hearing Transcript, 12 July 2019, 158:20-24.
1101 Hearing Transcript, 12 July 2019, 158:15-16.
1102 Hearing Transcript, 12 July 2019, 159:22-25.
1103 India's Counter-Memorial, paras 6.40, 6.43, 6.45.
1104 India's Rejoinder, para. 6.54.
1105 Hearing Transcript, 12 July 2019, 161:2-162:7.
1106 Hearing Transcript, 12 July 2019, 162:7-10.

"which state may *institute criminal or disciplinary proceedings* in case of incidents of navigation".[1107]

609. Rejecting Italy's proposed broad definition of "incident of navigation", India further points out that Italy's own hypothesis – that if two ships passed at sea at a safe distance and for reasons unrelated to navigation, an assassin on one ship shot a passenger on the other ship as it were passing, it would not be an incident of navigation – reveals the artificial nature of its position.[1108] Italy's proposed hypothetical situation, in India's view, would never occur because had one of the two ships changed course even slightly, it would become an incident of navigation, and in "no circumstance[s] would a ship maintain its course imperturbably after having been shot at".[1109]

610. Turning to the *travaux préparatoires*, India disagrees with Italy's view that it supports a broad interpretation of the phrase "incidents of navigation" and that, at the very least, it includes "incidents of loss of life" and "near and averted collisions".[1110] To the contrary, India points out that during the ILC debate on the Draft Articles Concerning the Law of the Sea, with Commentaries, adopted by the ILC at its eighth session, in 1956 (hereinafter "ILC Draft Articles Concerning the Law of the Sea"),[1111] no ILC member proposed to include the risk of collision or "a near and averted collision" within the meaning of the term, and all the incidents referred to concerned the manoeuvring of the ship and damage caused by the operation of the vessel.[1112]

611. India also dismisses Italy's reliance on Article II, paragraph 1, of the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, done at Brussels on 29 November 1969, because that provision inspired Article 221, paragraph 2, not Article 97 of the Convention, and concerns pollution, not criminal jurisdiction.[1113] Instead, India considers more relevant the 1952 Brussels Convention for the Unification of Certain Rules relating to Penal Jurisdiction in matters of Collisions and Other Incidents of Navigation, which the ILC considered when it developed Article 35 of the ILC Draft Articles Concerning the Law of the Sea, the predecessor to Article 97.[1114] In Berlingieri's commentary to this convention, Article 1 of which is almost identical to Article 35 of the ILC Draft Articles Concerning the Law of the Sea and

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1107 Hearing Transcript, 12 July 2019, 162:5-15 [emphases added].

1108 Hearing Transcript, 20 July 2019, 65:3-15.

1109 Hearing Transcript, 20 July 2019, 65:15-19.

1110 Hearing Transcript, 12 July 2019, 163:5-22. India's Rejoinder, para. 6.46, *citing* Italy's Reply, para. 7.75.

1111 International Law Commission, "Articles Concerning the Law of the Sea with Commentaries" in *Yearbook of the International Law Commission*, Vol. II, p. 265 at p. 281 (1956).

1112 Hearing Transcript, 12 July 2019, 164:7-165:3, *citing Yearbook of the International Law Commission*, Vol. I, 121st meeting, 10 July 1951, p. 336, paras 149-151 (1951).

1113 Hearing Transcript, 12 July 2019, 166:11-17.

1114 Hearing Transcript, 12 July 2019, 166:18-167:5.

Article 97 of the Convention, he considered that "other incidents of navigation" to be "incidents caused either by the execution or non-execution of a manoeuvre or by the non-observance of regulations, even if no collision has taken place".[1115] In this respect, India rejects as false Italy's claim that India only raised this definition in its oral submissions, pointing out that it was already mentioned in paragraph 6.37 of its Rejoinder.[1116] According to India, a series of other conventions "from which the substance of Article 97 was borrowed" and the commentary of these conventions similarly confirm its interpretation.[1117] India cites, *inter alia*, the 1910 Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels; and the Convention on Maritime Liens and Mortgages.[1118]

612. Applying this definition, India argues that the "Enrica Lexie" incident is not an "incident of navigation" because the Marines' firing of shots at the "St. Antony" and its crew was not linked to the movement of the vessels, not caused by manoeuvres of either of the vessels,[1119] and did not interrupt the movement of the "Enrica Lexie".[1120] Instead, India contends that the incident "was caused by two armed persons on board the *Enrica Lexie*, which were not part of the crew and were not responsible for the navigation".[1121] According to India, this incident related to "firing from weapons, [which] was totally unrelated to navigation".[1122]

613. India rejects Italy's attempt to link the conduct of the "Enrica Lexie" – particularly its alleged violation of the COLREGS – to firing of shots that caused damage to the "St. Antony" and the death of the fishermen. In India's view, the damage was caused by the Marines, not the Master; by the rifles used by the Marines, not by a movement of the ship; and before, not after the ship changed direction.[1123] Accordingly, India submits that it was "not the manoeuvre, or failure to

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1115 Hearing Transcript, 12 July 2019, 167:6-168:3, *citing* Francesco Berlingieri, *International Maritime Conventions (Volume II): Navigation, Securities, Limitation of Liability and Jurisdiction* (Informa Law from Routledge, 2015), pp 7-8, 40, 42, 143, 506.

1116 Hearing Transcript, 20 July 2019, 63:2-18.

1117 India's Rejoinder, para. 6.36. *See also* India's Rejoinder, paras 6.36-6.44, *referring to* Francesco Berlingieri, *International Maritime Conventions (Volume II): Navigation, Securities, Limitation of Liability and Jurisdiction* (Informa Law from Routledge, 2015), pp 7-8, 40, 42, 143, 506.

1118 India's Rejoinder, paras 6.36-6.44.

1119 India's Rejoinder, para. 6.45.

1120 India's Counter-Memorial, para. 6.37, *referring to* Piroli Report (Confidential Annex), pp 2-6, 2-17, 3-13 (**Annex IT-233**); (Confidential Annex) (**Annex IT-238**); Declaration of Carlo Noviello, 24 February 2012 (**Annex IT-148**). *See also* Hearing Transcript, 12 July 2019, 168:23-169:6.

1121 India's Rejoinder, para. 6.45.

1122 India's Rejoinder, para. 6.45. *See also* India's Counter-Memorial, para. 6.37, *citing* Judgment of the High Court of Kerala, 29 May 2012, para. 26 (**Annex IT-17**); India's Rejoinder, para. 6.40; Hearing Transcript, 12 July 2019, 168:15-16.

1123 India's Rejoinder, para. 6.49, *referring to* Italy's Reply, para. 7.78. *See also* Hearing Transcript, 12 July 2019, 170:2-11.

execute one, which caused the firing incident; it is the imagination of the marines, their recklessness".[1124] India contends that these alleged facts further exclude the ILC Special Rapporteur's hypothesis (relied on by Italy) that "cases of loss of life arising out of an accident attributable to the master of a ship, without any collision" fall within the definition of "incident of navigation", because the contested incident is attributable to the Marines instead of the Master.[1125]

614. Moreover, in India's view, the Marines were not concerned with the risk of collision as Italy submits, but were instead "doing their own thing out there".[1126] Indeed, India points out, not only has it established that there was no risk of collision,[1127] but none of the evidence and witness testimony to which Italy cites to prove the risk of collision mentions either of the Marines.[1128]

615. Even if a "near and averted collision" did occur, and even if the "Enrica Lexie" had increased speed and changed course earlier, India maintains that it was not the cause of death of the fishermen or of the damage to the "St. Antony", and hence, does not constitute an "accident of navigation due to failure to observe international rules compelling another ship to carry out some manoeuvre and damage its engines thereby".[1129] This, in India's view, is the significant difference between this case and the *S.S. "Lotus"* case, where the damage and loss of life was directly attributable to the collision of the two vessels that was caused by an incident of navigation.[1130]

(b) Interpretation and application of "person in the service of the ship" under Article 97, paragraph 1

616. India submits that Article 97, paragraph 1, does not apply because it only covers "the Master of the ship and its crew" but not the Marines.[1131] In the alternative, India submits that "the Marines were not in the service of the *Enrica Lexie*".[1132]

1124 Hearing Transcript, 20 July 2019, 71:5-8.

1125 India's Rejoinder, para. 6.50, *citing Yearbook of the International Law Commission*, Vol. I, 121st meeting, 10 July 1951, p. 336, para. 151 (1951).

1126 Hearing Transcript, 20 July 2019, 67:14-17.

1127 *See* Part V, Section B.2(a) above summarising India's position on the likelihood of a collision.

1128 Hearing Transcript, 20 July 2019, 67:17-22.

1129 India's Rejoinder, para. 6.48, *citing Yearbook of the International Law Commission*, Vol. I, 121st meeting, 10 July 1951, p. 336, para. 150 (1951). *See also* Hearing Transcript, 12 July 2019, 170:12-24.

1130 Hearing Transcript, 12 July 2019, 170:25-26.

1131 India's Counter-Memorial, para. 6.47.

1132 India's Rejoinder, para. 6.32.

617. India argues that Article 97, paragraph 1, "only applies to the Master of the ship and its crew"[1133] and refers to the explanation given by the Special Rapporteur when addressing the relevant draft article presented to the ILC for discussion, in which he clarified that the article applied to "the master or crew".[1134] In this regard, India rejects as baseless Italy's arguments that the Special Rapporteur was not addressing the expression "person in service of a ship", nor was he being exhaustive.[1135]

618. In addition, India points out that, other than in Article 97, the only three categories of persons mentioned elsewhere in the Convention are the master of the ship, its crew, and its passengers.[1136] Article 98, paragraph 1, of the Convention, India submits, further confirms that these are the only three categories of persons present on board a private ship which the Convention contemplates.[1137] Since Article 98 only refers to the three categories, an interpretation of the phrase, "other persons in service of the ship", to include persons other than the crew and its passengers would lead to the absurd result that, in the event of a collision, the duty to render assistance under Article 98 would not extend to such "persons in service of a ship".[1138]

619. India further submits that the *travaux préparatoires* confirm its interpretation by showing that the provision was included to avoid "intolerable interference[s] with international navigation", and VPDs "are not concerned with navigation".[1139]

620. According to India, the purpose of Article 97, paragraph 1, which stems from Article 35 of the ILC Draft Articles Concerning the Law of the Sea, is to protect international navigation.[1140] India submits that the master and crew are not only material but indispensable to navigation.[1141] Further, India submits that the Special Rapporteur explained that "the persons concerned" refers to the

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1133 India's Counter-Memorial, para. 6.47.

1134 India's Counter-Memorial, para. 6.47, *citing Yearbook of the International Law Commission*, Vol. I, 286th Meeting, 6 May 1955, p. 22, para. 43 (1955).

1135 Hearing Transcript, 12 July 2019, 175:20-176:15.

1136 Hearing Transcript, 12 July 2019, 174:9-16.

1137 Hearing Transcript, 12 July 2019, 174:17-20.

1138 Hearing Transcript, 12 July 2019, 174:21-175:6.

1139 India's Counter-Memorial, para. 6.48, *citing* International Law Commission, "Articles Concerning the Law of the Sea with Commentaries" in *Yearbook of the International Law Commission*, Vol. II, p. 265 at p. 281 (commentary to Article 35, para. 1) (1956); *referring to* J.P.A. François, 'Second Report on the Regime of the High Seas', *Yearbook of the International Law Commission*, Vol. II, p. 78, para. 21 (1951).

1140 India's Rejoinder, para. 6.56, *citing United Nations Convention on the Law of the Sea 1982: A Commentary* (Nordquist et al., eds. 1995) Vol. III, p. 169, para. 97 (hereinafter "Virginia Commentary"); International Law Commission, "Articles Concerning the Law of the Sea with Commentaries" in *Yearbook of the International Law Commission*, Vol. II, p. 265 at p. 281 (commentary to Article 35, para. 1) (1956).

1141 India's Rejoinder, para. 6.56.

"master and crew" only in response to Spiropoulos's complaint that it was not clear to whom the former phrase referred.[1142] India contends that comments referring to the exclusion of passengers were made only *ex abundanti cautela* and were outside the object of the discussion.[1143]

621. Thus, based on this interpretation, India concludes that Article 97, paragraph 1, does not apply to the Marines because they cannot be considered crew.[1144] India contends that this point is confirmed by Italian law,[1145] the Template Agreement,[1146] the VPD Manual,[1147] Italy's own explanation,[1148] and the communication between the "Enrica Lexie" and the Indian authorities.[1149]

622. Even if the Arbitral Tribunal accepts Italy's interpretation that the Marines are "other persons in service of the ship", India submits that this case still does not fall within the scope of Article 97 because the Marines act in service of Italy, not the ship.[1150]

(c) **Interpretation and Application of Article 97, paragraph 3**

i. Position of Italy

623. Italy claims that India breached Italy's exclusive flag-State jurisdiction under Article 97, paragraph 3, by ordering the detention of the "Enrica Lexie".[1151]

624. According to Italy, the Parties only disagree on one issue with respect to the interpretation of this provision, namely "whether it prevents arrest and detention only outside the territorial sea, or also within the territorial sea".[1152] Italy submits that Article 97, paragraph 3, "does prohibit in the

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1142 India's Rejoinder, para. 6.57, *referring to Yearbook of the International Law Commission*, Vol. I, 286th Meeting, 6 May 1955, p. 22, para. 43 (1955).

1143 India's Rejoinder, para. 6.57.

1144 India's Counter-Memorial, para. 6.50.

1145 India's Counter-Memorial, para. 6.50, *referring to* Law Decree no. 963 of the Ministry of Transport of Italy, 7 October 2011, 7 October 2011, Article 3(1) (**Annex IT-94**).

1146 India's Counter-Memorial, para. 6.50, *referring to* Article 4 of the Template Agreement between the Ministry of Defence of Italy and the Ship Owner (**Annex IT-95(b)**).

1147 India's Counter-Memorial, para. 6.51, *referring to* VPD Manual (Confidential Annex), pp 18-19 (**Annex IT-234**).

1148 India's Counter-Memorial, para. 6.52, *referring to* Italy's Memorial, para. 3.28; (Confidential Annex) (**Annex IT-235(c)**).

1149 India's Counter-Memorial, para. 6.54, *referring to* Statement of [redacted], Assistant Commandant, Coast Guard District HQ 4, Kochi, 18 February 2012 (**Annex IT-134**).

1150 India's Counter-Memorial, para. 6.53, *referring to* Decree no. 266 of the Ministry of Interior of Italy, 28 December 2012, Article 9(1) (**Annex IT-180**). *See also* Hearing Transcript, 12 July 2019, 176:16-177:9.

1151 Italy's Memorial, para. 10.61; Italy's Reply, para. 7.100.

1152 Hearing Transcript, 9 July 2019, 197:19-23.

territorial sea arrest and detention in respect of incidents of navigation occurring on the high seas or in the EEZ".[1153]

625. While India maintains that this provision only prohibits States from arresting and detaining ships while they remain in the high seas or the exclusive economic zone, Italy contends that this interpretation is untenable because it would "very significantly reduce the protection provided in Article 97 against intolerable interference with international navigation".[1154] Moreover, the plain terms of the provision provide for a blanket prohibition of arrests and detentions, and Italy's interpretation is consistent with the purpose of Article 97, namely to reverse the finding in the *S.S. "Lotus"* decision where the ship was similarly not arrested or detained on the high seas but at Constantinople, in Turkish territory.[1155] Italy also dismisses the two commentaries on which India relies for its claim as irrelevant and unhelpful to its case.[1156]

626. Furthermore, Italy argues that, according to Article 94, paragraph 7, of the Convention, India's competence *vis-à-vis* the "Enrica Lexie" incident is limited to holding an "inquiry", which Italy submits does not include inquiries into penal responsibility for the incident,[1157] and that inquiry has already been concluded.[1158] According to Italy, Article 97, paragraph 3, makes clear that "India had no right to arrest or detain the *Enrica Lexie* even as a measure of investigation".[1159]

627. Applying this to the facts, Italy claims that India violated its obligations under Article 97, paragraph 3, of the Convention in light of the facts that the Assistant Solicitor General of India admitted the arrest and detention of the "Enrica Lexie" before the High Court of Kerala;[1160] that the Ministry of External Affairs of India directed the police to detain the "Enrica Lexie";[1161] that a Circle Inspector of Police issued a letter dated 26 February 2012 to the Master of the "Enrica

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1153 Hearing Transcript, 9 July 2019, 197:24-198:1.

1154 Hearing Transcript, 9 July 2019, 198:19-21.

1155 Hearing Transcript, 9 July 2019, 199:5-20.

1156 Hearing Transcript, 9 July 2019, 198:22-100:10, *referring to* India's Rejoinder, para 6.61, *citing* Virginia Commentary, Vol. III, p. 169, para. 97; India's Rejoinder, para. 6.62, *citing* Alexander Proelß (ed.), *The United Nations Convention on the Law of the Sea: A Commentary* (C.H. Beck, Hart, Nomos, 2017), p. 724.

1157 Hearing Transcript, 18 July 2019, 154:1-155:10, *referring to* Code of the International Standards and Recommended Practices for a Safety Investigation into a Maritime Casualty or Marine Incident, annexed to Resolution MSC.255(84), adopted 16 May 2008, p. 4, para. 4.

1158 Italy's Memorial, para. 10.63, *referring to* Letter from the Mercantile Marine Department of the Ministry of Shipping of India to the Commissioner of Police, Kochi, 23 March 2012, attaching "Interim Report into the Marine Casualty of Death of Two Fishermen off Kochi due to Firing by M.T. *Enrica Lexie*, Flag Italy, on 15.02.2012", 12 March 2012 (**Annex IT-161**).

1159 Italy's Memorial, para. 10.63.

1160 Italy's Memorial, para. 10.61; Italy's Reply, para. 7.100, both *referring to* Statement filed by the Assistant Solicitor General of India before the High Court of Kerala, 15 March 2012, para. 7 (**Annex IT-162**).

1161 Italy's Memorial, para. 10.62; Italy's Reply, para. 7.101, *referring to* Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 176 (**Annex IT-131**).

Lexie" directing the ship not continue her voyage;[1162] and that the Supreme Court of India on 2 May 2012 ordered the "Enrica Lexie" to commence her voyage.[1163]

628. Italy rejects India's argument that India did not violate this provision because the Indian authorities were invited to board the "Enrica Lexie".[1164] Not only did Italy not consent to the boarding of the "Enrica Lexie", but even if they did, this would be irrelevant because Italy did not consent to the detention of the "Enrica Lexie".[1165]

629. Therefore, since India has not contested any of these facts, Italy submits that India was in breach of Article 97, paragraph 3, for "every day of the two and a half months prior to 2 May 2012".[1166]

ii. Position of India

630. India rejects Italy's arguments that it breached Article 97, paragraph 3. India offers several reasons in support of its view.

631. First, India reiterates that Article 97 is not applicable to the present case because, as India argued before,[1167] the "Enrica Lexie" incident does not constitute a collision or an incident of navigation.[1168]

632. Second, India submits that the detention of the "Enrica Lexie" occurred in an Indian port and not on the high seas. According to India, "[t]his is crucial since Article 97 is only applicable to the high seas" and not India's territorial sea.[1169] In support of this claim, India cites the *United Nations Convention on the Law of the Sea 1982: A Commentary* (hereinafter "Virginia Commentary") which states that "[i]n areas other than the high seas, the Convention explicitly refers to the arrest or detention of a ship by a State other than the flag State for the purpose of instituting civil or judicial proceedings for specific purposes".[1170]

1162 Italy's Memorial, para. 10.62, *citing M.T. Enrica Lexie and Another v. Doramma and Others* (2012) 6 SCC 760, p. 762, para. 5 (**Annex IT-181**); Italy's Reply, para. 7.101.

1163 Italy's Memorial, para. 10.62; Italy's Reply, para. 7.101, both *referring to M.T. Enrica Lexie and Another v. Doramma and Others* (2012) 6 SCC 760, p. 769, para. 29 (**Annex IT-181**).

1164 Italy's Reply, para. 7.104, *referring to* India's Counter-Memorial, paras 6.60-6.62. *See also* Hearing Transcript, 9 July 2019, 201:23-202:4.

1165 Italy's Reply, para. 7.104. *See also* Hearing Transcript, 9 July 2019, 202:4-10.

1166 Italy's Reply, para. 7.102. *See also* Hearing Transcript, 9 July 2019, 201:20-23.

1167 *See* paras 603-615 above.

1168 India's Rejoinder, para. 6.60.

1169 India's Rejoinder, para. 6.61; Hearing Transcript, 12 July 2019, 179:20-180:5.

1170 India's Rejoinder, para. 6.61, *citing* Virginia Commentary, Vol. III, p. 169, para. 97.8(d). *See also* Hearing Transcript, 12 July 2019, 180:23-181:17.

633. India further submits that the Convention is silent on the military use of the exclusive economic zone as well as other unlawful acts committed therein.[1171] Hence, according to India, relevant customary rules are reflected in the *S.S. "Lotus"* case.[1172] India contends that Article 97 overturned only those parts of the *S.S. "Lotus"* judgment which concern collision and incidents of navigation but not "other cases of criminal jurisdiction".[1173]

634. Finally, India submits that it did not breach Article 97, paragraph 3, because the Indian authorities "have not used force or measures of constraint to investigate on board the *Enrica Lexie* [...] [but] were invited to board the vessel".[1174] India cites the following alleged documents in support of its argument:[1175]

- The e-mail exchange between the Master of the "Enrica Lexie" and the MRCC Mumbai dated 15 February 2012 discussing the invitation to board the vessel.[1176]
- The letter from the Mercantile Marine Department of the Ministry of Shipping of India to the Commissioner of Police dated 23 March 2012 reflecting the invitation.[1177]
- The updated spontaneous statement of the Master of the "Enrica Lexie".[1178]

(d) **Analysis of the Arbitral Tribunal**

635. The Parties differ over the interpretation and application of Article 97 of the Convention, which, by virtue of Article 58, applies to the exclusive economic zone.

636. Italy submits that Article 97 applies to the incident of 15 February 2012 because the Marines were persons "in the service of the ship" during a "collision or any other incident of navigation",[1179] and Italy is the flag State of the "Enrica Lexie". Italy contends that only it had the authority to

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1171 India's Rejoinder, para. 6.63, *citing The "Enrica Lexie" Incident (Italy v. India)*, Provisional Measures, Order of 24 August 2015, Dissenting Opinion of Judge Ndiaye, ITLOS Reports 2015, pp 10-11.

1172 India's Rejoinder, para. 6.63.

1173 India's Rejoinder, para. 6.64, *citing* Alexander Proelß (ed.), *The United Nations Convention on the Law of the Sea: A Commentary* (C.H. Beck, Hart, Nomos, 2017), pp 703, 723.

1174 India's Counter-Memorial, para. 6.60.

1175 India's Counter-Memorial, para. 6.61.

1176 E-mail from the Master of the "Enrica Lexie" to MRCC Mumbai, 23:39 (IST), 15 February 2012, and E-mail from MRCC Mumbai to the Master of the "Enrica Lexie", 21:14 (CET), 15 February 2012 (**Annex IT-122**).

1177 Letter from the Mercantile Marine Department of the Ministry of Shipping of India to the Commissioner of Police, Kochi, 23 March 2012, attaching "Interim Report into the Marine Casualty of Death of Two Fishermen off Kochi due to Firing by M.T. *Enrica Lexie*, Flag Italy, on 15.02.2012", 12 March 2012 (**Annex IT-161**).

1178 Statement of Umberto Vitelli (**Annex IT-216**).

1179 Italy's Memorial, para. 10.58; Italy's Reply, para. 7.61.

institute penal or disciplinary proceedings against the Marines and detain the "Enrica Lexie", as either the flag State of the ship or the Marines' State of nationality.[1180] In Italy's view, India breached Article 97, paragraphs 1 and 3, of the Convention by violating Italy's exclusive jurisdiction to prosecute the Marines and by detaining the "Enrica Lexie".[1181]

637. India denies that it breached any provision in Article 97 of the Convention and instead maintains that the Article does not apply to this dispute because it did not involve an "incident of navigation", and the Marines were not persons "in the service of the ship".[1182]

i. The Definition of "Incident of Navigation" under Article 97 of the Convention

638. The phrase "incident of navigation" is not defined in the Convention. In accordance with Article 31, paragraph 1, of the VCLT, therefore, it must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[1183]

639. The dictionary meaning of the term "incident" is a "distinct occurrence or event, esp[ecially] one that attracts general attention or is noteworthy in some way".[1184] The term "navigation" refers to the "action or practice of travelling on water; sailing"; the "art or science of directing a ship, boat",[1185] and the verb "to navigate" means to "sail, direct, manage, a ship".[1186] Thus, based on the ordinary meaning of the phrase, an "incident of navigation" should involve, at least, a distinct or noteworthy event that occurs in relation to the movement and directing or manoeuvring of a ship.

640. The term "incident of navigation" appears in two other instances in the Convention.

641. First, Article 221, paragraph 2, provides:

> For the purposes of this article, "maritime casualty" means a collision of vessels, stranding or other incident of navigation, or other occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo.

1180 Italy's Memorial, para. 10.57.

1181 Italy's Memorial, paras 10.58, 10.62.

1182 India's Counter-Memorial, paras 6.32-6.33; India's Rejoinder, paras 6.32-6.33.

1183 Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 340, Article 31(1).

1184 *See Shorter Oxford English Dictionary*, Vol. I (6th ed. 2007) at 1351.

1185 *See Shorter Oxford English Dictionary*, Vol. I (6th ed. 2007) at 1897.

1186 *See Shorter Oxford English Dictionary*, Vol. II (6th ed. 2007) at 1897.

642. This provision distinguishes between (i) "a collision of vessels"; (ii) "stranding or other incident of navigation"; and (iii) "other occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo". The first two categories, namely, a collision and a "stranding or other incident of navigation", are but examples of occurrences "on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo". Accordingly, "incident of navigation", within the context of the Convention, must be taken to refer to an occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo.

643. This is corroborated by the further context provided by Article 94, paragraph 7, of the Convention, which addresses "incidents of navigation" "causing loss of life or serious injury to nationals of another State or serious damage to ships or installations of another State or to the marine environment".

644. The object and purpose of Article 97 of the Convention sheds further light on the meaning of "incident of navigation". In its commentary to Article 35 of the ILC Draft Articles Concerning the Law of the Sea, the precursor to Article 97 of the Convention, the ILC explained that the provision was intended to reverse the judgment rendered by the PCIJ in the *S.S. "Lotus"* case.[1187] That case turned on the question whether Turkey could exercise penal jurisdiction over the French officer-in-charge for the purposes of holding him to account for a high seas collision between his ship (the "Lotus") and a Turkish ship (the "Boz-Kourt") that resulted in the loss of eight lives aboard, and severe damage to, the latter, "which was cut in two [and] sank".[1188]

645. The PCIJ's judgment, which decided that both France and Turkey were entitled to exercise penal jurisdiction over the French officer, was reversed with "the object of protecting ships and their crews from the risk of penal proceedings before foreign courts in the event of collision on the high seas, since such proceedings may constitute an intolerable interference with international navigation".[1189] Article 35 of the ILC Draft Articles Concerning the Law of the Sea accordingly reserved exclusive penal jurisdiction to either the flag State of the ship on which the accused person serves, or the State of which the accused person is a national, with the latter addition made

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1187 International Law Commission, "Articles Concerning the Law of the Sea with Commentaries" in *Yearbook of the International Law Commission*, Vol. II, p. 265 at p. 281 (commentary to Article 35, para. 1) (1956).

1188 *S.S. "Lotus" (France v. Turkey)*, Judgment of 7 September 1927, P.C.I.J. Series A, No. 10, para. 14.

1189 International Law Commission, "Articles Concerning the Law of the Sea with Commentaries" in *Yearbook of the International Law Commission*, Vol. II, p. 265, at p. 281 (commentary to draft Article 35, para. 1) (1956).

"in order to enable States to take penal or disciplinary measures against their nationals serving on board foreign vessels who are accused of causing collisions".[1190]

646. It is thus apparent that an exception to the otherwise prevailing rules on allocating jurisdiction was created specifically for a situation where the master or any other person in the service of a ship are at risk of facing penal proceedings before foreign courts in respect of navigational conduct on the high seas; such risk would typically arise only where some form of damage or harm has occurred as a result of navigation.

647. Additionally, pursuant to Article 32 of the VCLT, "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31".[1191]

648. In this regard, the *travaux préparatoires* of Article 97 of the Convention similarly support the view that "incident of navigation" refers to an event that occurs in relation to the movement and manoeuvring of the ship and which is alleged to have caused some form of serious damage or harm to the ships involved, their cargo, or the individuals on board.

649. During the discussion in the ILC of Article 35 of the ILC Draft Articles Concerning the Law of the Sea, all examples of "incidents of navigation" that were raised concerned the manoeuvring of the ship and damage caused by the operation of the vessel.[1192] In its commentary to Article 35 of the ILC Draft Articles Concerning the Law of the Sea, the ILC also described "incident of navigation" as including "damage to a submarine telegraph, telephone or high-voltage power cable or to a pipeline".[1193] It is on this basis that a scholarly commentary to the Convention, to which the Parties referred during the Hearing,[1194] considered that "other incidents of navigation"

1190 International Law Commission, "Articles Concerning the Law of the Sea with Commentaries" in *Yearbook of the International Law Commission*, Vol. II, p. 265, at p. 281 (commentary to draft Article 35, para. 1) (1956).

1191 Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 340, Article 32.

1192 Hearing Transcript, 12 July 2019, 164:7-165:3, *citing Yearbook of the International Law Commission*, Vol. I, 121st meeting, 10 July 1951, p. 327, paras 149-151 (1951).

1193 International Law Commission, "Articles Concerning the Law of the Sea with Commentaries" in *Yearbook of the International Law Commission*, Vol. II, p. 265 at p. 281 (commentary to Article 35, para. 2) (1956). *See also* Virginia Commentary, Vol. III, pp 168-169, para. 97.8(b); Alexander Proelß (ed.), *The United Nations Convention on the Law of the Sea: A Commentary* (C.H. Beck, Hart, Nomos, 2017), p. 723, para. 6.

1194 Hearing Transcript, 9 July 2019, 187:18-188:22; Hearing Transcript, 12 July 2019, 167:6-168:4.

were "incidents caused either by the execution or non-execution of a manoeuvre or by the non-observance of regulations, even if no collision has taken place".[1195]

650. On the basis of the above analysis, in the view of the Arbitral Tribunal, the phrase "incident of navigation" within the meaning of Article 97, paragraph 1, of the Convention, refers to an event that (i) occurs in relation to the movement and manoeuvring of a ship; and (ii) which allegedly causes some form of serious damage or harm, including to the ships involved, their cargo, or the individuals on board.

ii. Application of Article 97, paragraph 1, of the Convention to the Incident of 15 February 2012

651. In order to answer the allegation that India has breached Article 97, paragraph 1, of the Convention, the Arbitral Tribunal must determine whether an "incident of navigation" occurred on 15 February 2012 and, therefore, whether Article 97, paragraph 1, is applicable in the present case. In order to constitute an "incident of navigation", in turn, there must have occurred manoeuvring or movement of a ship that resulted in serious damage or harm, including to the ships involved, their cargo, or the individuals on board.

652. The Arbitral Tribunal observes that it is undisputed between the Parties that no collision occurred between the "Enrica Lexie" and the "St. Antony" on 15 February 2012. In the view of the Arbitral Tribunal, there was a risk of collision. However, no damage resulted from the manoeuvring or movement of a ship. While the "St. Antony" was indeed damaged and two Indian fishermen on board lost their lives during the incident, this damage and mortal harm were not caused by the movement or manoeuvring of either ship.

653. The Arbitral Tribunal is unconvinced by the argument that the damage to the "St. Antony" and the death of the Indian fishermen related to navigation because the origin of the entire incident was the course steered by each of the two approaching vessels, that then led the Marines to apprehend a threat of piracy and fire a series of warning shots in the direction of the approaching fishing vessel, thereby causing damage to the "St. Antony" and harm to its crew. The link between any navigational aspect of the incident, on the one hand, and the damage and harm caused, on the other hand, is too tenuous to sustain the claim that the firing of shots by the Marines related to navigation.

[1195] Francesco Berlingieri, *International Maritime Conventions (Volume II): Navigation, Securities, Limitation of Liability and Jurisdiction* (Informa Law from Routledge, 2015), p. 40.

654. Unlike the *S.S. "Lotus"* case, where the death of the eight Turkish nationals on board the "Boz-Kourt" was directly caused by the collision of the two vessels, thus raising questions of criminal responsibility of the lieutenant on watch duty with responsibility for the navigation of the "Lotus",[1196] the direct cause of the death of the two Indian fishermen on board the "St. Antony" would have been the firing of shots by the Marines, who themselves were not involved with the navigation of the "Enrica Lexie". This is consistent with the division of responsibilities set out in Article 4.2 of the Template Agreement and the VPD Manual, both of which make clear that "[d]ecisions regarding navigation and manoeuvring the Vessel shall be included within the competence of the Ship master" and not the VPD.[1197]

655. While the acts for which the Marines are being prosecuted, and the harm caused by those acts, took place while two ships were sailing in the exclusive economic zone of India, they are not caused by the movement or manoeuvring of those ships and cannot be said to have been part of an "incident of navigation".

656. For the foregoing reasons, no "incident of navigation" has occurred that would trigger the application of Article 97, paragraph 1, of the Convention. While there also is some doubt as to whether the Marines qualify as "other person[s] in service of the ship", given that they are not involved with its navigation or manoeuvring, there is no need for the Arbitral Tribunal to further address this question, since it has already established that Article 97 does not apply in this dispute.

657. Accordingly, Italy's claim that India has violated Article 97, paragraph 1, of the Convention is rejected.

iii. Application of Article 97, paragraph 3, of the Convention in the Case of the Incident of 15 February 2012

658. The Parties disagree as to whether Article 97, paragraph 3, prohibits arrest and detention of foreign vessels in the territorial sea in respect of incidents of navigation occurring on the high seas. While Italy submits that such arrest and detention are prohibited, India maintains that such prohibition is only applicable to the high seas.

659. The Arbitral Tribunal observes that it follows from the title of Article 97 that it governs the exercise of penal jurisdiction only in matters of collision or any other incident of navigation. As

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1196 *S.S. "Lotus" (France v. Turkey)*, Judgment of 7 September 1927, P.C.I.J. Series A, No. 10, paras 14-15.

1197 Template Agreement between the Ministry of Defence of Italy and the Ship Owner, Article 4.2 (**Annex IT-95(b)**); VPD Manual (Confidential Annex), pp 18-19 (**Annex IT-234**). *See also* Hearing Transcript, 9 July 2019, 193:12-194:2.

has been determined by the Arbitral Tribunal in the preceding analysis on a possible applicability of paragraph 1 of Article 97, in the case of the incident that took place on 15 February 2012, there was no collision or any other incident of navigation during that incident. Consequently, Article 97, paragraph 3, is not applicable in the present case as well.

3. Alleged Violations by India of Articles 100 and 300 of UNCLOS

660. The Parties differ over their interpretation and application of Articles 100 and 300 of the Convention, which address, respectively, the duty to cooperate in the repression of piracy, and good faith and abuse of rights. Article 100 provides:

> *Article 100*
>
> *Duty to cooperate in the repression of piracy*
>
> All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.

661. Article 300 of the Convention provides:

> *Article 300*
>
> *Good faith and abuse of rights*
>
> States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.

662. Italy submits that India breached its obligations under Article 100 by failing to recognise and uphold the immunity of the Marines and by asserting jurisdiction over the "Enrica Lexie" and the Marines in respect of the incident. Further, Italy claims that India committed this breach in bad faith and abused its right to cooperation in the repression of piracy by using it as a pretext to obtain custody over the "Enrica Lexie" and the Marines, thereby further breaching its obligations under Article 100, read in conjunction with Article 300. India denies Italy's claims as baseless.

663. Since the Parties' claims turn on findings with regard to a common set of contested facts, namely those surrounding the apprehension of a threat of piracy on the day of the incident, the Arbitral Tribunal will first summarise the Parties' positions in respect of these facts. Thereafter, the Arbitral Tribunal will proceed to summarise the Parties' arguments regarding Article 100, read in conjunction with Article 300.

(a) **Reasonable Apprehension of a Threat of Piracy**

664. The Parties disagree as to whether there was a general threat of piracy on the day of the shooting incident, and whether there was an apprehension of a threat of piracy from the small craft – the "St. Antony", which appears to have led the Marines to have recourse to fire arms.

i. Piracy Situation off the Coast of Kerala

665. India submits that there was no serious threat of piracy off the southwest coast of India.[1198] It states that the southwest coast of India is a "popular fishing zone, with a large number of fishing grounds off the coast".[1199] India adds:

> The Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia [hereinafter "ReCAAP"] has recommended that ship masters navigate with extreme caution when approaching up to 50 nautical miles from the Indian coast because of the presence of intense fishing activity in the area. [...] ReCAAP points to IMO circular MSC 1/1334 of 23 June 2009, and highlights the need to appreciate sufficient grounds before suspecting that a fishing vessel is in fact a pirate skiff, stating that fishing boats should not be presumed to be pirate skiffs without verification.[1200]

666. According to Italy, there was a "very real and serious piracy risk posed to the *Enrica Lexie* as she crossed the waters off the Kerala coast in February 2012".[1201] Italy asserts that between 1 January 2010 and 15 February 2012, "about 35 incidents of piracy and armed robbery were reported" in the "waters off the western coast of India".[1202] Twelve incidents "(including the 'Enrica Lexie' Incident) occurred near the coast of Kerala".[1203]

667. India contends that these twelve "incidents of piracy" were either "cases of mistaken identity (where investigations verified that the suspected pirate skiff was in fact a fishing vessel), incidents

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1198 India's Rejoinder, para. 4.9.

1199 India's Counter-Memorial, para. 1.25.

1200 India's Counter-Memorial, para. 1.26, *referring to* "Special Report on Fishing Activities off Southwest Coast of India", SR 01/2012, ReCAAP Information Sharing Centre, 29 May 2012, p. 7 (**Annex IN-7**). *See also* Hearing Transcript, 11 July 2019, 64:21-65:8.

1201 Italy's Memorial, para. 2.9. *See also* Hearing Transcript, 8 July 2019, 155:4-6.

1202 Italy's Memorial, para. 2.7.

1203 Italy's Memorial, para. 2.7. Italy states:

> This figure has been derived using the IMO, Global Integrated Shipping Information System website (https://gisis.imo.org/Public/Default.aspx). The query entered into the database had the parameters: "Coastal State is India", "Incident date is between 2010-01-01 and 2012-02-15" and "Geographical area of incident is Indian Ocean". This query generated 45 results. For five of those results, geographic coordinates were not given. Another five occurred off the eastern coast of India".

Italy's Memorial, para. 2.7, n. 13. *See also* Hearing Transcript, 8 July 2019, 60:2-22, 149:2-11.

of robbery (but not piracy), or plainly false or unsubstantiated".[1204] According to India, no case of piracy has occurred in the relevant part of India's exclusive economic zone since June 2011,[1205] and, as a result of the efforts of the Indian Navy and Coast Guard, piracy was virtually eradicated in India's maritime zones by 2012.[1206]

668. According to India, "there was no serious threat of piracy off the Indian coast on the day of the 'incident'."[1207] In response, Italy notes that at the time of the incident, the International Maritime Organisation (hereinafter the "IMO") had "recently" declared, and the Indian Ministry of Shipping advised on, the area as a High Risk Area. Italy thus avers that focus should not be placed only on "the day", but also on this broader context.[1208]

669. Italy submits that it had adopted measures to combat the piracy threat, such as the deployment of military VPD, under a legal framework established in 2011.[1209] Under the Best Management Practices for Protection against Somalia Based Piracy, August 2011 (hereinafter the "BMP4"),[1210] the deployment of VPD was the "recommended option when considering armed guards".[1211] The BMP4 were issued to "assist ships to avoid, deter or delay piracy attacks in the High Risk Area" and were endorsed by the IMO.[1212] The High Risk Area, in turn, is described in the BMP4 as a place "where pirate activity and/or attacks have taken place" and in which a "high state of readiness and vigilance should be maintained".[1213] The BMP4 also specifically delimits the High

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1204 India's Counter-Memorial, para. 1.31. *See also* India's Counter-Memorial, paras 1.32; Hearing Transcript, 11 July 2019, 17:13-18:24.

1205 India's Counter-Memorial, para. 1.27, *referring to* Government of India, Ministry of Shipping Notice No. 7, 7 March 2012 (**Annex IN-9**). *See also* Hearing Transcript, 11 July 2019, 17:3-12.

1206 Hearing Transcript, 11 July 2019, 16:20-17:2.

1207 India's Rejoinder, para. 4.12.

1208 Italy's Reply, para. 3.8.

1209 Italy's Memorial, paras 3.5-3.8. *See also* Hearing Transcript, 8 July 2019, 14:1-4; 130:8-20; Hearing Transcript, 18 July 2019, 36:7-16.

1210 Best Management Practices for Protection against Somalia Based Piracy, August 2011, produced and supported by, *inter alia*, International Chamber of Shipping, International Association of Independent Tanker Owners, the Society of International Gas Tanker and Terminal Operators, Operation Ocean Shield, and the UKMTO.

1211 Italy's Memorial, para. 2.23, *citing* BMP4: Best Management Practices for Protection against Somalia Based Piracy, v. 4, August 2011, para. 8.15 (**Annex IT-90**).

1212 Italy's Memorial, para. 2.4, *citing* BMP4: Best Management Practices for Protection against Somalia Based Piracy, v. 4, August 2011, para. 1.1 (**Annex IT-90**).

1213 Italy's Memorial, para. 2.4, *citing* BMP4: Best Management Practices for Protection against Somalia Based Piracy, v. 4, August 2011, para. 2.4 (**Annex IT-90**). *See also* Hearing Transcript, 8 July 2019, 59:16-60:1.

Risk Area and on that basis, "the 'Enrica Lexie' Incident occurred within the [High Risk Area]".[1214]

ii. Navigation of the "Enrica Lexie" with Respect to Perceived Risk of Piracy

670. According to Italy, in the days leading up to the "Enrica Lexie" incident, the "Enrica Lexie" was acting under instruction to follow a "counter-piracy course".[1215] Italy describes the precautions taken by the "Enrica Lexie" in accordance with these instructions:

> There was an armed VPD on board. The deck was wound with barbed wire. The crew undertook counter-piracy drills. The voyage route was chosen to minimise piracy risks. The ship was headed to the north Indian Ocean to join a naval convoy to cross the Gulf, and then to Port Said. Portholes were shut and darkened.[1216]

671. After departing from the port of Galle on 14 February 2012, the VPD and crew aboard the "Enrica Lexie" jointly conducted, more than once, a "*Pirate Attack* exercise" in order to "make sure that the crew and the [VPD] team could familiarise themselves" with procedures for responding to a threat of pirate attack.[1217]

672. According to India, on 15 February 2012, the weather was good with clear visibility in the area off the Indian coast where the "Enrica Lexie" was navigating. Captain Vitelli testified that he received piracy-related information on a daily basis and that, on the day in question, "[t]here was no specific piracy threat at the Arabian Sea".[1218] Moreover, India points out that according to Captain Fredy's testimony, fishermen in the area in which he was fishing had not experienced any incident of collision or piracy before 15 February 2012.[1219]

673. However, Italy indicates that Captain Vitelli was "acutely aware of the risks".[1220] Captain Vitelli testified that, at the time of the incident, he recalled the pirate attack on the "Enrica Lexie"'s sister

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1214 Italy's Memorial, para. 2.5.

1215 Italy's Rejoinder, para. 2.11.

1216 Hearing Transcript, 18 July 2019, 36:9-15.

1217 Log Book of the Master of the "Enrica Lexie", p. 1 (**Annex IT-14**); Hearing Transcript, 15 July 2019, 21:6-23:1.

1218 India's Counter-Memorial, para. 1.28, *citing* Statement of Witness in connection with the NIA investigation, Statement of Mr. Vitelli Umberto, Master of "Enrica Lexie", 9 August 2013, p. 45 (**Annex IN-28**). *See also* Hearing Transcript, 11 July 2019, 63:3-6; India's Rejoinder, paras 4.9-4.12, *citing* Statement of Witness in connection with the NIA investigation, Statement of Mr. Carlo Noviello, Master Super NM, "Enrica Lexie", 9 August 2013, p. 59 (**Annex IN-29**).

1219 Hearing Transcript, 20 July 2019, 4:2-7.

1220 Hearing Transcript, 18 July 2019, 36:5-6.

ship, the "Savina Caylyn, with the use of RPGs, of rocket-propelled grenades, that had resulted in the crew being held hostage for almost eleven months".[1221]

674. India submits, in response, that the incident involving the "Savina Caylyn" took place "a year earlier, in February 2011, at a location that was more than 800 kilometres from India's northern coast" which was "nowhere near where the events of 15th February 2012 occurred".[1222]

iii. Appearance and Movement of the "St. Antony"

675. Italy submits that the appearance and conduct of the "St. Antony" inspired a "very real apprehension of piracy threat" in those on board the "Enrica Lexie". India challenges this assertion, contending that multiple members of the "Enrica Lexie"'s crew testified to the contrary, that the "St. Antony" appeared to be a regular fishing vessel and that there could be no real apprehension of the threat of a pirate attack.

(a) Position of Italy

676. Italy submits that the appearance of the "St. Antony" provided a legitimate basis for apprehension that the "St. Antony" posed a threat of piracy. In support of this claim, Italy relies on the following evidence.

677. Captain Noviello testified that he observed that the "St. Antony" had tyres as fenders. Fenders prevent damage to a vessel when approaching a wharf or another vessel and are typically pulled in while navigating in open seas. He testified that the "boat had a dozen fenders on the outside", which led him to contemplate as to why "they have the fenders on when sailing so far out",[1223] as though "preparing to come alongside another vessel".[1224] Captain Noviello also observed on the boat persons with black belts across their shoulders.[1225] In addition, he testified that the "Enrica Lexie" attempted to contact the "St. Antony" multiple times on the emergency VHF channel without a response.[1226]

1221 Hearing Transcript, 18 July 2019, 35:20-36:6, *referring to* Hearing Transcript, 15 July 2019, 34:10-22.

1222 Hearing Transcript, 20 July 2019, 3:17-4:1.

1223 Italy's Memorial, para. 4.16, *citing* (Confidential Annex), p. 1 (**Annex IT-261**). *See also* (Confidential Annex), p. 2 (**Annex IT-236**); Hearing Transcript, 18 July 2019, 131:17-19, *referring to* Hearing Transcript, 15 July 2019, 125:17-20.

1224 Italy's Memorial, para. 4.16.

1225 Hearing Transcript, 18 July 2019, 131:15-17, *referring to* Hearing Transcript, 15 July 2019, 125:9-14.

1226 Hearing Transcript, 18 July 2019, 130:1-9, *referring to* Hearing Transcript, 15 July 2019, 111:14-24.

678. Italy also cites Sergeant Girone's account of what he saw through binoculars when the craft was at a distance of 300 metres:

> at least two members of the crew were equipped with long-barrel rifles slung over their shoulders, with a posture clearly aimed at boarding our vessel. Bulk equipment was also visible on the starboard of the fishing boat's deck, which could be assessed as boarding instruments and tools.[1227]

679. Italy opposes India's argument that Sergeant Girone's account is "self-serving since he undoubtedly would have wanted to justify his actions when questioned by Admiral Piroli".[1228] In response, Italy claims that contemporaneous evidence "confirms that Sergeant Girone had been saying since the beginning that he thought he saw armed persons on board the small craft".[1229] In this regard, Italy relies on an e-mail sent by Captain Vitelli shortly after the incident stating that, "Security team sighted 6 armed people on board the boat".[1230]

680. Italy disagrees with India's position that, should Sergeant Girone's testimony be disregarded, the Marines cannot have perceived the risk of piracy.[1231] Italy alleges in this regard that the apprehension of a piracy threat during the "Enrica Lexie" incident was warranted because small crafts, including fishing boats are "routinely used by pirates", and the "kinematics, or motion, of the approaching vessel" led the Marines to perceive that the craft was on an "interception course" and to don their equipment.[1232] Italy also submits that a number of other factors contributed to this perception, such as:

> the navigational trajectory of the *St Antony*, i.e., that it was on a collision course or near collision course with the *Enrica Lexie*; its failure to respond to signals from the *Enrica Lexie*; the short and rapidly diminishing distance between the two vessels; the *St Antony*'s failure to respond to warning shots; and physical characteristics including that the craft was navigating far out to sea with its fenders out, which could have been in anticipation of coming alongside a vessel such as the *Enrica Lexie*.[1233]

1227 Italy's Memorial, para. 4.23, *citing* (Confidential Annex), p. 2 (**Annex IT-237)** [emphases omitted].

1228 Hearing Transcript, 8 July 2019, 192:12-17, *citing* India's Rejoinder, para. 4.20.

1229 Hearing Transcript, 8 July 2019, 193:15-18.

1230 Hearing Transcript, 8 July 2019, 193:22-23, *citing* E-mail from the Master of the "Enrica Lexie" to Fratelli D'Amato SpA, 13:47 (CET), 15 February 2012 (**Annex IT-111**). *See also* Hearing Transcript, 8 July 2019, 194:1-5; Hearing Transcript, 18 July 2019, 127:2-18.

1231 Hearing Transcript, 8 July 2019, 194:17-20, *referring to* India's Rejoinder, paras 4.21-4.23.

1232 Hearing Transcript, 8 July 2019, 195:5-197:11, *referring to* (Confidential Annex), p. 1 (**Annex IT-236**); Action Report from Massimiliano Latorre to the Commander in Chief of the Naval Squadron (CINCNAV), 19:30 (IST - 0.5 hours), 15 February 2012 (**Annex IT-108**). *See also* Italy's Rejoinder, para. 2.13.

1233 Italy's Rejoinder, para. 2.10. *See also* Hearing Transcript, 8 July 2019, 197:12-18, *referring to* (Confidential Annex), p. 1 (**Annex IT-236**); (Confidential Annex) (**Annex IT-261**); Hearing Transcript, 18 July 2019, 36:17-25, 129:15-21, 131:1-5.

681. Italy questions the probative weight of evidence presented in the NIA Report, upon which India relies. First, Italy notes that none of the crew members' statements is contemporaneous, as they were made between 16 and 18 months after the incident.[1234] Second, Captain Vitelli had sent most of the crew members in question to the citadel, and according to Captain Vitelli's testimony at the Hearing, he had ordered the crew members on the bridge not to get close to the glass, and hence did not "think that they got close to the glass to see if any armed people were present on the boat or not".[1235] Third, Italy alleges that "when one examines the full statements carefully [...] there is an interesting coincidence of language on key issues that inevitably raises questions about the reliability of these statements".[1236]

682. Furthermore, Italy submits that Captain Fredy's statement that he "abruptly helmed the boat away" so as to avoid a collision further demonstrates the circumstances to which those on the "Enrica Lexie" responded.[1237]

683. Finally, Italy avers that India's own official notice one month after the incident that "[t]he ship's security guards had assumed the innocent fishermen to be pirates" contemporaneously acknowledges that the Marines did perceive that the "Enrica Lexie" was being approached by pirates.[1238]

(b) Position of India

684. India points out that in the NIA Report, based on an interrogation of the crew members of the "Enrica Lexie", the incident was described as follows:

> On 15.02.2012 at 1630 hrs. IST, Enrica Lexie was sailing at a position of Latitude 9 degree 17.2 Minutes North and Longitude 076 Degree 01.8 minutes E in Arabian Sea and 20.5 nautical miles away from the nearest base, Thrikkunnapuzha, Alappuzha District of Kerala and the fishing vessel St Antony was about 100 metres away from the ship. The Italian Marines [...] opened unprovoked firing which continued even after the death of the two fishermen thereby endangering the safe navigation of the ship [...] [Captain Freddy] was also present on the boat, immediately turned away and started sailing towards the coast [...] The authorities were successful in identifying the ship involved in the incident and caused to sail it back and anchor at Kochi port for the purpose of joining in the enquiry.[1239]

1234 Hearing Transcript, 18 July 2019, 39:11-20.

1235 Hearing Transcript, 18 July 2019, 128:16-18. *See also* Hearing Transcript, 18 July 2019, 39:21-40:1, 127:22-128:23, *referring to* Hearing Transcript, 11 July 2019, 84:3-87:19.

1236 Hearing Transcript, 18 July 2019, 40:2-7.

1237 Italy's Rejoinder, para. 2.14, *citing* First Information Statement relating to First Information Report no. 2 of 2012, Kerala Police, 15 February 2012, p. 2 (**Annex IT-110**).

1238 Hearing Transcript, 8 July 2019, 198:8-19, *citing* Government of India, Ministry of Shipping Notice No. 7, 7 March 2012 (**Annex IN-9**) para. 4. *See also* Hearing Transcript, 18 July 2019, 132:11-133:11.

1239 NIA Report (Confidential Annex), para. 9.1 (**Annex IN-27**).

685. India submits that the NIA investigation involved the examination of 64 witnesses and over 180 documents and material objects.[1240] As part of the investigation, the NIA interviewed all members of the crew of the "Enrica Lexie". The testimony of the members of the crew indicated that there was no threat emanating from the "St. Antony". Specifically, statements by the crew members "ruled out any sighting of armed persons, and also the shape and make of the boat was far from a typical pirate skiff which usually carries ladders and hooks".[1241] In light of their testimony, the investigation report concluded as follows:

> The accused [Massimiliano Latorre and Salvatore Girone][...] while they were deployed as the mariners in the Italian Ship MT Enrica Lexie, had fired from the ship with automatic weapons, without any reasonable apprehension of threat, on the fishing boat owned by the complainant [...] which resulted in the death of two fishermen, caused damage to the fishing boat and affected the safe navigation of the fishing boat dangerously. The accused therefore, had committed the offences of murder, attempt to commit murder, mischief and act endangering the safe navigation of the fishing boat.[1242]

686. India considers that these statements are tenable. First, contrary to Italy's argument, the fact that they were given 18 months after the incident does not render them unreliable.[1243] Second, Captain Vitelli and Captain Noviello made statements to the NIA during the same period, in which they noted that they did not see any armed men or boarding equipment on the craft.[1244] Third, in response to Captain Vitelli's testimony that he had sent the non-essential crew members to the citadel (and hence they could not have been observing the small craft or the people on it), India submits that the crew "had been observing the St Antony with binoculars for some time – a good 20 minutes – before the shooting started, and none of them saw anything suspicious".[1245] Fourth, even though, according to Captain Vitelli's testimony, the crew members on the bridge had been asked to stay away from the glass, Captain Vitelli testified that using binoculars "you can still see if there is a fishing boat approaching, if there is another vessel approaching".[1246]

1240 NIA Report (Confidential Annex), para. 11.2 (**Annex IN-27**).

1241 NIA Report (Confidential Annex), para. 11.25 (**Annex IN-27**).

1242 NIA Report (Confidential Annex), para. 10 (**Annex IN-27**).

1243 Hearing Transcript, 20 July 2019, 13:10-14.

1244 Hearing Transcript, 20 July 2019, 13:14-22, *referring to* Statement of Witness in connection with the NIA investigation, Statement of Mr. Vitelli Umberto, Master of "Enrica Lexie", 9 August 2013, p.46 (**Annex IN-28**); Statement of Witness in connection with the NIA investigation, Statement of Mr. Carlo Noviello, Master Super NM, "Enrica Lexie", 9 August 2013, p. 56 (**Annex IN-29**).

1245 Hearing Transcript, 20 July 2019, 14:16-19.

1246 Hearing Transcript, 20 July 2019, 15:16-17, *citing* Hearing Transcript, 15 July 2019, 38:18-26.

687. India submits that, apart from Sergeant Girone,[1247] none of the crew members of the "Enrica Lexie" claimed to have seen any armed men or boarding equipment on the fishing boat.[1248] In support of this claim, India cites the following statements.

688. First, the Chief Officer of the "Enrica Lexie", James Mandley Samson, stated:

> I heard a bunch of gunshots from the bridge wing. I took the binocular and went to the AFT window (behind window) and sighted a boat drawing away. Then the Commander of the armed guard shouted at me to go away from the glass window. The sighted boat looked like a fishing boat and there was no armed personnel in that fishing boat. There were no hooks and ladders in the boat.[1249]

689. Second, Able Sea Man Narendra Kumar Naran Fulbariya in his statement recorded that he "noticed it as a fishing boat and two men on board, they were unarmed". He added that "[t]here was no ladder and hooks on the boat".[1250]

690. Third, the duty officer, Second Officer Gupta stated that "[w]hen I heard the firing, the boat was about 200 mtrs away from the ship. It was a normal fishing boat and I didn't see anything unusual with it. I have not seen any person armed in the boat".[1251] He added that "I didn't press the VDR since to me it was not a suspicious boat, it was a normal fishing boat".[1252]

691. Fourth, Captain Vitelli stated:

> When I saw the boat from the bridge I have not seen any armed person on the board of the boat. I did not see any ladders or hooks in the boat. I have not cross checked with Fulbaria

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1247 India contends that Sergeant Girone's account of the incident is "self-serving since he undoubtedly would have wanted to justify his actions when questioned by Admiral Piroli". Hearing Transcript, 8 July 2019, 192:10-17, citing India's Rejoinder, para. 4.20, *referring to* (Confidential Annex) (**Annex IT-237**). *See also* India's Counter-Memorial, para. 2.44; Hearing Transcript, 11 July 2019, 89:7-90:1.

1248 India's Counter-Memorial, para. 2.24, *referring to* NIA Report (Confidential Annex), paras 11.15, 11.18 (**Annex IN-27**).

1249 India's Counter-Memorial, para. 2.25, citing Statement of Witness in connection with the NIA Investigation, Statement of Shri Victor James Mandley Samson, p. 48 (**Annex IN-31**). See also India's Rejoinder, para. 4.17; Hearing Transcript, 11 July 2019, 87:6-13.

1250 India's Counter-Memorial, para. 2.25, *citing* Statement of Witness in connection with the NIA Investigation, Statement of Fulbariya Narendra Kumar Naran, p. 52 (**Annex IN-32**). [emphasis added by India omitted] *See also* India's Rejoinder, para. 4.17; Hearing Transcript, 11 July 2019, 84:12-85:4.

1251 India's Counter-Memorial, para. 2.25, *citing* Statement of Witness in connection with the NIA Investigation, Statement of Shri Sahil Gupta, p. 61 (**Annex IN-30**); Hearing Transcript, 11 July 2019, 85:5-10.

1252 India's Counter-Memorial, para. 2.25, *citing* Statement of Witness in connection with the NIA Investigation, Statement of Shri Sahil Gupta, p. 61 (**Annex IN-30**); Hearing Transcript, 11 July 2019, 85:12-15. *See also* India's Rejoinder, para. 4.17.

> about the presence of the armed men and other crew members. Only the Italian Naval Guards conveyed the message to me in Italian language.[1253]

692. Fifth, Captain Noviello stated:

> On 1545 hrs, I was in the Wheel House and I noticed in the Radar a target and I took the Binocular and looked into it, it appears to be a fishing boat. I didn't notice any hooks, ladder or any drum like material in the boat.[1254]

693. Captain Noviello added that when the boat was about 100 metres away, he still "couldn't find any hooks, ladders or any armed men in the boat".[1255]

694. Sixth, Ordinary Seaman Shri Kandamochu Thirumala Rao stated:

> I was also asked to do watch duty. At that time ship time was 30 minutes behind Indian Standard time (IST). There was a Binocular in the bridge for the watchman on duty. It was a new one. I could see far away objects. I was on the bridge two minutes prior to 1600 hrs ship time. I have seen Fulbariya watching a fishing boat approaching the vessel. I also took the Binocular and watched it. It was a fishing boat. Nobody was seen in the boat armed. I did not see any ladders or hooks in the fishing boat.[1256]

695. India concludes that, in light of these multiple contrasting accounts, Sergeant Girone's statement that he spotted two armed men on the fishing boat is "self-serving" and "unsustainable".[1257]

696. With regard to Italy's argument that the "kinematics" of the "St. Antony" contributed to an apprehension of the risk of piracy, India submits that the "St. Antony" was entitled to maintain its course and speed, as it had the right of way under Rule 15 of the COLREGS, while the "Enrica Lexie", under Rule 16, was obliged to "take early and substantial action to keep well clear". Thus, India argues that the "St. Antony"'s navigation, which was "not only permitted but expressly

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1253 India's Counter-Memorial, para. 2.25, *citing* Statement of Witness in connection with the NIA Investigation, Statement of Mr. Vitelli Umberto, Master of "Enrica Lexie", 15 June 2013, p. 46 (**Annex IN-28**). *See also* India's Rejoinder, para. 4.17; Hearing Transcript, 11 July 2019, 84:3-11.

1254 India's Counter-Memorial, para. 2.25, *citing* Statement of Witness in connection with the NIA investigation, Statement of Mr. Carlo Noviello, Master Super NM, "Enrica Lexie", 9 August 2013, p. 56 (**Annex IN-29**). *See also* India's Rejoinder, para. 4.17; Hearing Transcript, 11 July 2019, 85:24-86:6.

1255 India's Counter-Memorial, para. 2.25, *citing* Statement of Witness in connection with the NIA investigation, Statement of Mr. Carlo Noviello, Master Super NM, "Enrica Lexie", 9 August 2013, p. 57 (**Annex IN-29**). *See also* Hearing Transcript, 11 July 2019, 86:8-11.

1256 India's Counter-Memorial, para. 2.25, *citing* Statement of Witness in connection with the NIA investigation, Statement of Shri Kandamochu Thirumala Rao, 2 July 2013, p. 63 (**Annex IN-33**). *See also* Hearing Transcript, 11 July 2019, 86:15-87:1.

1257 India's Counter-Memorial, para. 2.44; India's Rejoinder, paras 4.19-4.20, *citing* (Confidential Annex) (**Annex IT-237**). *See also* Hearing Transcript, 11 July 2019, 89:7-90:1.

called for under the COLREGS scarcely justified the marines assuming that it was a pirate attack, let alone opening fire on the boat".[1258]

697. Concerning the testimony of Captain Noviello that he saw men with black belts on the fishing boat, India asserts that this was not mentioned in any of Captain Noviello's past statements.[1259]

698. Finally, India points to the testimony of Captain Fredy that his boat was not continuing to move towards the other vessel, that he did not think there was a risk of collision, and that he abruptly helmed away "to prevent more casualties and damage to the boat, not to avoid a collision".[1260]

iv. The Reaction on Board the "Enrica Lexie"

699. Italy submits that the "Enrica Lexie" incident is comparable to the incident involving the "San Padre Pio", and there was a "very real apprehension of vulnerability to pirate attack by those on board the Enrica Lexie".[1261] Italy underscores the significance of the "Enrica Lexie"'s Log Book entries[1262] and contemporaneous reports of the incident in the immediate days following 15 February 2012 and contends that they are "very compelling" in supporting the apprehension of a threat of piracy by those on board the "Enrica Lexie".[1263]

700. India, on the other hand, submits that there was "no reasonable apprehension of a security threat" or "piracy attack" on the "Enrica Lexie".[1264]

701. Italy contends, relying on the testimony of Captain Noviello, that the "Enrica Lexie" continuously attempted to communicate with the "St. Antony" by calling on channel 16 of the VHF radio, but received no response.[1265] In addition, Italy submits that, as the craft approached the "Enrica Lexie" from approximately 800 metres, the Marines implemented various visual signals to warn

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1258 Hearing Transcript, 11 July 2019, 70:22-71:2, *referring to* Rules 15 and 16 of International Regulations for Preventing Collisions at Sea, 1972.

1259 Hearing Transcript, 20 July 2019, 13:23-14:9.

1260 Hearing Transcript, 20 July 2019, 17:20-21:4, *referring to* Hearing Transcript, 15 July 2019, 153:24-25; 162:1-11.

1261 Hearing Transcript, 8 July 2019, 61:21-62:8, *referring to M/T "San Padre Pio" (Switzerland v. Nigeria)*, Provisional Measures, Order of 6 July 2019, ITLOS Reports 2018-2019 [forthcoming], para.129.

1262 Hearing Transcript, 8 July 2019, 151:16-152:26, *referring to* Log Book of the Master of the "Enrica Lexie", p. 1 (**Annex IT-14**).

1263 Hearing Transcript, 8 July 2019, 63:2-9. *See also* Italy's Reply, paras 4.17, 4.19; Italy's Rejoinder, paras 2.4-2.7, 2.12; Hearing Transcript, 8 July 2019, 152:11-26; Hearing Transcript, 18 July 2019, 35:20-36:6.

1264 India's Rejoinder, paras 4.9-4.24, 9.5.

1265 Hearing Transcript, 18 July 2019, 36:17-20; 130:1-16, *referring to* Hearing Transcript, 15 July 2019, 111:10-24.

the craft, including flashing a search light[1266] and showing their weapons above their heads, in order to "signal the presence of military personnel onboard".[1267] Nevertheless, Italy contends, the small craft continued to approach the "Enrica Lexie".[1268]

702. Responding to the above, India argues that Captain Noviello's testimony that the "Enrica Lexie" sought to establish radio communication with the "St. Antony" through VHF is untenable. In this regard, India points to Captain Fredy's testimony that he had the VHF on high volume while he lay down, and that after the incident, he made contact with other boats and with his brother-in-law through VHF communication.[1269] India additionally notes that according to the Piroli Report, "no attempt to use VHF emergency channel in order to get radio contact with the fishing boat was made"[1270] despite that "an attempt to hail the craft should have been made using the VHF emergency channel, at least to clarify the parameters of its navigation".[1271]

703. Italy asserts that upon monitoring the trajectory of the "St. Antony", the VPD marines donned their equipment, including "bulletproof vests and helmets [...] all before any warning shots were fired and before anything needed to be justified to anyone".[1272]

704. India, in response, alleges that the Marines, contrary to the VPD Manual and the operational directives of CINCNAV,[1273] opened fire before there was any evidence either of "armed men or pirate boarding equipment", as it was only when the fishing boat was about 300 metres from the "Enrica Lexie" that Sergeant Girone said that he spotted "at least two members of the crew" with

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1266 Italy's Memorial, para. 4.18, *referring to* (Confidential Annex), p. 1(**Annex IT-236**); Statement of Carlo Noviello, 19 February 2012 (**Annex IT-142**); Declaration of Carlo Noviello, 19 February 2012 (**Annex IT-138**).

1267 Italy's Memorial, para 4.19, *citing* (Confidential Annex), p. 1 (**Annex IT-236**). *See also* (Confidential Annex) (**Annex IT-237**); Declaration of Carlo Noviello, 19 February 2012 (**Annex IT-138**); Log Book of the Master of the "Enrica Lexie", p. 2 (**Annex IT-14**).

1268 Italy's Memorial, para. 4.19, *referring to* Log Book of the Master of the "Enrica Lexie", p. 2 (**Annex IT-14)**; (Confidential Annex) (**Annex IT-237**).

1269 Hearing Transcript, 20 July 2019, 10:18-11:22, *referring to* Hearing Transcript, 15 July 2019, 149:21-22, 151:5-24.

1270 Hearing Transcript, 20 July 2019, 12:11-16, *citing* Piroli Report (Confidential Annex), p. 3-16 (**Annex IT-233**).

1271 Hearing Transcript, 20 July 2019, 12:20-13:1, *citing* Piroli Report (Confidential Annex), p. 4-5 (**Annex IT-233**).

1272 Hearing Transcript, 8 July 2019, 195:21-196:2.

1273 Hearing Transcript, 20 July 2019, 16:13-19, *referring to* VPD Manual (Confidential Annex) (**Annex IT-234**); Piroli Report (Confidential Annex), p. 1-20 (**Annex IT-233**).

long-barrel rifles slung over their shoulders.[1274] With regard to the warning shots fired by the Marines, India states:

> It strains belief that, under the circumstances, the Marines could keep track of where each of their rounds landed, particularly given that only nine of the total of 20 rounds fired, and just two of the eight rounds fired from the closest distance (100 meters), were tracer bullets that could be visually followed.[1275]

705. Italy points to Captain Vitelli's announcement three times on the vessel's public address system that "[w]e are under pirate attack. This is not a drill",[1276] together with the fact that he sent all non-essential crew to the citadel.[1277] According to Italy, these actions during the incident coupled with an SSAS message sent by Captain Vitelli immediately after the "Enrica Lexie" incident, when the "St. Antony" navigated away from the "Enrica Lexie", demonstrate that he perceived the "nature of distress" as a "piracy/armed attack".[1278]

706. Italy concludes that the Marines may have been wrong about whether the "Enrica Lexie" was being approached by a pirate skiff, "but there is no credible basis to doubt that the marines considered that the Enrica Lexie was at risk of a pirate attack" both by reference to these statements and the general context in that part of the Indian Ocean during the time of the incident.[1279]

(b) **Interpretation and Application of Article 100 (Duty to Cooperate), in Conjunction with Article 300 (Good Faith and Abuse of Rights)**

i. Position of Italy

707. Italy submits that India breached Article 100 of the Convention, which imposes a strong, and not merely hortatory, duty on all States to cooperate to the fullest extent in the repression of piracy. In particular, Italy claims that India breached this Article by failing to recognise and uphold the

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1274 India's Rejoinder, paras 4.22-4.23. *See also* Hearing Transcript, 11 July 2019, 90:21-91:7; Hearing Transcript, 20 July 2019, 16:6-10.

1275 India's Counter-Memorial, para. 2.27, *referring to* Piroli Report (Confidential Annex), pp 2-7-2-8 (**Annex IT-233**).

1276 Italy's Reply, para. 4.19, *citing* Declaration of Umberto Vitelli, 19 February 2012 (**Annex IT-141**). *See also* Hearing Transcript, 8 July 2019, 191:21-23.

1277 Italy's Reply, para. 4.19, *referring to* (Confidential Annex), p. 1 (**Annex IT-236**).

1278 Italy's Memorial, para. 4.28, *citing* Ship Security Alarm System Message sent out by the "Enrica Lexie" on 15 February 2012 (**Annex IT-3**). *See also* Hearing Transcript, 8 July 2019, 191: 23-192:1.

1279 Hearing Transcript, 8 July 2019, 197:19-198:3.

immunity of the Marines and by asserting jurisdiction over the "Enrica Lexie" and the Marines in respect of the incident.[1280]

708. In this regard, Italy submits:

> If the Tribunal finds that India breached any of Articles 87, 92 or 97 of UNCLOS, and as a result orders that India cannot exercise criminal jurisdiction over the Marines, it will not be necessary for the Tribunal to determine Italy's claim under Article 100. If, however, the Tribunal were to find [...] that India was not in breach of any of these Articles, and finds [...] that the *Enrica Lexie* decided to change course for Kochi voluntarily, then India would nonetheless have breached Article 100 of UNCLOS, read with Article 300 of UNCLOS. This Section proceeds on those alternative bases.[1281]

709. In addition, Italy submits that India violated Article 100, read in conjunction with Article 300. According to Italy, it is well established that Article 300 cannot be breached on its own, but only in conjunction with other obligations under the Convention.[1282] Conversely, a mere breach of a provision of the Convention itself is not sufficient to constitute a breach of Article 300 – it must be established that the provision was violated in breach of good faith.[1283]

710. Applying this to the facts, Italy submits that India violated Article 100 in bad faith, and is therefore in violation of Article 300 as well, by "directing the *Enrica Lexie* to assist with an investigation of an incident of piracy as a pretext for obtaining custody of the *Enrica Lexie* and the Marines".[1284] Italy submits that such instruction constitutes an abuse of right because, in its view, although India purported to require cooperation to repress piracy, India's real motive was to obtain custody of those who allegedly fired the shots. In support of this claim, Italy submits that India informed the Marines that they were under investigation for murder only after they arrived in Kochi.[1285]

1280 Italy's Memorial, paras 10.66-10.68. *See also* Hearing Transcript, 10 July 2019, 22:19-23, 24:23-25:8, 30:15-31:6; Hearing Transcript, 18 July 2019, 98:7-24, 99:9-22.

1281 Italy's Reply, para. 7.117 [emphases omitted].

1282 Hearing Transcript, 10 July 2019, 31:7-33:11, *referring to* PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 303; *M/V "Norstar" (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], paras 232-308.

1283 Hearing Transcript, 10 July 2019, 32:20-33:3, *citing M/V "Norstar" (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], para. 243.

1284 Italy's Memorial, para. 10.68. *See also* Italy's Memorial, para. 10.69, *referring to* Declaration of Sahil Gupta, 15 February 2012 (**Annex IT-118**); Letter from the Mercantile Marine Department of the Ministry of Shipping of India to the Commissioner of Police, Kochi, 23 March 2012, attaching "Interim Report into the Marine Casualty of Death of Two Fishermen off Kochi due to Firing by M.T. *Enrica Lexie*, Flag Italy, on 15.02.2012", 12 March 2012, p. 7 (**Annex IT-161**); "Coast Guard, fishermen made a smart move", The Times of India (Electronic Edition), 18 February 2012 (**Annex IT-39**). *See also* Italy's Reply, para. 7.120; Hearing Transcript, 10 July 2019, 22:24-23:1, 25:9-14.

1285 Italy's Memorial, para. 10.70, *referring to* "Coast Guard, fishermen made a smart move", The Times of India (Electronic Edition), 18 February 2012 (**Annex IT-39**); "Smart move brings ship to Kochi", The New Indian Express, 18 February 2012 (**Annex IT-137**). *See also* Italy's Reply, para. 7.125.

711. Furthermore, Italy claims that the e-mail from MRCC Mumbai, in which the "Enrica Lexie" was requested to proceed to Kochi for "further deposition/clarification" regarding a "piracy incident/firing incident", confirms that the Indian authorities wanted to create the impression that the assistance was for a piracy incident because by that time they already knew that no pirates or pirate vessels were involved.[1286] Italy cites communications between Indian authorities to support its view that their real motivation was to investigate the alleged shooting of the fishermen instead of any incident of piracy.[1287] Italy further submits that the "misleading of the *Enrica Lexie* by Indian authorities" was characterised as a "trick" by the Indian Coast Guard and as a "mystification of facts" by Admiral Piroli.[1288]

712. Italy also disagrees with India's claim that Articles 100 and 300 do not apply in this case because no piracy act was involved in the "Enrica Lexie" incident. In Italy's view, Article 100 cannot be read as conditional on an act of piracy having occurred because it would render the obligation thereunder "meaningless and inoperable".[1289] Rather, Italy posits that Article 100 is "engaged in respect of precautionary planning, in respect of the taking of dissuasive action, in respect of engagement with vulnerable vessels, and much more".[1290] In fact, Italy points out, the Supreme Court of India itself considered Article 100 to play an important role in addressing the question of India's jurisdiction over the Marines and their immunity with respect to the "Enrica Lexie" incident.[1291]

1286 Italy's Reply, para. 7.121, *referring to* E-mail from the Master of the "Enrica Lexie" to MSCHOA and UKMTO, 16:18 (CET), 15 February 2012 (**Annex IT-120**); Hearing Transcript, 10 July 2019, 33:12-34:12.

1287 Italy's Reply, paras 7.122-7.124, *referring to* General Diary Extract of Coastal Police Station, Neendakara, Kollam, 15 February 2012 (**Annex IT-113**); Statement of Witness in connection with the NIA investigation, Statement of Commandant Neeraj Sharma, Commandant, Coast Guard Headquarters, Delhi, 12 July 2013, p. 39 (**Annex IT-276**); Statement of Witness in connection with the NIA investigation, Statement of K. Suresh, Uttam Adhikari, Coast Guard Regional Headquarters, Andaman and Nicobar Islands, 20 September 2013, p. 35 (**Annex IT-280**); Statement of Witness in connection with the NIA investigation, Statement of Shri N.V. Rama Rao, Commandant, Coast Guard, Officer In-Charge, MRCC Mumbai, 16 July 2013, pp 128-129 (**Annex IT-277**).

1288 Italy's Reply, para. 7.126 [emphases omitted], *citing* "Coast Guard, fishermen made a smart move", The Times of India (Electronic Edition), 18 February 2012 (**Annex IT-39**); Piroli Report (Confidential Annex), pp 3-35, 4-8 (**Annex IT-233**).

1289 Hearing Transcript, 10 July 2019, 24:1-5.

1290 Hearing Transcript, 10 July 2019, 24:7-12.

1291 Hearing Transcript, 10 July 2019, 24:21-28:10, *referring to Republic of Italy & Ors v. Union of India & Ors*, Supreme Court of India, Judgment of 18 January 2013, Judgment of Kabir CJ, para. 101 (**Annex IT-19**). *See also* Hearing Transcript, 18 July 2019, 100:4-101:19.

ii. Position of India

713. India submits that it has already addressed the first two of Italy's arguments for the alleged breach of Article 100 as baseless. According to India, these arguments have nothing to do with the repression of piracy because the "Enrica Lexie" incident did not involve an act of piracy, and India "had virtually eradicated piracy off its coast".[1292] In addition, contrary to Italy's claim, India does not agree and has not admitted in its submissions that Article 100 is relevant to the question of immunities, nor that it incorporates the international law rules on immunity of State officials from criminal jurisdiction.[1293] In any event, even if Article 100 were somehow relevant to the question of the Marines' immunities, Italy's claims of breach would fail because the Arbitral Tribunal has no jurisdiction to address that question on the merits.[1294] India also maintains that the obligation to cooperate under Article 100 is not absolute and cannot extend to upholding the Marines' immunities in this case, otherwise it would give States a *carte blanche* to take any counter-piracy measures they wish "without regard to their legality, legitimacy or the burden imposed on other states by those [measures]".[1295]

714. India similarly dismisses Italy's claim that India breached Article 100 in conjunction with Article 300 because it abused its right to cooperation in the repression of piracy and maintains that it acted well within its right under Article 100 to request assistance from Italy in investigating the incident.[1296]

715. A finding of bad faith, India first notes, must be established by clear and convincing evidence.[1297] Yet, India alleges, Italy has not presented any evidence to this effect.[1298] In fact, India claims that it did not even invoke Article 100 in seeking cooperation from the "Enrica Lexie", but rather sought Captain Vitelli's cooperation, which he freely gave without having been misled.[1299]

716. In this regard, India rejects Italy's claim that India engaged in trickery to lure the "Enrica Lexie" to its territorial waters. In particular, India's request for the "Enrica Lexie" to head to Kochi did not cause it to change course.[1300] Moreover, according to India, the e-mail from MRCC Mumbai

1292 India's Counter-Memorial, para. 6.73. *See also* India's Counter-Memorial, paras 6.63, 6.66, 6.74, 6.77.

1293 Hearing Transcript, 13 July 2019, 3:6-4:1; Hearing Transcript, 20 July 2019, 78:9-79:21.

1294 Hearing Transcript, 20 July 2019, 79:22-80:7.

1295 Hearing Transcript, 20 July 2019, 81:10-17.

1296 India's Rejoinder, para. 6.75.

1297 Hearing Transcript, 13 July 2019, 4:13-4:4, *referring to Tcana-Arica Question (Chile/Peru)*, Award of 4 March 1925, RIAA Vol. 2, p. 921 at p. 930. *See also* Hearing Transcript, 20 July 2019, 82:11-83:2.

1298 Hearing Transcript, 13 July 2019, 5:5-8.

1299 India's Rejoinder, para. 6.75.

1300 Hearing Transcript, 20 July 2019, 86:6-16.

to the "Enrica Lexie", which describes a "piracy incident/firing incident", simply shows that Indian authorities did not have "any preconceived mindset" [1301] and were then "in the dark", which is why they requested cooperation to clarify the situation.[1302] In India's view, the e-mail "merely reflects the difficult situation in which the MRCC was, handling two different – and yet unverified – [pieces of] information: one about a firing incident, and the other – which had started circulating from international agencies and the Enrica Lexie itself – about a pirate attack".[1303] This is further corroborated, according to India, by an e-mail sent later that day to the Master in which MRCC Mumbai explained that "the firing incident needs to be investigated" and formally requested the Master "to be in the anchored position till completion of the said investigation".[1304] India argues that the General Diary Extract of the Coastal Police Station again proves that the Indian authorities were uncertain on the situation and wanted to ascertain the facts instead of prejudging them.[1305]

717. Noting that "the only annex Italy refers to that mentions a trick, is a press report",[1306] India emphasises that the ICJ has explained in several cases that press information must not be regarded as evidence capable of proving facts.[1307] Moreover, India submits that the newspaper article does not give factual information but rather an impression. India argues that the e-mail from MRCC Mumbai contained nothing that could reasonably mislead the Master, who, according to India, decided on his own to proceed to Kochi.[1308]

718. Conversely, India argues that "the *Enrica Lexie*'s attitude violated both Article 100 and 300".[1309] According to India, the "Enrica Lexie" did not contact the MRCC as they were supposed to, did not inform India of the passage of the "Enrica Lexie" off India's coast when armed military personnel were on board, and did not notify India as to the presence of the Marines on board.

1301 India's Counter-Memorial, para. 6.70. *See also* India's Rejoinder, paras 6.77-6.80, *citing* E-mail from the Master of the "Enrica Lexie" to MSCHOA and UKMTO, 16:18 (CET), 15 February 2012 (**Annex IT-120**).

1302 India's Rejoinder, para. 6.79. *See also* Hearing Transcript, 13 July 2019, 5:9-8:21.

1303 Hearing Transcript, 13 July 2019, 9:6-13.

1304 India's Counter-Memorial, para. 6.71, *citing* E-mail from the Master of the "Enrica Lexie" to MRCC Mumbai, 23:39 (IST), 15 February 2012, and E-mail from MRCC Mumbai to the Master of the "Enrica Lexie", 21:14 (CET), 15 February 2012 (**Annex IT-122**).

1305 India's Counter-Memorial, paras 6.68-6.69; India's Rejoinder, para. 6.79, both *referring to* General Diary Extract of Coastal Police Station, Neendakara, Kollam, 15 February 2012 (**Annex IT-113**).

1306 India's Rejoinder, para. 6.81, *referring to* Italy's Reply, ns 565, 567.

1307 India's Rejoinder, para. 6.81, *referring to Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 14 at p. 40, para. 62.

1308 India's Rejoinder, para. 6.81.

1309 India's Counter-Memorial, para. 6.75.

India concludes that "[t]hese omissions are hardly compatible with a cooperation on Italy's part *bona fide* to suppress piracy".[1310]

(c) **Analysis of the Arbitral Tribunal**

719. Italy submits that if the Arbitral Tribunal were to find that India was not in breach of Articles 87, 92, and 97 of the Convention, then India would nonetheless have breached Article 100 read with Article 300 of UNCLOS.[1311] Italy, in its final submission (quoted in paragraph 75 above), states that "India abused its right to seek Italy's cooperation in the repression of piracy, in breach of Article 300 read in conjunction with Article 100 of UNCLOS".

720. Italy claims that India violated Article 100 of UNCLOS because the real motive of India in directing the "Enrica Lexie" to proceed to port was not to seek assistance with an investigation of piracy but to obtain custody of those who allegedly fired shots at the "St. Antony".[1312] Italy further claims that India violated Article 100 in bad faith, thus violating Article 300 of UNCLOS as well.[1313]

721. India denies these allegations by pointing out that the available information proves that, by directing the "Enrica Lexie" to proceed to Kochi, the competent Indian authorities "wanted to ascertain the facts, without prejudging them".[1314] India stresses that "[t]he fight against piracy cannot serve as an excuse for criminal acts or to legitimize unfounded claims".[1315]

722. The Arbitral Tribunal notes that Article 100 does not stipulate the forms or modalities of cooperation States shall undertake in order fulfil their duty to cooperate in the repression of piracy. In its commentary to Article 38 of the ILC Draft Articles Concerning the Law of the Sea, the forerunner of Article 100 of the Convention, the ILC made the following observation:

> Any state having an opportunity of taking measures against piracy, and neglecting to do so, would be failing in a duty laid upon it by international law. Obviously, the State must be allowed a certain latitude as to the measures it should take to this end in any individual case.[1316]

1310 India's Counter-Memorial, para. 6.76.

1311 Italy's Reply, para. 7.117.

1312 Italy's Memorial, paras 10.68-10.70.

1313 Italy's Memorial, para. 10.68; Italy's Reply, paras 7.120, 7.126.

1314 India's Counter-Memorial, para. 6.69.

1315 India's Counter-Memorial, para. 6.77.

1316 International Law Commission, "Articles Concerning the Law of the Sea with Commentaries" in *Yearbook of the International Law Commission*, Vol. II, p. 265 at p. 282 (commentary to Article 38, para. 2) (1956).

723. The duty to cooperate under Article 100 of the Convention "does not necessarily imply a duty to capture and prosecute pirates".[1317] Rather, States' obligations under Article 100 can be implemented, for example, by including "in their national legislation provisions on mutual assistance in criminal matters, extradition and transfer of suspected, detained and convicted pirates" or conclusion of "bilateral and multilateral agreements or arrangements in order to facilitate such cooperation".[1318] This is consistent with other provisions of the Convention prescribing a duty to cooperate as "a duty of a continuing nature – an obligation of conduct rather than a one-time commitment or result".[1319]

724. In this regard, the Arbitral Tribunal notes that India has provided sufficient information confirming that it has taken and is taking active steps to prevent piracy attempts at sea and plays an active role in this regard within the framework of the ReCAAP, launched in November 2006.[1320]

725. Moreover, the Arbitral Tribunal notes that when MRCC Mumbai first contacted the "Enrica Lexie" by telephone and instructed it to change course and head towards Kochi, the MRCC explained that this was necessary in order to "take stock of events" in connection with the information it had received about the suspected pirate attack,[1321] which is evidence of India's willingness to cooperate in the repression of piracy. Therefore, given that "the State must be allowed a certain latitude as to the measures it should take",[1322] the Arbitral Tribunal does not

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1317 Alexander Proelß (ed.), *The United Nations Convention on the Law of the Sea: A Commentary* (C.H. Beck, Hart, Nomos, 2017), p. 734, para. 1.

1318 International Maritime Organization, 'Circular letter No. 3180 concerning information and guidance on elements of international law relating to piracy', 17 May 2011, LEG 98/8/3 of 18 February 2011, para. 17. *See also* James Kraska, *Contemporary Maritime Piracy: International Law, Strategy, and Diplomacy at Sea* (Praeger Security International, 2011), p. 128. ("*Adoption, of a national legislation relating to piracy is a manifest pre-condition for state to fulfil the duty to co-operate*"), cf. Alexander Proelß (ed.), *The United Nations Convention on the Law of the Sea: A Commentary* (C.H. Beck, Hart, Nomos, 2017), p. 737, para. 1. ("*This duty does not expressly require that States have an adequate national criminal law addressing piracy; many States have lacked such laws historically and many continue to do so*").

1319 Seokwoo Lee, Jeong Woo Kim, 'UNCLOS and the Obligation to Cooperate: International Legal Framework for Semi-Enclosed Seas Cooperation', in Keyuan Zou (ed.), *Maritime Cooperation in Semi-Enclosed Seas* (Nijhoff, 2019), p. 12.

1320 India's Counter-Memorial, paras 1.25-1.27.

1321 Log Book of the Master of the "Enrica Lexie", p. 2 (**Annex IT-14**).

1322 International Law Commission, "Articles Concerning the Law of the Sea with Commentaries" in *Yearbook of the International Law Commission*, Vol. II, p. 265, at p. 282 (commentary to Article 38, para. 2) (1956).

find that India breached its obligation to cooperate in the repression of piracy, even from the viewpoint that "States may not lightly decline to intervene against acts of piracy".[1323]

726. In respect of Italy's allegation that India's real motive in directing the "Enrica Lexie" to proceed to Kochi was not to seek assistance with an investigation of piracy, the Arbitral Tribunal recalls that it has already determined that Italy has not discharged its burden of proof in regard to its allegation that India perpetrated a ruse in order to bring the "Enrica Lexie" into India's territorial waters (*see* paragraph 489). The Arbitral Tribunal recalls in this regard that, in analyzing the alleged violation by India of Article 87, paragraph 1, subparagraph (a), it has found that this communication from the MRCC Mumbai did not amount to a breach of Italy's freedom of navigation.

727. Further, the Arbitral Tribunal observes that as reflected in the ILC's commentary cited above, the threshold for accusing a State of violating Article 100 of UNCLOS is relatively high, and Italy has not provided sufficient evidence to discharge its burden of proof in this regard.

728. Accordingly, the Arbitral Tribunal concludes that India has not violated its duty to cooperate in the repression of piracy under Article 100 of the Convention.

729. With reference to Italy's allegation of the violation by India of Article 300 of the Convention, the Arbitral Tribunal notes that in the *M/V "Norstar"* case, ITLOS stated:

> article 300 of the Convention cannot be invoked on its own. Therefore, a State Party claiming a breach of article 300 must first identify "the obligations assumed under this Convention" that are not fulfilled in good faith or "the rights, jurisdiction and freedoms recognized in this Convention" that are exercised in an abusive manner. The State Party then has to establish a link between its claim under article 300 and "the obligations assumed under this Convention" or "the rights, jurisdiction and freedoms recognized in this Convention".[1324]

730. Consequently, the Arbitral Tribunal finds that, in light of its conclusion that India has not violated Article 100 of the Convention, Article 300 cannot be invoked in the present case.

4. Remedies

731. The Parties have each presented their positions on the question of remedies. However, considering that the Arbitral Tribunal has concluded that India has not violated Articles 87, 92, 97, or 100 in

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1323 Rüdiger Wolfrum, 'Fighting Terrorism at Sea: Options and Limitations under International Law' in Myron H. Nordquist, Rüdiger Wolfrum, Ronán Long (eds.), *Legal Challenges in Maritime Security* (Brill, Nijhoff 2008), at p. 3.

1324 *M/V "Norstar" (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], para. 241.

conjunction with 300, there is no need for the Arbitral Tribunal to consider the question of remedies in this respect.

C. ALLEGED VIOLATION BY INDIA OF THE IMMUNITY OF THE MARINES

732. The Arbitral Tribunal will next address Italy's claim that India has acted inconsistently with UNCLOS by exercising jurisdiction over the Marines even though the Marines, as Italian State officials exercising official functions, enjoy immunity.

1. Jurisdiction

733. Before proceeding to the consideration of the merits of Italy's claim, the Arbitral Tribunal must determine whether it has jurisdiction over such claim.

(a) Jurisdiction pursuant to Article 288, paragraph 1, in Conjunction with Article 2, paragraph 3, Article 56, paragraph 2, and Article 58, paragraph 2, of UNCLOS

734. Italy submits that the question whether the Marines enjoy immunity from Indian criminal jurisdiction concerns the interpretation and application of the Convention in view of Article 2, paragraph 3; Article 56, paragraph 2; and Article 58, paragraph 2, of UNCLOS, which "import immunity by *renvoi*".[1325]

735. Article 288, paragraph 1, of the Convention provides:

> *Article 288*
>
> *Jurisdiction*
>
> 1. A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.

736. Article 2, paragraph 3, of the Convention provides:

> *Article 2*
>
> *Legal status of the territorial sea, of the air space over the territorial sea and of its bed and subsoil*
>
> 3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.

[1325] Italy's Memorial, paras 8.17, 11.1.

737. Article 56, paragraph 2, of the Convention provides:

> *Article 56*
>
> *Rights, jurisdiction and duties of the coastal State in the exclusive economic zone*
>
> 2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State 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.

738. Article 58, paragraph 2, of the Convention provides:

> *Article 58*
>
> *Rights and duties of other States in the exclusive economic zone*
>
> 2. 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.

739. India denies that Italy's claim concerns the interpretation and application of any provision of the Convention.[1326]

i. Position of India

740. India submits that "Italy's claim fails, first and foremost, because none of the provisions of UNCLOS it invokes deals with, nor refers to, the issue of the immunity of the marines from criminal jurisdiction of foreign courts and tribunals".[1327] India refers to the finding in *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom) (*hereinafter "*Chagos Marine Protected Area Arbitration*") that if "the 'real issue in the case' and the 'object of the claim' [...] do not relate to the interpretation or application of the Convention, [...] an incidental connection between the dispute and some matter regulated by the Convention is insufficient to bring the dispute, as a whole, within the ambit of Article 288(1)".[1328] India asserts that, contrary to Italy's claim, when determining the "real issue in the case" and the "object of the claim", tribunals have adopted an objective, rather than purposive or pragmatic, approach.[1329]

741. Applying this to the facts of this case, India argues that Italy's claim "is essentially based on a set of rules extraneous to UNCLOS, belonging to general (customary) international law on

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1326 India's Counter-Memorial, para. 5.10.

1327 Hearing Transcript, 12 July 2019, 73:9-13.

1328 India's Counter-Memorial, para. 5.9, *citing* PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 220. *See also* India's Rejoinder, para. 3.12.

1329 India's Rejoinder, paras 3.11, 3.13-3.14, *citing* PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Award on Jurisdiction and Admissibility of 29 October 2015, para. 150.

immunities of States officials".[1330] Indeed, India observes, "nothing in UNCLOS concerns or refers to the immunities of military personnel on board commercial ships".[1331] In particular, the Convention contains no provision concerning the immunities of State officials, and the only provisions that address immunity – Articles 95 and 96 – pertain to the immunity of warships and ships used only on government non-commercial service.[1332] While ITLOS did recently hold, in the case *Concerning the Detention of Three Ukrainian Naval Vessels*, that the rights claimed by Ukraine in relation to the immunity of its naval vessels on the basis of, *inter alia*, Articles 95 and 96 of the Convention "are plausible under the circumstances,"[1333] the circumstances in this case are different because the "Enrica Lexie" is neither a warship within the meaning of Article 29 of the Convention nor "a ship owned or operated by a State and used only on government non-commercial services".[1334]

742. Further, India finds it telling that Article 97, which was invoked by Italy and immediately follows the only two articles in the Convention that deal with immunities, does not expressly mention immunities. In India's view, this was intentional on the part of the drafters, and therefore any consideration by this Arbitral Tribunal of immunities issues not envisaged in the Convention, as Italy urges, would exceed its jurisdiction.[1335]

743. Accordingly, India contends, because the "'real issue in the case' and the 'object of the claim' [...] do not relate to the interpretation or application of the Convention", the Arbitral Tribunal does not have jurisdiction over Italy's claim.[1336]

744. In addition, India submits that Italy's *renvoi* argument would "abusively stretch the meaning" of "other rules of international law" in Article 2, paragraph 3, of the Convention; "the rights and duties of other States" in Article 56, paragraph 2, of the Convention; and "other pertinent rules of international law" in Article 58, paragraph 2, of the Convention.[1337] Although these provisions refer to international law, India argues that they "clearly do not intend to constitute a *renvoi* to

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1330 India's Rejoinder, para. 3.14.

1331 Hearing Transcript, 12 July 2019, 74:22-24. *See also* Hearing Transcript, 12 July 2019, 74:1-23.

1332 India's Counter-Memorial, para. 5.10.

1333 Hearing Transcript, 12 July 2019, 79:5-80:20, *citing Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation)*, Provisional Measures, Order of 25 May 2019, ITLOS Reports 2018-2019 [forthcoming], paras 93, 96-97.

1334 Hearing Transcript, 12 July 2019, 80:1-4. *See also* Hearing Transcript, 12 July 2019, 80:5-81:5.

1335 Hearing Transcript, 12 July 2019, 78:17-79:4.

1336 India's Counter-Memorial, para. 5.9, *citing* PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 220.

1337 India's Rejoinder, para. 3.8. *See also* Hearing Transcript, 12 July 2019, 98:11-99:15.

international law in general", including any law of immunity.[1338] Rather, the rights and duties envisaged by these provisions can only be those protected by the Convention, as they may be interpreted in light of the general rules of international law, and do not include unrelated issues of international law not provided for or relevant under the Convention.[1339]

745. Specifically in relation to Article 2, paragraph 3, of the Convention, India submits that the relevant international jurisprudence confirms that "[t]he sole mention of the sovereignty of the state does not attract, under the Convention, all the rules of international law deriving from the principle of sovereignty, including state immunities".[1340]

746. According to India, in the recent *Immunities and Criminal Proceedings (Equatorial Guinea v. France)* (hereinafter "*Immunities and Criminal Proceedings*") case, the ICJ found that Article 4, paragraph 1, of the Palermo Convention,[1341] which requires parties to "carry out their obligations [...] in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States", "does not appear to create new rules concerning the immunities of holders of high-ranking office in the state or incorporate rules of customary international law concerning those immunities".[1342] Similarly, the ICJ in the *Oil Platforms* case found that Article I of the 1955 Treaty of Amity,[1343] which provided that there shall be firm and enduring peace and sincere friendship between the parties, was relevant for the interpretation of other provisions in the Treaty, but could not form the basis for the jurisdiction of the court in relation to the regulation of peace and friendly relations between the States in a general sense.[1344] Likewise in this case, India argues, while Article 2, paragraph 3, of the Convention "can be used in view of throwing light on the interpretation of the other provisions", "it cannot be a basis for the jurisdiction of the court in the matter of the immunity of the marines, which is simply alien to the provision".[1345]

747. India submits that the above reasoning applies *mutatis mutandis* to Italy's *renvoi* argument in connection with Article 56, paragraph 2, and Article 58, paragraph 2, of the Convention, which

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1338 India's Counter-Memorial, para. 5.12.

1339 India's Counter-Memorial, para. 5.12. *See also* Hearing Transcript, 12 July 2019, 86:8-87:4.

1340 Hearing Transcript, 12 July 2019, 92:8-11.

1341 United Nations Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/25 of 15 November 2000.

1342 Hearing Transcript, 12 July 2019, 89:4-25.

1343 Treaty of Amity, Economic Relations, and Consular Rights. Signed at Tehran, on 15 August 1955.

1344 Hearing Transcript, 12 July 2019, 87:5-88:17, *referring to Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, I.C.J. Reports 2003, p. 161 at p. 213, para. 117.

1345 Hearing Transcript, 12 July 2019, 88:18-89:2.

are "irrelevant and unconnected with the facts [of this] case".[1346] This is because, India reasons, those articles apply to the exclusive economic zone, and the exercise of adjudicative jurisdiction by a court on the territory of a State concerning events that occurred within the exclusive economic zone is not an exercise of jurisdiction within that zone, and accordingly, they do not apply in this case.[1347]

748. In pursuing such an interpretation of the provisions, India additionally asserts, Italy is "attempt[ing] to blur the fundamental distinction between jurisdiction and applicable law" and improperly trying to extend the jurisdiction of the Arbitral Tribunal beyond the limits prescribed under UNCLOS. [1348]

749. Referring to scholarly commentary and decisions of international courts and tribunals, India emphasises that the reference to "other rules of international law" in Article 293, paragraph 1, of the Convention, which determines the applicable law to this dispute, cannot be used to extend the jurisdiction of a tribunal.[1349] In particular, India argues, Article 293 cannot be used as a means to obtain a determination that certain rules of customary international law, such as those relating to the immunity of State officials from foreign criminal jurisdiction, have been violated, unless those rules themselves are a source of jurisdiction for the Arbitral Tribunal, or unless they otherwise directly apply pursuant to the Convention.[1350] In this case, according to India, the alleged rule on immunities that Italy invokes "is not referred to either expressly or implicitly in the Convention; nor is it, by any stretch of the imagination, a source of jurisdiction for this Tribunal".[1351]

750. Consequently, according to India, interpreting Article 2, paragraph 3; Article 56, paragraph 2; and Article 58, paragraph 2, of the Convention in the way Italy proposes "would call for the same criticisms as those rightly addressed to an excessively broad interpretation of Article 293".[1352]

1346 Hearing Transcript, 12 July 2019, 95:8-16, 96:13-16.

1347 India's Rejoinder, para. 3.19, *referring to M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, ITLOS Reports 2013, p. 4 at p. 36, para. 109. *See also* Hearing Transcript, 12 July 2019, 95:17-96:16.

1348 India's Counter-Memorial, paras 5.2-5.7, 5.12.

1349 India's Counter-Memorial, paras 5.6-5.7, *citing* PCA Case No. 2014-02: *The Arctic Sunrise Arbitration (Netherlands v. Russia)*, Award on the Merits of 14 August 2015, para. 188.

1350 India's Counter-Memorial, para. 5.7, *citing* PCA Case No. 2014-02: *The Arctic Sunrise Arbitration (Netherlands v. Russia)*, Award on the Merits of 14 August 2015, para. 188.

1351 India's Counter-Memorial, para. 5.7.

1352 India's Counter-Memorial, para. 5.12.

751. India further disagrees that Italy's interpretation of Article 2, paragraph 3; Article 56, paragraph 2; and Article 58, paragraph 2, of the Convention is in any way assisted by the fact that questions of immunity and jurisdiction are inextricably linked.[1353]

752. According to India, "the existence of a link between two aspects of a dispute does not necessarily mean that *both* aspects come within the jurisdiction of the court or tribunal seized of the case".[1354] India argues that, in fact, decisions of international courts or tribunals demonstrate that tribunals regularly decide only the specific legal questions over which they have jurisdiction, despite there being other legal questions that are related and implicated in a single dispute.[1355] India concludes from this that it is insufficient merely to invoke a link between different aspects of a dispute to establish a basis of jurisdiction. Rather, case law demonstrates that the Arbitral Tribunal's jurisdiction must be established with respect to each element of the allegedly linked aspects.[1356]

753. Neither, in India's view, is Italy assisted by its argument that the Arbitral Tribunal must reach a decision on immunity or risk not settling the overall dispute between the Parties in regards to jurisdiction over the Marines.[1357] As an initial matter, India maintains that the Arbitral Tribunal does not have jurisdiction to decide the question of which Party may exercise criminal jurisdiction over the Marines.[1358] In addition, one of the reasons India considers the entire case to fall outside the Arbitral Tribunal's jurisdiction is precisely because the core issue of jurisdiction cannot be settled without deciding on the Marines' immunity, and the latter does not concern the application and interpretation of the Convention.[1359] Moreover, India notes, even if the Arbitral Tribunal found that it had jurisdiction over this matter globally, it does not mean that it has jurisdiction over the limited question of immunities, as mentioned above, in particular since "[i]n the international field, the existence of obligations that cannot in the last resort be enforced by any legal process, has always been the rule rather than the exception".[1360]

754. India further maintains that its use of the "necessary for and connected with" test, to support its counter-claim that its rights under Article 56, paragraph 1, include the right to protect its

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1353 India's Rejoinder, para. 3.4.

1354 India's Rejoinder, para. 3.4 [emphasis added by India]. *See also* Hearing Transcript, 12 July 2019, 103:21-104:10, *citing* PCA Case No. 2013-19, *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Award on Jurisdiction and Admissibility of 29 October 2015, para. 152.

1355 India's Rejoinder, paras 3.6-3.9.

1356 India's Rejoinder, para. 3.10.

1357 Hearing Transcript, 12 July 2019, 99:22-101:19.

1358 Hearing Transcript, 12 July 2019, 101:12-20.

1359 Hearing Transcript, 12 July 2019, 101:21-102:5.

1360 Hearing Transcript, 12 July 2019, 102:7-24, *citing South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase*, Judgment, I.C.J. Reports 1966, p. 6, at p. 46, para. 86.

fishermen in all circumstances, does not contradict its arguments against Italy's *renvoi* claim with respect to Article 56, paragraph 2. In India's view, this difference is explained by the fact that "the exclusive fishing right claimed by India is the direct and express consequence of the 'sovereign rights'" enumerated in Article 56, paragraph 1, while "[t]here is nothing like this with regard to Italy's alleged right to enforce the immunity of its military personnel in the exclusive [economic] zone".[1361]

755. In the alternative, even if Article 2, paragraph 3; Article 56, paragraph 2; and Article 58, paragraph 2, of the Convention do incorporate the rules of customary international law on immunity, India maintains that the Arbitral Tribunal still lacks jurisdiction because Italy has failed to establish that the alleged breaches of the Marines' immunity were committed in India's exclusive economic zone or territorial sea.[1362]

756. India notes that the topic of immunity of State officials from foreign criminal jurisdiction remains "extremely controversial", as evidenced by the debates both in the ILC and at the Sixth Committee of the United Nations General Assembly, and the fact that there is no multilateral treaty providing for compulsory jurisdiction for disputes concerning the interpretation or application of such rules.[1363] Italy, India points out, does not appear to dispute this.[1364] In light of "the reluctance to codify the law of state officials' immunity and, *a fortiori*, to institute compulsory jurisdiction in this area", India therefore considers it "rather paradoxical if UNCLOS overcame this reluctance and filled this gap in international law by, in addition, complementing it with a mandatory mechanism for the settlement of [such] disputes".[1365]

757. In any event, India does not agree that Italy has properly established any breach of the Marines' immunities in India's exclusive economic zone or territorial sea. While Italy cites an extract from the Second Report of Mr. Roman Kolodkin, the then-ILC Special Rapporteur on this issue, which states that an official enjoying immunity *ratione materiae* is protected from criminal procedures and restrictive measures in respect of acts performed by him in an official capacity, India maintains that this does not "advance Italy's case or [assist in] the determination of the acts

1361 Hearing Transcript, 12 July 2019, 97:7-98:9. *See also* Hearing Transcript, 20 July 2019, 136:1-10.

1362 Hearing Transcript, 12 July 2019, 105:15-106:3.

1363 Hearing Transcript, 12 July 2019, 107:1-19.

1364 Hearing Transcript, 20 July 2019, 136:11-20.

1365 Hearing Transcript, 12 July 2019, 107:20-26. *See also* Hearing Transcript, 12 July 2019, 107:23-108:1.

precluded by the immunity".[1366] Rather, India points to the more "telling"[1367] part of the Report which states that "a State which has grounds to believe that a foreign official has performed an act which is criminally punishable under its legislation, is able to carry out at least the initial collection of evidence for this case [...] using measures which are not binding or constraining on the foreign official".[1368] This was, according to India, confirmed by Ms. Concepción Escobar Hernández, the current ILC Special Rapporteur on the issue, who identified three categories of precluded acts, all of which involve "some kind of coercive effect or aiming at having one".[1369] Similarly, the ICJ in its decision in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* (hereinafter "*Certain Questions of Mutual Assistance in Criminal Matters*") held that "the determining factor in assessing whether or not there has been an attack on the immunity of the Head of State lies in the subjection of the latter to a constraining act of authority".[1370] For this reason, the ICJ found that the summons addressed to the President of the Republic of Djibouti in that case by the French investigating judge was not a breach of the immunity from criminal jurisdiction that he enjoyed because it was simply an invitation to testify which he could freely accept or decline.[1371] In their joint separate opinion in the ICJ's *Arrest Warrant* case, India observes, Judges Higgins, Kooijmans, and Buergenthal also confirmed that "commencing an investigation on the basis of which an arrest warrant may later be issued does not of itself violate [the] principles" of inviolability and immunity.[1372]

758. According to India, the Marines raised no complaint that any jurisdiction or unlawful pressure was being exercised over them or the vessel while the "Enrica Lexie" was on her way to Kochi in India's exclusive economic zone.[1373] Similarly, while in India's territorial sea, India maintains

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1366 Hearing Transcript, 12 July 2019, 108:2-109:1, *citing* R. Kolodkin, Special Rapporteur, 'Second Report to the International Law Commission on the Immunity of State Officials from Foreign Criminal Jurisdiction', U.N. Doc. A/CN.4/631, *Yearbook of the International Law Commission 2010*, Vol. II (Part 1), p. 409, para. 45.

1367 Hearing Transcript, 20 July 2019, 109:2.

1368 Hearing Transcript, 12 July 2019, 111:4-11, *citing* R. Kolodkin, Special Rapporteur, Second Report to the International Law Commission on the Immunity of State Officials from Foreign Criminal Jurisdiction, U.N. Doc. A/CN.4/631, *Yearbook of the International Law Commission 2010*, Vol. II (Part 1), p. 409, para. 43.

1369 Hearing Transcript, 12 July 2019, 111:18-112:2, *referring to* C. Escobar Hernández, Special Rapporteur, Sixth Report to the International Law Commission on Immunity of State Officials from Foreign Criminal Jurisdiction, U.N. Doc. A/CN.4/722, 12 June 2018, pp 26-27, para. 67.

1370 Hearing Transcript, 12 July 2019, 109:3-9, *citing Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, p. 177 at p. 237, para. 170.

1371 Hearing Transcript, 12 July 2019, 109:11-22, *citing Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, p. 177 at p. 237, para. 171.

1372 Hearing Transcript, 12 July 2019, 110:14-22, *citing Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, I.C.J. Reports 2002, p. 3 at pp 80-81, para. 59.

1373 Hearing Transcript, 12 July 2019, 115:2-5.

that its authorities "merely checked the identities of the persons on board and held a meeting with Italian officials, the shipmaster and the marines".[1374] India maintains that "the investigation of the events only started when the marines were in India's internal waters; and the marines were detained only on India's land territory".[1375]

759. Unlike with respect to the exclusive economic zone and territorial sea, India submits that the Convention does not similarly regulate the conduct of the coastal State on its land territory and "sets out only very few rules with regard to internal waters whose regime is outside the scope of UNCLOS".[1376] The latter is confirmed, according to India, by both academic commentators and the joint separate opinion of Judges Cot and Wolfrum in *"Ara Libertad" (Argentina v. Ghana)*, in which they found that, *inter alia*, "the fact that 'internal waters in principle are not covered by the Convention but by customary international law' is largely confirmed by the *travaux préparatoires* of the Convention".[1377]

760. As such, India submits that since no coercive act has been committed in India's exclusive economic zone or territorial sea, and the regime governing coastal States' internal waters and land territory fall outside the scope of the Convention, Italy has failed to establish that the facts in violation of the Marines' immunity are covered by at least one provision of the Convention.[1378]

761. For all these reasons, according to India, Italy's claim is not, and cannot be brought, within the Arbitral Tribunal's jurisdiction by operation of Article 2, paragraph 3; Article 56, paragraph 2; and Article 58, paragraph 2, of the Convention.

ii. Position of Italy

762. Italy submits that the Arbitral Tribunal has jurisdiction over its claim because the question of immunity arises in the interpretation or application of three provisions of the Convention, which by their plain terms effect a *renvoi* to general international law, including the law of immunity. The three provisions of the Convention that Italy invokes are Article 2, paragraph 3, which provides that sovereignty over the territorial sea is exercised subject to the Convention as well as

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1374 Hearing Transcript, 12 July 2019, 114:7-11.

1375 Hearing Transcript, 12 July 2019, 114:11-14.

1376 Hearing Transcript, 12 July 2019, 116:5-9.

1377 Hearing Transcript, 12 July 2019, 117:3-6, *citing "Ara Libertad" (Argentina v. Ghana)*, Provisional Measures, Order of 15 December 2012, Separate Opinion of Judges Cot and Wolfrum, ITLOS Reports 2012, p. 332 at pp 369-70, paras 23-24; *referring to* R.R. Churchill and V. Lowe, *The Law of the Sea* (3rd edn., Manchester University Press, 1999), p. 61; D.R. Rothwell and T. Stephens, *The International Law of the Sea* (2nd edn., Hart Publishing, 2016), p. 55.

1378 Hearing Transcript, 12 July 2019, 114:1-2, 115:23-116:3; Hearing Transcript, 20 July 2019, 133:23-134:7.

"other rules of international law"; Article 56, paragraph 2, which obliges coastal States to give "due regard to the rights and duties of other States", where those rights and duties, Italy argues, are those that arise under international law generally, not only under the Convention; and Article 58, paragraph 2, which refers to "other pertinent rules of international law" applying to the exclusive economic zone.[1379]

763. In any event, Italy maintains that India's jurisdictional objection has no merit, for various reasons.

764. Italy points out that India's objection pertains not to the Arbitral Tribunal's jurisdiction but to the merits of Italy's claim because they pertain to the questions whether certain provisions of the Convention provide for immunity, and whether they are applicable to the facts of the case.[1380] According to Italy, these questions plainly concern the interpretation and application of those provisions, thereby placing this claim squarely within the Arbitral Tribunal's jurisdiction under Article 288, paragraph 1, of the Convention.[1381]

765. Italy does not disagree with India[1382] that, as the arbitral tribunal in the *Chagos Marine Protected Area Arbitration* stated, "the jurisdiction of a court or tribunal pursuant to Article 288(1) extends to making such findings of fact or ancillary determinations of law as are necessary to resolve the dispute presented to it"[1383] and "[w]here the 'real issue in the case' and the 'object of the claim' do not relate to the interpretation or application of the Convention, however, an incidental connection between the dispute and some matter regulated by the Convention is insufficient to bring the dispute, as a whole, within the ambit of Article 288(1)".[1384]

766. Unlike India, however, Italy submits that the "real issue in the case" and "object of the claim" is "the determination of which state is entitled, under UNCLOS, to exercise jurisdiction over the two marines in relation to the incident" and that "self-evidently concerns both the interpretation and the application of the Convention".[1385] The question whether the Marines are entitled to immunity in respect of criminal proceedings before Indian courts is, in Italy's view, not the central issue as India asserts, but an "ancillary determination of law" necessary to decide which State

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1379 Italy's Reply, para. 2.54. *See also* Italy's Memorial, para. 8.17; Italy's Rejoinder, paras 4.6, 4.24; Hearing Transcript, 9 July 2019, 66:16-69:2.

1380 Italy's Reply, paras 2.53, 2.57; Italy's Rejoinder, para. 4.23.

1381 Italy's Reply, para. 2.49.

1382 Hearing Transcript, 18 July 2019, 90:19-22.

1383 Hearing Transcript, 9 July 2019, 58:2-8.

1384 Hearing Transcript, 9 July 2019, 58:2-16, *citing* PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration* (*Mauritius v. United Kingdom*), Award of 18 March 2015, para. 220. *See also* Italy's Rejoinder, para. 4.10.

1385 Hearing Transcript, 9 July 2019, 58:19-24.

may lawfully exercise jurisdiction to resolve the dispute.[1386] India's position in this regard, Italy points out, is inconsistent both "with the logical view that it is only when a domestic court is found to have jurisdiction that the question of immunity arises" and "with India's repeated assertion in respect of its domestic proceedings that considerations of jurisdiction will necessarily include the determination of immunity".[1387]

767. Consistent with the approach articulated, Italy submits that the question of the Marines' immunity is sufficiently connected to the real issue in the case to come within the scope of Article 288(1). That the issues of jurisdiction and immunity are so intertwined, Italy argues, is demonstrated by the fact that the Arbitral Tribunal will necessarily have to consider the immunity of the Marines under the Convention in order to determine which Party may lawfully exercise jurisdiction over the Marines.[1388] Italy claims that India itself admitted this when they noted that the Special Court set up pursuant to the direction of the Supreme Court of India would be able to decide the claim of immunity when it would be seised again with the question of jurisdiction.[1389]

768. Moreoever, Italy notes, any conclusion that India had criminal jurisdiction over the Marines under or consistent with the Convention, but which did not simultaneously address the immunity of the Marines would, in Italy's view, not resolve the disagreement between the Parties with which the Arbitral Tribunal is seised and lead to a "profoundly unsatisfactory outcome".[1390] This is especially the case given that the Indian courts have failed to determine the question of immunity *in limine litis* in the criminal proceedings against the Marines, in contravention of a cardinal principle of the international law on immunities.[1391] Moreover, according to Italy, "[t]here is nothing unusual in an international court or tribunal with jurisdiction over a dispute concerning the interpretation or application of a treaty deciding questions of international law that necessarily arise in the resolution of the dispute".[1392] Italy further cautions that "[a]ny other approach would gravely weaken the dispute settlement provisions in the very large number of treaties [...] that contain compromissory clauses referring to their interpretation or application".[1393]

1386 Hearing Transcript, 9 July 2019, 59: 3-4. *See also* Hearing Transcript, 9 July 2019, 58:24-59:13.

1387 Hearing Transcript, 18 July 2019, 92:25-93:8.

1388 Hearing Transcript, 18 July 2019, 93:13-19. *See also* Hearing Transcript, 18 July 2019, 107:9-18.

1389 Hearing Transcript, 18 July 2019, 93:20-94:7, *citing* Hearing Transcript, 12 July 2019, 58:21-59:19, 103:1-20.

1390 Italy's Rejoinder, para. 4.17. *See also* Hearing Transcript, 9 July 2019, 59:5-26.

1391 Hearing Transcript, 9 July 2019, 60:1-14.

1392 Italy's Rejoinder, para. 4.20.

1393 Italy's Rejoinder, paras 4.20. *See also* Hearing Transcript, 9 July 2019, 61:4-63:19.

769. Italy also disagrees with India's claim that the link between the Marines' immunity from India's criminal jurisdiction and India's exercise of jurisdiction under the Convention is irrelevant.[1394] This link, the existence of which Italy states India does not dispute, is in Italy's view highly relevant because it reinforces Italy's argument that the three provisions of the Convention incorporate rules on immunity.[1395] According to Italy, the link also explains why the effect of the three provisions of the Convention is not to incorporate all the rules of international law into the Convention, but only those relevant for the interpretation and application of the Convention in the case at issue.[1396] Italy also dismisses as irrelevant the decisions of international courts or tribunals that India cited on the basis that they "show only that other issues, having nothing to do with immunity, were held not to concern the interpretation or application of UNCLOS in the cases in question".[1397]

770. With respect to its claim that the references to general international law in certain provisions in the Convention effect a *renvoi*, Italy disagrees with India's position that it would be an abusive interpretation because the references only "serve at most an interpretative function".[1398] India's position, Italy claims, "is inconsistent with a plain reading of the text of those provisions, and with arbitral jurisprudence and scholarly commentary".[1399] For example, Italy points out, the arbitral tribunal in the *Chagos Marine Protected Area Arbitration* found that the reference to "other rules of international law" in Article 2, paragraph 3, of the Convention does include "general rules of international law".[1400]

771. In the same vein, Italy maintains that the *Immunities and Criminal Proceedings* and *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)* (hereinafter "*Certain Iranian Assets*") decisions by the ICJ "do not stand for any general proposition that rules on immunity cannot be read into a treaty that does not expressly provide for them".[1401] Rather, in Italy's view, the ICJ "clearly envisaged that this could be the case"[1402] but declined to do so based on the particular terms of the treaty provisions concerned and on the facts, both of which are

1394 Italy's Rejoinder, paras 4.13-4.22.

1395 Italy's Rejoinder, para. 4.14.

1396 Italy's Rejoinder, para. 4.14. *See also* Hearing Transcript, 18 July 2019, 107:9-18.

1397 Italy's Rejoinder, paras 4.15.

1398 Italy's Reply, para. 2.55; Italy's Rejoinder, para. 4.7.

1399 Italy's Reply, para. 2.55.

1400 Italy's Reply, para. 2.57, *citing* PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration* (*Mauritius v. United Kingdom*), Award of 18 March 2015, para. 516; Italy's Rejoinder, paras 4.9-4.10.

1401 Hearing Transcript, 9 July 2019, 70:4-6.

1402 Hearing Transcript, 9 July 2019, 69:11-15.

distinguishable from the present case.[1403] For example, Italy notes that while the provisions on which Italy relies in this case directly refer to rules of international law, there were no similar references in the Palermo Convention and the 1955 Treaty of Amity, which were at issue in the *Immunities and Criminal Proceedings* and *Certain Iranian Assets* cases, respectively.[1404] Moreover, Italy observes, the ICJ in the *Certain Iranian Assets* case recognised that the mere fact that the relevant article in the 1955 Treaty of Amity did not mention sovereign immunities or contain a *renvoi* to the rules of general international law "does not suffice to exclude the question of immunities from the scope *ratione materiae* of the provision at issue".[1405] But the ICJ went on to find that "for that question to be relevant, the breach of international law on immunities would have to be capable of having some impact on compliance with the right guaranteed" by the relevant article.[1406]

772. Applying the same approach to this case, Italy submits that the Arbitral Tribunal should find jurisdiction because "the mere fact that the UNCLOS provisions at issue in our case makes no express mention of immunities does not suffice to exclude the question of immunities from the provisions",[1407] and unlike the *Certain Iranian Assets* case, "there is an express *renvoi* to rules of international law" and a "breach of international law on immunities would most certainly be capable of having an impact on compliance with the provisions of UNCLOS".[1408]

773. Italy also dismisses as groundless India's contention that a negative inference – that these provisions cannot be interpreted to address immunity – must be drawn on the basis that there are provisions elsewhere in the Convention that expressly address immunity issues, and that those provisions, which pertain to the immunity of warships and ships in non-commercial service, are irrelevant to the case at hand.[1409] To the contrary, Italy asserts, the inclusion of express provisions on immunity in the Convention "show[s] that the law of immunity does not exist in a separate

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1403 Hearing Transcript, 9 July 2019, 69:12-70:7.

1404 Hearing Transcript, 9 July 2019, 69:16-70:3, *referring to Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, I.C.J. Reports 2018, p. 292; *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 2019, p. 7. *See also* Hearing Transcript, 18 July 2019, 109:11-15.

1405 Hearing Transcript, 9 July 2019, 71:18-72:3, *citing Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 2019, p. 7 at p. 32, para. 70. *See also* Hearing Transcript, 18 July 2019, 108:21-109:10.

1406 Hearing Transcript, 9 July 2019, 72:5-8, *citing Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 2019, p. 7 at p. 32, para. 70.

1407 Hearing Transcript, 9 July 2019, 72:9-13.

1408 Hearing Transcript, 9 July 2019, 72:14-18.

1409 Italy's Reply, paras 2.63-2.64.

universe from the law of the sea, and that there would be no reason to excise 'general rules of international law' of immunity from the scope of Articles 2(3), 56(2) or 58(2)".[1410]

774. In response to India's claim that Article 2, paragraph 3, of the Convention is not applicable because India did not take any enforcement measure concerning, or exercise jurisdiction over, the Marines outside India's internal waters or land territory, Italy claims that "India takes an impermissibly narrow approach to acts that engage the immunity of the Marines".[1411] According to Italy, other than arrest and detention, the immunity enjoyed by the Marines also protects them from acts that interfere with their freedom to perform their official functions.[1412] Italy submits that this includes India's exercise of criminal jurisdiction over the Marines while they were on board the "Enrica Lexie" when it was anchored in India's territorial sea, a fact which Italy claims India has conceded.[1413]

775. Italy maintains that, contrary to India's claim, Article 56, paragraph 2, and Article 58, paragraph 2, of the Convention are also implicated because of the "prior coercive action taken by the Indian authorities against the *Enrica Lexie* precisely because of the actions of the Marines in the exclusive economic zone".[1414] Italy states that India itself took the position in the domestic proceedings that it exercised jurisdiction over the Marines in the exclusive economic zone.[1415] Italy further claims that India's interdiction, direction, and escort of the "Enrica Lexie" while the Marines were on board constitutes an interference by the Indian authorities in the Marines' freedom of movement and exercise of their official functions in India's exclusive economic zone and territorial sea.[1416]

776. Italy denies India's allegation that it has blurred the distinction between jurisdiction and applicable law. Italy contends that, to the contrary, Article 293, paragraph 1, of the Convention actually requires the Arbitral Tribunal to apply both the Convention and other rules of international law not incompatible with the Convention.[1417]

1410 Italy's Reply, para. 2.64, *referring to* India's Counter-Memorial, para. 5.12.

1411 Italy's Rejoinder, para. 4.25.

1412 Italy's Rejoinder, para. 4.25.

1413 Italy's Rejoinder, paras 4.26, *referring to* India's Rejoinder, para. 5.6.

1414 Italy's Rejoinder, para. 4.28.

1415 Italy's Rejoinder, para. 4.28.

1416 Italy's Rejoinder, para. 4.30.

1417 Italy's Reply, paras 2.16-2.19, *citing M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10 at pp 61-62, para. 155; PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Award on Jurisdiction and Admissibility of 29 October 2015, para. 176.

777. Italy submits that India's jurisdictional objections to this claim are in many respects at odds with the arguments India raises in support of its counter-claims.[1418] Italy argues in particular that India's narrow reading of the rights and duties envisaged by the three provisions is at odds with its own expansive reading of, *inter alia*, Articles 56, paragraph 1, and 58, paragraph 3, of the Convention.[1419] For example, India argues that the Marines' firing on the "St. Antony" was a breach of Italy's obligation to have "due regard" to India's rights under Article 58, paragraph 3 of the Convention. In doing so, India is claiming that the Arbitral Tribunal's jurisdiction must cover both "Italy's obligations not to engage in conduct violative of India's rights in the EEZ" and "Italy's rights *vis-à-vis* India arising directly from the very same conduct and having [...] a connection to the EEZ".[1420] These rights and obligations to which India claims the Arbitral Tribunal's jurisdiction extends are, in Italy's view, not unlike those pertaining to the Marines' immunity with respect to the same conduct.[1421] Similarly, India's use of the "necessary for and connected with" test to support its counter-claim that its rights under Article 56, paragraph 1, include the right to protect its fishermen in all circumstances, is not dissimilar to Italy's claim that the three provisions include rights and rules not expressly mentioned.[1422] Italy also notes that India cannot rely on the relationship of attribution between Italy and the Marines in support of its counter-claim while at the same time asserting that immunity is outside the scope of the Convention.[1423]

778. For all these reasons, Italy claims that India has "failed to advance any argument capable of challenging the jurisdiction of the Tribunal over immunity in this case".[1424]

(b) **Jurisdiction pursuant to Article 297, paragraph 1, of UNCLOS**

779. As a "subsidiary argument", Italy asserts that the Arbitral Tribunal may also rely on Article 297, paragraph 1, of the Convention which, according to Italy, "extends the jurisdiction of a court or tribunal established in accordance with Part XV of UNCLOS beyond Article 288(1)" and effects a *renvoi* to other sources of law.[1425]

1418 Italy's Reply, para. 2.60.

1419 Italy's Reply, paras 2.60-2.62.

1420 Hearing Transcript, 18 July 2019, 105:14-19. *See also* Hearing Transcript, 18 July 2019, 105:1-13.

1421 Hearing Transcript, 18 July 2019, 105:20-24.

1422 Hearing Transcript, 18 July 2019, 106:1-15, *referring to* India's Counter-Memorial, para. 4.19.

1423 Hearing Transcript, 18 July 2019, 106:16-21.

1424 Italy's Reply, para. 2.68.

1425 Italy's Memorial, para. 8.19, *referring to* PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 220; Italy's Reply, para. 2.50.

780. Article 297, paragraph 1, of the Convention provides, in relevant part:

> *Article 297*
>
> *Limitations on applicability of section 2*
>
> 1. Disputes concerning the interpretation or application of this Convention with regard to the exercise by a coastal State of its sovereign rights or jurisdiction provided for in this Convention shall be subject to the procedures provided for in section 2 in the following cases:
>
> (a) when it is alleged that a coastal State has acted in contravention of the provisions of this Convention in regard to the freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines, or in regard to other internationally lawful uses of the sea specified in article 58;
>
> (b) when it is alleged that a State in exercising the aforementioned freedoms, rights or uses has acted in contravention of this Convention or of laws or regulations adopted by the coastal State in conformity with this Convention and other rules of international law not incompatible with this Convention;

781. India disagrees with Italy's interpretation of Article 297, paragraph 1, of the Convention, and maintains that it does not provide a ground for the Arbitral Tribunal to have jurisdiction over Italy's claim regarding the alleged violation of the Marines' immunities.

i. Position of India

782. India disputes Italy's claim that Article 297, paragraph 1, of the Convention provides an additional ground upon which the Arbitral Tribunal may exercise jurisdiction over the issue of the Marines' immunity from foreign criminal jurisdiction. India disagrees in particular with Italy's interpretation of the provision, claiming that Article 297, paragraph 1, subparagraph (b), of the Convention is irrelevant, and that Article 297, paragraph 1, subparagraph (a), does not expand the jurisdiction of the Arbitral Tribunal over Italy's claim.[1426]

783. India disagrees with Italy's assertion that its claim regarding the Marines' immunities is covered by Article 297, paragraph 1, subparagraph (b), of the Convention because it involves an allegation that India, in exercise of the "'aforementioned freedoms, rights or uses' [has acted] in contravention of the Convention [and] 'of other rules of international law not incompatible with' the Convention".[1427]

784. According to India, Italy's interpretation is "plainly wrong" because the provision only covers disputes arising in connection with acts of States other than the coastal State, and in this case, Italy's claim targets the acts of a coastal State, India.[1428] India argues that "the expression 'other

[1426] India's Counter-Memorial, para. 5.15, *citing* Italy's Memorial, para. 8.16.

[1427] India's Counter-Memorial, para. 5.16.

[1428] India's Counter-Memorial, para. 5.16.

rules of international law' does not relate to acts under arbitral scrutiny, but to the 'laws or regulations adopted by the coastal State'." [1429] India submits that Article 297, paragraph 1, subparagraph (b), of the Convention should be read to provide that a claim by a coastal State that a third State has breached its laws or regulations is admissible only if these laws or regulations are in conformity with the Convention and other rules of international law.[1430]

785. India argues that, in any event, Article 297, paragraph 1, subparagraph (b), of the Convention is irrelevant because the subject matter of this claim does not pertain to "the exercise of freedoms, rights and uses of the sea '*in contravention of … the laws and regulations adopted by the coastal State* in conformity with this Convention and other rules of international law not incompatible with this Convention'."[1431]

786. India maintains that Article 297, paragraph 1, subparagraph (a), cannot expand the Arbitral Tribunal's jurisdiction over Italy's claim concerning the Marines' immunities for the same reasons which it claims that Article 2, paragraph 3, Article 56, paragraph 2, and Article 58, paragraph 2, of the Convention cannot. Indeed, India notes, Italy's interpretation of this provision is untenable because it "is so far-reaching that it would transform the ITLOS and Annex VII Arbitral Tribunals in[to] bodies possessing 'all-competent' international law jurisdiction".[1432]

787. India concedes that the arbitral tribunal in the *Chagos Marine Protected Area Arbitration* found that Article 297, paragraph 1, of the Convention establishes the jurisdiction of the relevant tribunals in positive terms, but it disagrees that this implies that such jurisdiction extends to questions of immunities, a subject matter not regulated by the Convention.[1433]

788. India submits that the arbitral tribunal in the recent *Arctic Sunrise Arbitration (Netherlands v. Russia)* (hereinafter "*Arctic Sunrise Arbitration*") declined to exercise jurisdiction over a subject matter not linked with the Convention.[1434] There, India asserts, the *Arctic Sunrise Arbitration* arbitral tribunal referred to human-rights standards in order to interpret the relevant provisions of the Convention, but the arbitral tribunal found that it did not have jurisdiction to apply directly

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1429 India's Counter-Memorial, para. 5.16.

1430 India's Counter-Memorial, para. 5.16.

1431 India's Counter-Memorial, para. 5.16 *citing* PCA Case No. 2011-03: *Chagos Marine Protected Area (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 316(b) [emphasis added by India].

1432 India's Counter-Memorial, para. 5.20. *See also* Hearing Transcript, 12 July 2019, 104:11-105:14.

1433 India's Counter-Memorial, para. 5.21, *referring to* PCA Case No. 2011-03: *Chagos Marine Protected Area (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 307.

1434 India's Counter-Memorial, para. 5.23, *referring* PCA Case No. 2014-02: *The Arctic Sunrise Arbitration (Netherlands v. Russia)*, Award on the Merits of 14 August 2015, paras 140, 198.

specific provisions of the 1966 International Covenant on Civil and Political Rights or to determine breach of such provisions.[1435]

789. India argues that the Arbitral Tribunal in this case similarly does not have jurisdiction over Italy's claim on the basis of Article 297, paragraph 1, subparagraph (a), of the Convention because the law of immunities in general is a different body of law, and, India submits that Italy's claim does not concern the application or interpretation of the Convention.[1436]

790. Finally, India claims that Article 297, paragraph 1, subparagraph (a), of the Convention is irrelevant to the Arbitral Tribunal's jurisdiction over this claim because India's alleged actions concerning events in the exclusive economic zone do not relate to immunity.[1437]

ii. Position of Italy

791. Italy contends that, while the Arbitral Tribunal's jurisdiction over Italy's claim regarding the immunity of the Marines is already well established under Article 288, paragraph 1, of the Convention, Article 297, paragraph 1, provides an additional and confirmatory ground for jurisdiction.[1438]

792. According to Italy, Article 297, paragraph 1, of the Convention expands the jurisdiction given by Article 288 of the Convention by including a *renvoi* to sources of law beyond UNCLOS.[1439] Citing the *Chagos Marine Protected Area Arbitration* award, to which India also refers, Italy contends that Article 297, paragraph 1, of the Convention "expands the Tribunal's jurisdiction to certain disputes involving the contravention of legal instruments beyond the four corners of the Convention itself".[1440] Indeed, the fact that India quoted the very same language from the *Chagos Marine Protected Area Arbitration* award, Italy submits, shows that India has effectively conceded Italy's point about the effect of Article 297.[1441]

793. Accordingly, Italy argues that, insofar as the claim is deemed to involve any of the other sources of law to which Article 297, paragraph 1, effects a *renvoi*, the Arbitral Tribunal would also have

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1435 India's Counter-Memorial, para. 5.23, *referring to* PCA Case No. 2014-02: *The Arctic Sunrise Arbitration (Netherlands v. Russia)*, Award on the Merits of 14 August 2015, para. 198.

1436 India's Counter-Memorial, para. 5.24.

1437 India's Rejoinder, para. 3.21.

1438 Italy's Reply, paras 2.50, 2.66.

1439 Italy's Memorial, paras 8.14-8.15; India's Reply, para. 2.67.

1440 Italy's Reply, para. 2.67, *citing* PCA Case No. 2011-03: *Chagos Marine Protected Area (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 316. *See also* India's Counter-Memorial, para. 5.22.

1441 Italy's Reply, para. 2.67.

jurisdiction to determine it under that provision.[1442] According to Italy, this is because "(a) the dispute arises in connection with India's actions in contravention of UNCLOS 'in regard to the freedoms and rights of navigation' or 'in regard to other internationally lawful uses of the sea specified in article 58'; and/or (b) India's exercise of 'the aforementioned freedoms, rights or uses' is in contravention of the Convention or of 'other rules of international law not incompatible with' the Convention".[1443]

794. Italy dismisses India's attempt to distinguish the present case from the *Chagos Marine Protected Area Arbitration* on the basis that, according to India, the claim regarding the alleged violation of the Marines' immunities has no link whatsoever with the Convention.[1444] To the contrary, Italy argues, "immunity is incorporated by reference into certain provisions of UNCLOS and is inextricably linked to the question of jurisdiction".[1445]

(c) **Analysis of the Arbitral Tribunal**

795. As pointed out in paragraph 733 of this Award, before proceeding to the consideration of Italy's claim concerning the immunity *ratione materiae* of the Marines from Indian criminal jurisdiction, or in other words, the merits of Italy's claim, the Arbitral Tribunal must first determine whether it has jurisdiction over Italy's claim.

796. The Arbitral Tribunal will first address the issue whether any of the Articles of the Convention invoked by Italy may constitute a basis for the Arbitral Tribunal ascertaining its jurisdiction regarding the issue of the immunity of the Marines. The Arbitral Tribunal will then turn to the question whether there is any other justification for the Arbitral Tribunal to ascertain such jurisdiction.

797. Italy invokes Article 2, paragraph 3; Article 56, paragraph 2; and Article 58, paragraph 2, of the Convention which make reference to "other rules of international law", "the rights and duties of other States", and "other pertinent rules of international law".[1446]

798. However, in the view of the Arbitral Tribunal, these Articles are not pertinent and applicable in the present case. Article 2, paragraph 3; Article 56, paragraph 2; and Article 58, paragraph 2, of

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1442 Italy's Memorial, paras 8.14-8.16, 8.19.

1443 Italy's Memorial, para. 8.16, *citing* Article 297, paragraph 1, subparagraphs (a) and (b), of the Convention.

1444 Italy's Reply, para. 2.67.

1445 Italy's Reply, para. 2.67.

1446 Italy's Reply, paras 2.49, 2.54. *See also* Italy's Memorial, para. 8.17; Italy's Rejoinder, paras 4.6, 4.24; Hearing Transcript, 9 July 2019, 66:16-69:2.

the Convention apply to the exercise of rights and duties in the territorial sea and the exclusive economic zone by coastal States, while the evidence in the present case demonstrates that India enforced its jurisdiction over the Marines only in its internal waters and on land, when the Marines were arrested and detained.[1447] Although the Indian authorities boarded the "Enrica Lexie" and conducted preliminary investigations when it was anchored in India's territorial sea, it was only when the "Enrica Lexie" was docked at Kochi harbour that the Indian authorities disembarked the Marines for questioning and arrested them.[1448]

799. Articles 95 and 96, also invoked by Italy, do not address the immunity of persons, namely individuals who may be described as State officials. They address, first in Article 95, the immunity of warships, and second in Article 96, the immunity of ships "owned or operated by a State and used only on government non-commercial service". The word "only" in Article 96 is of specific significance, and indicates that even if the vessel is not a warship, it must still be owned or operated by a State and exclusively dedicated to government non-commercial service. The Arbitral Tribunal is therefore of the view that these two articles are not applicable to Italy's claim.

800. Article 297, paragraph 1, is invoked by Italy as a "subsidiary argument". [1449]

801. The Arbitral Tribunal observes that in the *Chagos Marine Protected Area Arbitration*, the arbitral tribunal found that Article 297, paragraph 1, subparagraph (a), "includes a *renvoi* to sources of law beyond the Convention itself". The arbitral tribunal made this finding in the context of considering "other internationally lawful uses of the sea specified in article 58".[1450] However, Article 58 does not apply to the present dispute, nor does Article 297, paragraph 1, subparagraph (a).

802. As to Article 297, paragraph 1, subparagraph (b), of the Convention, the Arbitral Tribunal notes that the subject matter of the Parties' dispute does not pertain to the exercise of freedoms, rights and uses of the sea "in contravention of … the laws and regulations adopted by the coastal State in conformity with this Convention and other rules of international law not incompatible with this

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1447 *See* Hearing Transcript, 12 July 2019, 114:2-14.

1448 Italy's Memorial, paras 4.101, 6.22, *referring to* Remand Report in Crime 02/2012 U/S 302 IPC, Coastal Police Station, Neendakara, Kollam, 20 February 2012, p. 28 (**Annex IT-144**); Log Book of the Master of the "Enrica Lexie" (**Annex IT-14**); Affidavit of R. Jayaraj, Circle Inspector of Police, Coastal Police Station, Neendakara, Kollam, 1 March 2012, para. 16 (**Annex IT-153**); Kerala Charge Sheet, 18 May 2012, p. 9 (**Annex IT-171**).

1449 Italy's Reply, para. 2.50; Italy's Memorial, para. 8.19, *referring to* PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 316.

1450 PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 316(a).

Convention".[1451] Consequently, the Arbitral Tribunal is of the view that Article 297, paragraph 1, subparagraph (b), is not relevant to the present case.

803. The Arbitral Tribunal now turns to the question whether there is any other justification for it to exercise jurisdiction over the issue of the immunity of the Marines.

804. As determined by the Arbitral Tribunal, the dispute between the Parties in the present case concerns which Party is entitled to exercise jurisdiction over the incident of 15 February 2012 involving the "Enrica Lexie" and the "St. Antony" which raises, but is not limited to, the question of the immunity of the Marines.[1452]

805. The question therefore arises as to whether the issue of the entitlement to exercise jurisdiction over the incident of 15 February 2012 could be satisfactorily answered without addressing the question of the immunity of the Marines.

806. The issue of entitlement to exercise jurisdiction encompasses, but is not conclusively answered by, the question as to whether the Marines enjoy immunity from jurisdiction in respect of acts that they undertook during the incident. In fact, both Italy and India have presented various other arguments, unrelated to the question of immunity, as to why each of them should or should not be entitled to exercise jurisdiction under different provisions of the Convention. Thus the question of the immunity of the Marines is one aspect out of several, albeit an important one, that requires examination in resolving the Parties' dispute.

807. The Arbitral Tribunal takes note in this regard that as stated by the counsel for Italy, Sir Michael Wood KCMG, during the Hearing:

> in the circumstances of this case, it would make no sense whatsoever for the Tribunal to determine that a state has jurisdiction under the Convention without, at the same time, deciding whether the exercise of such jurisdiction would be lawful under international law. This necessarily requires a decision on immunity.[1453]

808. Immunity from jurisdiction, by definition, operates as an exception to an otherwise-existing right to exercise jurisdiction. Whether that exception applies in the present case is a question that forms an integral part of the Arbitral Tribunal's task to determine which Party may exercise jurisdiction over the Marines. The Arbitral Tribunal could not provide a complete answer to the question as to which Party may exercise jurisdiction without incidentally examining whether the Marines

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1451 India's Counter-Memorial, para. 5.16 *citing* PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 316(b).

1452 *See* Part IV, Section A.

1453 Hearing Transcript, 9 July 2019, 57:17-23.

enjoy immunity. The issue of immunity of the Marines, in the words of the PCIJ in the *Case Concerning Certain German Interests* belongs to those "questions preliminary or incidental to the application"[1454] of the Convention.

809. The Arbitral Tribunal considers that, while the Convention may not provide a basis for entertaining an independent immunity claim under general international law, the Arbitral Tribunal's competence extends to the determination of the issue of immunity of the Marines that necessarily arises as an incidental question in the application of the Convention.

810. The Arbitral Tribunal recalls in this regard Italy's argument that "[t]here is nothing unusual in an international court or tribunal with jurisdiction over a dispute concerning the interpretation or application of a treaty deciding questions of international law that necessarily arise in the resolution of the dispute".[1455] India, for its part, has acknowledged that "the very fact that the ITLOS, as well as Annex VII tribunals, are called to apply, besides the UNCLOS itself, 'other rules of international law not incompatible with [the] Convention' confirms the accepted incompleteness of the Convention".[1456]

811. The Arbitral Tribunal finds that examining the issue of the immunity of the Marines is an incidental question that necessarily presents itself in the application of the Convention in respect of the dispute before it, namely which Party is entitled to exercise jurisdiction over the incident of 15 February 2012 involving the "Enrica Lexie" and the "St. Antony". The Arbitral Tribunal accordingly concludes that it has jurisdiction to deal with the question of immunity of the Marines in the present dispute.

1454 *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Judgment of 25 August 1925, P.C.I.J. Series A, No. 6, p. 18 ("It is true that the application of the Geneva Convention is hardly possible without giving an interpretation of Article 256 of the Treaty of Versailles and the other international stipulations cited by Poland. But these matters then constitute merely questions preliminary or incidental to the application of the Geneva Convention. Now the interpretation of other international agreements is indisputably within the competence of the Court if such interpretation must be regarded as incidental to a decision on a point in regard to which it has jurisdiction"). *See also* Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (first published 1953, Grotius Publications Ltd., Cambridge, 1987), p. 266 ("Where a tribunal has jurisdiction in a particular matter, it is also competent with regard to all relevant incidental questions, subject to express provision to the contrary"); Charles Kotuby Jr and Luke Sabota, *General Principles Of Law And International Due Process*, (Oxford University Press, 2017), pp 159-160 ("once jurisdiction is properly obtained, the tribunal's power typically extends to all relevant and auxiliary questions necessary to decide the primary dispute – even when those questions technically fall beyond the scope of the tribunal's authority").

1455 Italy's Rejoinder, para. 4.20.

1456 Hearing Transcript, 13 July 2019, 34:1-5.

2. Immunity *Ratione Materiae* of the Italian Marines as Applicable in the Context of UNCLOS

812. In the following, the Arbitral Tribunal will summarise the positions of the Parties as to whether the Marines are entitled to immunity *ratione materiae* from India's exercise of criminal jurisdiction. Italy's claim in this regard is set out in its request for relief (f) as follows:

> The assertion and continued exercise of criminal jurisdiction by India over Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone is in violation of India's obligation to respect the immunity of the Marines under UNCLOS Articles 2(3), 56(2), 58(2) and 100 as Italian State officials exercising official functions.[1457]

(a) Position of Italy

813. Italy claims that the Marines enjoy immunity *ratione materiae* from criminal jurisdiction because they were and are State officials who were acting in an official capacity during the "Enrica Lexie" incident which took place in the exclusive economic zone and territorial sea. Accordingly, because the law of immunity which applies to the Marines is a necessary part of the Convention by operation of Article 2, paragraph 3; Article 56, paragraph 2; and Article 58, paragraph 2, India is in breach of these provisions by continuing to assert and exercise criminal jurisdiction over the Marines for actions that they undertook during the "Enrica Lexie" incident.

814. Italy contends that immunity *ratione materiae* "attaches to a person who acts on behalf of a State in relation to acts performed in an official capacity", and that this rule "applies to all State officials, regardless of their position in the internal hierarchy".[1458] Italy asserts that this general principle finds extensive support in State practice and has been endorsed by India itself.[1459] Italy claims that one of the clearest examples of an individual having immunity *ratione materiae* is a

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1457 Italy's Memorial, p. 188.

1458 Italy's Memorial, para. 11.10; Hearing Transcript, 9 July 2019, 76:16-23, *citing* International Law Commission, "Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction", provisionally adopted by the International Law Commission, in 'Report of the International Law Commission on the Work of its 68th Session' (2 May – 10 June and 4 July – 12 August 2016) U.N. Doc. A/71/10, p. 353 (Draft Article 6).

1459 Italy's Memorial, paras 11.13-11.14, *referring to* A. Sari, 'The Status of Armed Forces in Public International Law: Jurisdiction and Immunity', in Alexander Orakhelashvili (ed.), *Research Handbook on Jurisdiction and Immunities in International Law* (Edward Elgar Publishing Limited, 2015), p. 360; *citing* General Assembly, Official Records, Sixty-sixth session, Sixth Committee, Summary Record of the 27th meeting, 2 November 2011, A/C.6/66/SR.27, para. 79; Statement by Ambassador Asoke Kumar Mkerji, Permanent Representative of India to the United Nations at the United Nations Security Council Open Debate on Peacekeeping Operations, 11 June 2014, U.N. Doc. S/PV.7196, p. 27.

member of a State's armed forces on official duties[1460] and that allegations of excessive use of force do not lift such immunity.[1461]

815. Applying this general principle, Italy claims that the Marines are entitled to immunity on the basis of two elements, neither of which, Italy notes, India disputes.

816. First, Italy asserts that the Marines are "State officials of the Italian Republic".[1462] Referring to the ILC Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction, provisionally adopted by the ILC (hereinafter "ILC Draft Articles on Immunity of State Officials"), Italy submits that a "State official" is defined as "any individual who represents the State or who exercises State functions".[1463] The Marines, Italy claims, fall within this definition because they were and remain members of the Italian Navy and officers and agents of the judicial police entrusted with guaranteeing the maritime defence of the State. Italy argues that this status is supported by the relevant Articles of the Italian Military Code, as well as other Italian legal instruments, which define and affirm the status of the Marines as State officials exercising State functions, both generally and as part of the VPD on board the "Enrica Lexie".[1464] In addition, Italy notes, the Marines are subject to a military chain of command, receive their salary from the Ministry of Defence according to their rank and deployment, and were listed as Government military personnel on board the "Enrica Lexie", as required by Italian law.[1465]

817. Second, Italy submits that the Marines were acting in an official capacity. Italy proffers several bases in support of this submission. Italy contends that under international law, there is a presumption that a State is correct about its official acting in an official capacity, and that this

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1460 Italy's Memorial, para. 11.11, *referring to Germany v. Margellos and 18 other natural and legal persons (intervening)*, Petition for Cassation, Case No. 6/2002, (2003) 1 AED 11, ILDC 87 (GR2002), 17 September 2002, para. 14; and *citing* J. Voetelink, *Status of Forces: Criminal Jurisdiction over Military Personnel Abroad* (Asser Press, 2015), p. 162. *See also* Hearing Transcript, 9 July 2019, 78:2-7.

1461 Italy's Memorial, para. 11.15, *referring to* R. Kolodkin, Special Rapporteur, Second Report to the International Law Commission on the Immunity of State Officials from Foreign Criminal Jurisdiction, U.N. Doc. A/CN.4/631, *Yearbook of the International Law Commission 2010*, Vol. II (Part 1), para. 29.

1462 Italy's Memorial, para. 11.18; Hearing Transcript, 9 July 2019, 79:2-3.

1463 Italy's Memorial, para. 11.18, *citing* International Law Commission, "Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction", provisionally adopted by the International Law Commission, in 'Report of the International Law Commission on the Work of its 66th Session' (5 May – 6 June and 7 July – 8 August 2014) U.N. Doc. A/69/10, p. 231 (Draft Article 2, paragraph (e)).

1464 Italy's Memorial, paras 11.19-11.23; Hearing Transcript, 9 July 2019, 79:4-13, *citing* Italian Military Code, Articles 110 and 111(1)(a) (**Annex IT-228**); Italian Code of Navigation, Article 1235 in conjunction with Articles 1135 and 1136 (**Annex IT-225**); Template Agreement between the Ministry of Defence of Italy and the Ship Owner, Article 4(4) (**Annex IT-95(b)**).

1465 Italy's Memorial, paras 11.24-11.26, 11.28-11.29. *See also* Hearing Transcript, 9 July 2019, 80:14-19, 81:1-82:12, *citing* (Confidential Annex) (**Annex IT-235(c)**); Law Decree no. 963 of the Ministry of Transport of Italy, 7 October 2011, Article 3 (**Annex IT-94**).

presumption is only displaced if the circumstances of the case clearly indicate otherwise.[1466] Italy claims that, in this case, it asserted immunity at the first opportunity, namely in the written notification that Sergeant Latorre handed to the Indian boarding team on 16 February 2012, and repeatedly again thereafter.[1467]

818. In addition, Italy claims that, as members of the VPD assigned to the vessel, the Marines were on board the "Enrica Lexie" in an official capacity with a specific anti-piracy mandate under Italian law.[1468] Italy contends that the Marines "acted in their official capacity before, during and in the aftermath of the incident of 15 February 2012".[1469] Specifically, Italy submits that the Marines "were defending an Italian-flagged oil tanker *pursuant to a mandate from the Italian State* to ensure maritime security in a high-risk piracy area".[1470] Italy further submits that the Marines acted in accordance with the applicable rules of engagement, which, according to Italy, authorise the use of warning shots in the proximity of a suspected pirate vessel or craft and the use of proportional and necessary force to force suspected pirate vessels or crafts to implement specific kinematic manoeuvers.[1471]

819. Moreover, even if the Marines' acts were found to be *ultra vires*, unlawful, or as having involved an excessive use of force, Italy asserts that the Marines would still have immunity *ratione materiae* because the conduct at issue was nevertheless engaged "under colour of or in ostensible exercise of [their] public authority".[1472] This is demonstrated, Italy submits, by the facts that Chief Master Sergeant Latorre "engaged his chain of command while the incident was still ongoing", "was the source of the first flash report by CINCNAV regarding an attempted attack on the Enrica

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1466 Italy's Memorial, paras 11.33-11.36, *citing* R. Kolodkin, Special Rapporteur, Third Report to the International Law Commission on the Immunity of State Officials from Foreign Criminal Jurisdiction, U.N. Doc. A/CN.4/646, *Yearbook of the International Law Commission 2011*, Vol. II (Part 2), paras 30, 61(i); *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. 87, paras 60-61. *See also* Hearing Transcript, 9 July 2019, 82:18-83:1, 83:7-84:15.

1467 Italy's Memorial, para. 11.38, *citing* Statement of Massimiliano Latorre addressed to the Indian authorities, 16 February 2012 (**Annex IT-124**); *referring to Note Verbale* 69/456, 17 February 2012 (**Annex IT-12**); Log Book of the Master of the "Enrica Lexie", p. 4 (**Annex IT-14**). *See also* Hearing Transcript, 9 July 2019, 84:16-17.

1468 Italy's Memorial, paras 11.41-11.45. *See also* Hearing Transcript, 9 July 2019, 84:18-86:4.

1469 Italy's Memorial, para. 11.46.

1470 Italy's Memorial, para. 11.47 [emphasis added by Italy]. *See also* Hearing Transcript, 9 July 2019, 86:5-18.

1471 Italy's Memorial, para. 11.48, *citing* (Confidential Annex) (**Annex IT-235(d)**). *See also* Hearing Transcript, 9 July 2019, 86:19-87:5.

1472 Italy's Memorial, para. 11.49, *citing* J. Foakes, *The Position of Heads of State and Senior Officials in International Law* (Oxford University Press, 2014), pp 142-143; R. Kolodkin, Special Rapporteur, Second Report to the International Law Commission on the Immunity of State Officials from Foreign Criminal Jurisdiction, U.N. Doc. A/CN.4/631, *Yearbook of the International Law Commission 2010*, Vol. II (Part 1), para. 29. *See also* Hearing Transcript, 9 July 2019, 87:6-88:10.

Lexie", and "a couple of hours after the attack, he sent his action report to CINCNAV, the Italian Ministry of Defence and the Office of the Chief of Staff of the Italian Navy regarding the incident".[1473]

820. Italy disputes the contention that the Marines do not enjoy immunity because they were on a merchant vessel, not a warship.[1474] Italy notes that it is not claiming immunity for the "Enrica Lexie" under Articles 32 and 95 of the Convention.[1475] In any event, Italy submits that whether the "Enrica Lexie" is a merchant vessel or a warship is irrelevant to the determination of the immunity *ratione materiae* of the Marines.[1476] This is because the Marines were protecting the "Enrica Lexie" in exercise of State authority in pursuit of State interests with respect to maritime security.[1477] Moreover, even if the interests at issue were commercial, Italy submits that the "distinction between acts *jure imperii* and acts *jure gestionis* is irrelevant to the immunity *ratione materiae* of State officials from foreign criminal jurisdiction" as long as the acts at issue were performed in an official capacity.[1478] For these reasons, Italy maintains that the Marines were acting in an official capacity for purposes of determining their immunity *ratione materiae*.

821. In response to India's claim that the Marines do not enjoy immunity *ratione materiae* from India's criminal jurisdiction because they fall within the "territorial tort" exception, Italy argues that the exception is not customary international law.[1479] Italy submits that this is most notably demonstrated by the fact that the ILC deleted the "territorial tort" exception from Article 7 of the ILC Draft Articles on Immunity of State Officials (regarding the exceptions to the immunity *ratione materiae* of State officials), which the ILC plenary adopted provisionally on 20 July 2017.[1480]

822. Italy further argues that State practice on the claimed exception is sparse and diverse and that the case law cited by India is largely distinguishable from the case at hand because they either related

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1473 Hearing Transcript, 9 July 2019, 88:14-89:16.

1474 Italy's Memorial, para. 11.50.

1475 Italy's Memorial, para. 11.50. *See also* Hearing Transcript, 9 July 2019, 89:16-18.

1476 Italy's Memorial, paras 11.50. *See also* Hearing Transcript, 9 July 2019, 89:19-21.

1477 Italy's Memorial, paras 11.51-11.53. *See also* Hearing Transcript, 9 July 2019, 90:1-5.

1478 Italy's Memorial, para. 11.54; Hearing Transcript, 9 July 2019, 90:5-91:6, *citing John Doe I and Ors v. UNOCAL Corporation and Ors*, 25 March 1997, 963 F. Supp. 880 (9th Cir. 2002), p. 14230; *Airport L, LLC GmbH v. United States*, 28 August 2003, 2 Ob 156/O3k, ILDC 3 (AT 2003), p. 4; *Littrell v. U.S.A. (No. 2)*, [1995] 1 WLR 82, p. 95.

1479 Italy's Reply, paras 8.5-8.7, 8.14-8.19. *See also* Hearing Transcript, 9 July 2019, 91:9-14.

1480 Italy's Reply, paras 8.6-8.7, 8.14, *referring to* International Law Commission, "Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction", provisionally adopted by the International Law Commission, in 'Report of the International Law Commission on the Work of its 69th Session' (1 May – 2 June and 3 July – 4 August 2017) U.N. Doc. A/72/10, p. 231 (Draft Article 7 and Annex). *See also* Hearing Transcript, 9 July 2019, 91:15-93:6.

to immunity from civil proceedings or cases in which the State never invoked immunity for its official.[1481] In Italy's view, the only case cited by India that might be relevant is the English first-instance decision in *Khurts Bat v. Investigating Judge of the General Federal Court*, which is "wholly exceptional" and does not provide any support for India's claim.[1482] This is because the alleged crime in that case was committed not in the United Kingdom but in Germany, and since Germany had requested a European arrest warrant, the English court assumed that Germany took the view that the accused did not enjoy immunity.[1483] Further, the court itself recognised that "the evidence of state practice [on the territorial tort exception] is not all one way"[1484] and ultimately relied on one academic source to find that in the special case of covert action, such an exception was allowed.[1485] Thus, Italy submits, even if such an exception did exist, it has at most been applied only to covert operations not acknowledged by the State concerned as an official act, wholly unlike the circumstances in this case where Italy has from the beginning asserted the immunity of the Marines.[1486]

823. Italy dismisses the academic commentary which India cites as insufficient to support the "territorial tort" exception because, according to Italy, the authors either concede that State practice is sparse and inconsistent or provide examples of cases that concern covert action where immunity was not considered and the State of nationality of the accused did not admit that the covert act was undertaken on its behalf.[1487]

824. Italy submits that, even if the "territorial tort" exception were a rule of customary international law, it would not apply because two key elements have not been satisfied in this case.[1488] Specifically, Italy submits that the alleged crime did not occur on Indian territory and the Marines were not present in Indian territory at the time of the alleged crime.[1489] With respect to the first element, Italy notes that the Parties do not dispute that the alleged crime occurred 20.5 nautical miles off India's coast, beyond India's territorial sea. Italy submits that India's assertion that the crime occurred on an Indian flagged boat which is assimilated to India's territory for the application of criminal law is not supported by any authority. To the contrary, Italy argues under

1481 Italy's Reply, para. 8.16. *See also* Hearing Transcript, 9 July 2019, 93:7-13.

1482 Italy's Reply, para. 8.17; Hearing Transcript, 9 July 2019, 93:14-20, *referring to Khurts Bat and Mongolia (intervening) v. Investigating Judge of the German Federal Court and Secretary of State for Foreign and Commonwealth Affairs (intervening)*, Appeal Decision, [2011] EWHC 2029 (Admin).

1483 Hearing Transcript, 9 July 2019, 93:20-94:2.

1484 Hearing Transcript, 9 July 2019, 94:5-6.

1485 Hearing Transcript, 9 July 2019, 94:7-13.

1486 Hearing Transcript, 9 July 2019, 94:17-95:5.

1487 Italy's Reply, para. 8.18.

1488 Italy's Reply, paras 8.9, 8.23. *See also* Hearing Transcript, 9 July 2019, 96:13-20.

1489 Italy's Reply, para. 8.23. *See also* Hearing Transcript, 9 July 2019, 96:20-23.

international law, a vessel is not a "floating territory" of a State, and the "fiction of the territoriality of the ship […] has now been abandoned by all States".[1490] Italy further submits that the Supreme Court of India expressly recorded that the "St. Antony" is not registered under the Indian Merchant Shipping Act, 1958, and found that it "was not flying an Indian Flag at the time when the incident took place".[1491]

825. Italy submits that the second element is also not met because, as Italy notes the Parties do not dispute, the Marines never boarded the "St. Antony".[1492] According to Italy, the fact that the Marines were arrested in India's territorial sea is irrelevant for the purposes of the claimed exception.[1493] This is because, Italy contends, "[f]or the purposes of the claimed exception, the relevant place is where the person concerned was present when the alleged crime was committed", not where any arrest was made.[1494] As such, Italy submits, even on India's own description of the claimed exception, the facts of the case do not satisfy the relevant requirements.[1495]

826. Italy also rejects India's argument that the Marines' immunity was only engaged when they were arrested and detained on India's land territory. In Italy's view, "[i]mmunity is engaged by subjecting an official to a 'constraining act of authority', coercive measures, any measure directed at that official which imposes obligations on him or her which, in the event of non-compliance, may lead to coercive measures and which may impede the proper performance of his or her state function".[1496] While Italy acknowledges that Judges Higgins, Kooijmans, and Buergenthal did observe in the *Arrest Warrant* case that the commencement of an investigation does not by itself violate the immunities of the person concerned, Italy points out that they also took into account the important factor that the investigating State "must first offer to the national State of the prospective accused person the opportunity itself to act upon the charges concerned".[1497]

1490 Italy's Reply, paras 8.26-8.27 *citing* R.J. Dupuy and D. Vignes (eds.), *A Handbook on the New Law of the Sea*, Vol. 1 (Martinus Nijhoff Publishers, 1991), p. 407; and *referring to* James Crawford, *Brownlie's Principles of Public International Law* (8th edn., Oxford University Press, 2012), p. 464. *See also* Hearing Transcript, 9 July 2019, 96:24-98:1.

1491 Italy's Reply, para. 8.28, *citing Republic of Italy & Ors v. Union of India & Ors*, Supreme Court of India, Judgment of 18 January 2013, Judgment of Kabir CJ, paras 29, 93 (**Annex IT-19**).

1492 Italy's Reply, para. 8.30(1). *See also* Hearing Transcript, 9 July 2019, 98:6.

1493 Italy's Reply, para. 8.30(2). *See also* Hearing Transcript, 9 July 2019, 98:6-8.

1494 Hearing Transcript, 9 July 2019, 98:9-11. *See also* Hearing Transcript, 9 July 2019, 98:12-13.

1495 Hearing Transcript, 9 July 2019, 98:19-21.

1496 Hearing Transcript, 18 July 2019, 112:7-13, *referring to Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, p. 177 at p. 237, para. 170; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, I.C.J. Reports 2002, p. 3 at p. 79, paras 54-55.

1497 Hearing Transcript, 18 July 2019, 113: 1-3, *citing Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, Joint Separate Opinion of Judges Higgins, Kooijmans and

Moreover, Italy notes, the ICJ in that case found that the mere issuance of an arrest warrant was an act that violated the immunity of the person concerned because it constituted "a statement of willingness and ability to act and as such may be perceived as a threat so to do at a moment of Belgium's choosing".[1498] This is, in Italy's view, not different from the case at hand, in which "the Indian authorities searched for and locked on to the Enrica Lexie" and "'prepared the ground' for their arrest and detention" while the ship was in the exclusive economic zone and the territorial sea.[1499] Italy similarly rejects India's reliance on the ICJ's decision in *Certain Questions of Mutual Assistance in Criminal Matters*, noting that unlike the invitation to testify issued by the French judge to the President of Djibouti, which he could freely accept or decline, the Marines were not free to accept or decline to enter into India's territorial sea or to be brought into its internal waters and land territory.[1500]

827. Finally, Italy dismisses as irrelevant the declaration that India signed upon its ratification of the Convention, in which India contends that the Convention does not authorise other States to carry out in the contiguous zone and exclusive economic zone military exercise or manoeuvres, in particular those involving the use of weapons or explosives without the consent of the coastal State.[1501] According to Italy, this is because the declaration is not a reservation that modifies legal relations between the Parties, and in any event, the "Enrica Lexie" incident does not concern military exercises or manoeuvres.[1502]

828. Therefore, since the Marines enjoy immunity *ratione materiae* and no exceptions apply under international law, Italy submits that India has breached provisions of UNCLOS by violating the immunity of the Marines.[1503] First, Italy submits, India breached Article 56, paragraph 2, and Article 58, paragraph 2, of the Convention, which require the coastal State to have "due regard to the rights and duties of other States" and the "pertinent rules of international law" that apply in the exclusive economic zone.[1504] They did so, Italy alleges, by exercising jurisdiction over the Marines as persons implicated in the "Enrica Lexie" incident by directing, interdicting and escorting the "Enrica Lexie", on which India knew the Marines were boarded, beginning some

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Buergenthal, I.C.J. Reports 2002, p. 3 at pp 80-81, para. 59. *See also* Hearing Transcript, 18 July 2019, 112:14-21.

1498 Hearing Transcript, 18 July 2019, 114:4-6, *citing Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, I.C.J. Reports 2002, p. 3 at p. 84, para. 69. *See also* Hearing Transcript, 18 July 2019, 113:4-19.

1499 Hearing Transcript, 18 July 2019, 114:8-10, 114:9-20.

1500 Hearing Transcript, 18 July 2019, 118:3-13.

1501 Italy's Reply, para. 8.33. *See also* Hearing Transcript, 9 July 2019, 98:22-99:7.

1502 Italy's Reply, para. 8.33(1)-8.33(2).

1503 Hearing Transcript, 9 July 2019, 99:18-22.

1504 Hearing Transcript, 9 July 2019, 100:4-8.

36 nautical miles from its coast in the exclusive economic zone.[1505] Similarly, Italy claims that India exercised criminal jurisdiction over the Marines while they were on board the "Enrica Lexie" when it was anchored in India's territorial sea, in breach of Article 2, paragraph 3, of the Convention which requires States Parties to respect the rules on immunity in the territorial sea, and refraining from restrictive measures in respect of acts performed by a person in an official capacity.[1506]

829. Separately, Italy also submits that India failed to decide the Marines' immunity *in limine litis*, in breach of their obligations to do so under international law.[1507] Despite Chief Master Sergeant Latorre's written notification to the Indian boarding team less than 24 hours after the incident that the Marines were "exclusively answerable to Italian Judicial Authorities", Italy's 18 February 2012 *note verbale* to India's Ministry of External Affairs asserting the Marines' immunity, and Italy's repeated invocation of the Marines' immunity to challenge the jurisdiction of Indian courts, the Indian authorities and judicial bodies have failed to decide the question of immunity to date.[1508]

(b) **Position of India**

830. India disputes that the Marines are entitled to immunity *ratione materiae* from the Indian courts' exercise of criminal jurisdiction. Specifically, India contends that the "territorial tort" exception to the immunity that the Marines would otherwise enjoy applies in this case because the alleged crime was "committed against Indian nationals, on an Indian flagged boat, which is assimilated to India's territory for the application of criminal law, and the Marines have been found on India's territory".[1509]

831. While acknowledging that "there seems to be no exact precedent in case-law", India submits that the facts of this case "can be compared, by analogy, to [those] prevailing when a crime is committed (or alleged to have been committed) by a State official on the territory of a foreign State".[1510] India asserts that, in such cases, there is a substantive body of case law and academic

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1505 Hearing Transcript, 9 July 2019, 100:9-18.

1506 Hearing Transcript, 9 July 2019, 101:2-13.

1507 Hearing Transcript, 9 July 2019, 74:23-75:6.

1508 Hearing Transcript, 9 July 2019, 75:9-76:14, *referring to* Statement of Massimiliano Latorre, 16 February 2012, p. 1 (**Annex IT-124**); *Note Verbale* 71 from Italy to India, 18 February 2012 (**Annex IT-133**). *See also* Hearing Transcript, 18 July 2019, 119:4-120:16.

1509 India's Counter-Memorial, para. 5.25, *referring to* Article 188 of the Indian Code of Criminal Procedure, 1973 (**Annex IN-20**). *See also* India's Counter-Memorial, paras 5.26-5.35; India's Rejoinder, paras 7.1-7.16.

1510 India's Counter-Memorial, para. 5.26.

commentary that recognises the application of a "territorial tort" exception to the immunity of State officials from foreign criminal jurisdiction.[1511]

832. India submits that this exception is enshrined in draft Article 7, paragraph 1, subparagraph (iii) as proposed by Special Rapporteur Escobar Hernández in her fifth report on immunity of State officials from foreign criminal jurisdiction. India further contends that its reliance on this draft is not undermined by the fact that the ILC subsequently decided not to include that provision in Article 7 of the ILC Draft Articles on Immunity of State Officials as provisionally adopted by the ILC plenary. India claims that, to the contrary, the ILC plenary debate and ILC commentary to this Draft Article served to confirm India's position.[1512]

833. Specifically, according to India, the Special Rapporteur's summary of the ILC plenary debate notes that "most [ILC] members had indicated that they were in favour, in a more or less qualified way, of incorporating the 'territorial tort exception'."[1513] Similarly, India submits that the commentary to Article 7 of the ILC Draft Articles on Immunity of State Officials that was provisionally adopted states as follows:

> *Although the view was expressed that immunity could exist in these circumstances and the exception should not be included in draft Article 7 because there was insufficient practice to justify doing so, the Commission decided not to include it in the draft article for other reasons. The Commission considers that certain crimes, such as murder, espionage, sabotage or kidnapping, committed in the territory of a State in the aforementioned circumstances are subject to the principle of territorial sovereignty and do not give rise to immunity from jurisdiction* ratione materiae, and therefore there is no need to include them in the list of crimes for which this type of immunity does not apply.[1514]

834. India further claims that, despite the fact that the "territorial tort" exception finds its origins in the context of immunities from civil proceedings, India is entitled to reason by analogy.[1515] India claims that this is because the ILC has done the same on the basis of the review of the jurisprudence by the Special Rapporteur, and because such reasoning is also consistent with the

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1511 India's Counter-Memorial, para. 5.28-5.32.

1512 India's Rejoinder, para. 7.4, *referring to* C. Escobar Hernández, Special Rapporteur, Fifth Report to the International Law Commission on Immunity of State Officials from Foreign Criminal Jurisdiction, U.N. Doc. A/CN.4/701, 14 June 2016.

1513 India's Rejoinder, para. 7.5 *citing* International Law Commission, 'Provisional Summary Record of the 3365th Meeting', U.N. Doc. A/CN.4/SR.3365, p. 15.

1514 India's Rejoinder, para. 7.6, *citing* International Law Commission, 'Report of the International Law Commission on the Work of its 69th Session' (1 May-2 June and 3 July-4 August 2017), U.N. Doc. A/72/10, p. 188, para. 141 [emphasis added by India].

1515 India's Rejoinder, para. 7.7.

ILC's work on the identification of customary international law.[1516] India submits, in particular, that the ILC's commentary to Conclusion 8, in its Report on the work of its 68th session provides:

> [I]t is of course important to consider instances of conduct that are in fact comparable, that is, where the same or similar issues have arisen so that such instances could indeed constitute reliable guides. The Permanent Court of International Justice referred in the *Lotus* case to: 'precedents offering a close analogy to the case under consideration; for it is only from precedents of this nature that the existence of a general principle [of customary international law] applicable to the particular case may appear'.[1517]

835. India also disputes Italy's claim that the "territorial tort" exception is not customary international law because State practice is deemed not to be fully consistent.[1518] India claims that, to the contrary, both the ICJ and the ILC have noted that complete consistency in State practice is not required for a rule to be established as customary, and that some inconsistencies and contradictions are not necessarily fatal to a finding of "a general practice".[1519]

836. Finally, India disputes Italy's claim that the "territorial tort" exception would not apply to the facts of this case even if it were customary international law.[1520] With regard to Italy's first argument in this respect, India maintains that the alleged crimes were committed on Indian territory.[1521] According to India, the "legal fiction [of] assimilating ship and territory" for the specific purpose of criminal law is well accepted and logical, especially since criminal jurisdiction can only be either territorial or personal, and for crimes committed on board a ship, India contends, territorial jurisdiction is the only possibility.[1522]

837. With regard to Italy's second argument, India maintains that the fact that the Marines were not on board the "St. Antony" when they committed the alleged crime is not dispositive of its claim. Relying on a scholarly article which analyses various national legislation on immunity, India

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1516 India's Rejoinder, paras 7.7-7.8.

1517 India's Rejoinder, para. 7.8, *citing* International Law Commission, 'Report of the International Law Commission on the Work of its 68th Session' (2 May – 10 June and 4 July – 12 August 2016) U.N. Doc. A/71/10, Paragraph 6 of the Commentary to Conclusion 8, p. 195, para. 63.

1518 India's Rejoinder, para. 7.9.

1519 India's Rejoinder, paras 7.9-7.10, *citing Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 14 at p. 98, para. 186; International Law Commission, 'Report of the International Law Commission on the Work of its 68th Session', (2 May-10 June and 4 July-12 August 2016), U.N. Doc. A/71/10, p. 96, para. 63 (commentary to Conclusion 8, para. 7).

1520 India's Rejoinder, paras 7.12-7.16.

1521 India's Rejoinder, para. 7.13.

1522 India's Rejoinder, para. 7.13.

argues that Italy's argument fails because "general State practice shows that the overriding consideration is whether the injury has been suffered on the territory of the forum State".[1523]

(c) **Analysis of the Arbitral Tribunal**

838. As observed by the Arbitral Tribunal, the disagreement between the Parties on points of law or fact and conflicts of legal views or interests are confined to the question of which one of them is entitled to exercise jurisdiction over the incident involving the "Enrica Lexie" and the "St. Antony" which led, as claimed by the Parties, to the alleged violations of various provisions of the Convention referred to in their respective submissions.

839. Pursuant to Article 58, paragraph 2, and Article 92, each Party has exclusive jurisdiction over their respective ship involved in the incident, namely, Italy over the "Enrica Lexie" and India over the "St. Antony". The Parties therefore have concurrent jurisdiction over the incident.

840. At the same time, pursuant to the principle of objective territoriality, well established in international law, a State may assert its jurisdiction in respect of offences committed outside its territory but consummated within its territory or, as stated in 1926 by the PCIJ in the *S.S. "Lotus"* judgment, "if one of the constituent elements of the offence, and more especially its effects, have taken place [in its territory]".[1524]

841. A question therefore arises whether India, as the flag State of the "St. Antony", on which the effects of the Marines' alleged offences – the death of Mr. Ajeesh Pinku and Mr. Jelastine Valentine – occurred, has in principle the right to exercise jurisdiction over the Marines or whether such exercise of jurisdiction is precluded because the Marines enjoy immunity under international law.

842. To answer this question the Arbitral Tribunal must consider whether the Marines are entitled to immunity *ratione materiae* for the acts that they committed in relation to the incident of 15 February 2012. Since there is no provision in the Convention that expressly addresses the immunity *ratione materiae* of State officials, the Arbitral Tribunal will examine how this matter is governed by customary international law.

1523 India's Rejoinder, paras 7.14-7.15, *citing* Xiaodong Yang, *State Immunity in International Law*, (Cambridge University Press, 2015), pp 216-228.

1524 *S.S. "Lotus" (France v. Turkey)*, Judgment of 7 September 1927, P.C.I.J. Series A, No. 10, p. 23. *See also* James Crawford, *Brownlie's Principles of Public International Law* (8th edn., Oxford University Press, 2012), p. 458.

i. Immunity *Ratione Materiae* under Customary International Law

843. Under customary international law, immunity *ratione materiae* from foreign criminal jurisdiction is accorded to State officials in respect of their "official acts" or "acts performed in an official capacity".

844. The International Criminal Tribunal for the Former Yugoslavia in the *Prosecutor v. Tihomir Blaškic* case recognised the immunity of State officials as "a well-established rule of customary international law going back to the eighteenth and nineteenth centuries".[1525] The ICJ also considered the issue in *Certain Questions of Mutual Assistance in Criminal Matters* and, while not stating directly that the *procureur de la République* and the Head of the National Security Service of Djibouti held functional immunity, refers to functional immunity in the following terms:

> The Court observes that it has not been "concretely verified" before it that the acts which were the subject of the summonses as *témoins assistés* issued by France were indeed acts within the scope of their duties as organs of State.[1526]

845. While acknowledging that various aspects of its discussion on the immunity of State officials from foreign criminal jurisdiction were still in flux, the ILC's discussion of the topic started from what the Commission regarded as the uncontroversial premise that the acts of State officials performed in an official capacity are subject to immunity.[1527] This was then further reflected in Articles 5, and 6, paragraph 1, of the ILC Draft Articles on Immunity of State Officials.[1528]

1525 *Prosecutor v. Tihomir Blaškic*, ICTY, Appeal Chamber, IT-95-14-AR108 bis, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 38.

1526 *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, p. 177 at p. 243, para. 191.

1527 *See* R. Kolodkin, Special Rapporteur, Second Report to the International Law Commission on the Immunity of State Officials from Foreign Criminal Jurisdiction, U.N. Doc. A/CN.4/631, *Yearbook of the International Law Commission 2010*, Vol. II (Part 1), p. 402, para. 21; International Law Commission, Immunity of State Officials from Foreign Criminal Jurisdiction: Memorandum by the Secretariat, U.N. Doc. A/CN.4/596, 31 March 2008, paras 88 ("[f]ollowing a construction that seems to be widely accepted by States, judicial organs and scholars, issues concerning beneficiaries, covered acts and possible exceptions are often examined with reference to two distinct categories of immunity of State officials, namely immunity *ratione personae* and immunity *ratione materiae*"), and 154 ("[c]ontrary to immunity *ratione personae* […], immunity *ratione materiae* covers only official acts, that is, conduct adopted by a State official in the discharge of his or her functions. This limitation to the scope of immunity *ratione materiae* appears to be undisputed in the legal literature and has been confirmed by domestic courts").

1528 *See* International Law Commission, "Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction", provisionally adopted by the International Law Commission, in 'Report of the International Law Commission on the Work of its 68th Session' (2 May – 10 June and 4 July – 12 August 2016) U.N. Doc. A/71/10, p. 353 (Draft Articles 5 ("State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction") and 6, paragraph 1, ("State officials enjoy immunity *ratione materiae* only with respect to acts performed in an official capacity")).

846. The Parties, in the present proceedings, similarly appear to accept the existence of the customary international law rule of functional immunity for State officials in respect of acts performed in an official capacity. Italy submits that immunity *ratione materiae* is "an integral part of the body of international legal rules on State immunity".[1529] On its part, India has not questioned the notion that such a rule exists under customary international law. Instead, it focussed on establishing the existence of a "territorial tort" exception to that rule, pursuant to which immunity does not apply in respect of certain crimes committed by a foreign official on the territory of the forum State, thereby implying an acceptance of the general rule itself.[1530]

ii. Immunity *Ratione Materiae* of the Marines as Applicable in the Context of the Present Case

847. In the following subsections, the Arbitral Tribunal will proceed to assess whether the Marines enjoy immunity *ratione materiae* in this case by determining whether they are "State officials", whether the acts that they undertook in relation to the incident of 15 February 2012 were "official acts" or "acts performed in an official capacity", and finally whether any exceptions, to the extent they exist under customary international law, apply to preclude them from enjoying such immunity.

(a) Qualification of the Marines as State officials

848. Immunity *ratione materiae* is enjoyed by State officials in general, irrespective of their position in the hierarchy of the State,[1531] and includes members of a State's armed forces on official duties.[1532]

1529 Italy's Memorial, para. 11.10, *citing to* J. Foakes, *The Position of Heads of State and Senior Officials in International Law* (Oxford University Press, 2014), p. 7. *See also* Hearing Transcript, 9 July 2019, 76:16-23.

1530 *See* India's Counter-Memorial, paras 5.25-5.28; India's Rejoinder, paras 7.4-7.5.

1531 *See* International Law Commission, "Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction", provisionally adopted by the International Law Commission, in 'Report of the International Law Commission on the Work of its 68th Session' (2 May – 10 June and 4 July – 12 August 2016) U.N. Doc. A/71/10, p. 353 (Draft Articles 5 and 6); A. Sari, "The Status of Armed Forces in Public International Law: Jurisdiction and Immunity", in A. Orakhelashvili (ed.), *Research Handbook on Jurisdiction and Immunities in International Law* (Edward Elgar Publishing, Limited, 2015), p. 360; General Assembly, Official Records, Sixty-sixth session, Sixth Committee, Summary Record of the 27th meeting, 2 November 2011, U.N. Doc. A/C.6/66/SR.27, para. 79. *See also Germany v. Margellos and 18 other natural and legal persons (intervening)*, Petition for Cassation, Case No. 6/2002, 17 September 2002, (2003) 1 AED 11, ILDC 87 (GR2002), para. 14.

1532 *See* J. Voetelink, *Status of Forces: Criminal Jurisdiction over Military Personnel Abroad* (Asser Press, 2015), pp 162-163; *Bundesverwaltungsgericht* (Federal Administrative Court), Judgment of 30 September 1988, Deutsches Verwaltungsblatt 1989, p. 261 et seq., summarised in Council of Europe, Committee of Legal Advisers on Public International Law (CADHI), Database on the Immunities of

849. In his second report on the immunity of State officials from foreign criminal jurisdiction, the ILC's then-Special Rapporteur Kolodkin noted an "agreement in the doctrine on the question of the category of persons enjoying immunity *ratione materiae*: all State officials are meant, irrespective of their position within the structure of the organs of State power".[1533] In its commentary to the provisionally adopted definition of "State official", the ILC recognised in this regard that "what is important is the link between the individual and the State, whereas the form taken by that link is irrelevant. The Commission considers that the link may take many forms, depending upon national legislation and the practice of each State".[1534]

850. According to Articles 110 and 111, paragraph 1, subparagraph (a), of the Italian Military Code, the "Navy is the operative component of the Military entrusted with the maritime defence of the State" and has special competences with respect to the "safeguarding and protection of national interests […] beyond the outer limit of the territorial sea, including as regards the fight against piracy, with the modalities set forth under article 5, paragraph 1, of the Decree-Law dated 12 July 2011, no. 107".[1535] The Italian Law on VPDs, in turn, is the specific legislation on the basis of which the two Marines were on board the "Enrica Lexie" as part of a VPD.[1536]

851. As provided in Article 5, paragraph 2, of the Italian Law on VPDs and Article 55, paragraph 1, of the Italian Code of Criminal Procedure, the Marines had the additional status of officers and agents of the judicial police (*ufficiali ed agenti di polizia giudiziaria*) which authorised them, among other things, to arrest pirates and maintain them under their custody, and conduct investigations into crimes of piracy and suspicion of piracy in support of the public prosecutor.[1537]

852. Article 4, paragraph 4, of the Template Agreement further corroborates this role:

> Pursuant to art. 5, Law Decree n.l07, 12 July 2011, the Chief of the VPD shall be assigned, for the time the VPD remains onboard to protect the Vessel, judicial police functions, limited

States and International Organisations, available at <http://www.coe.int/t/e/legal_affairs/legal_co-operation/ public_international_law/State_Immunities/>.

1533 R. Kolodkin, Special Rapporteur, Second Report to the International Law Commission on the Immunity of State Officials from Foreign Criminal Jurisdiction, U.N. Doc. A/CN.4/631, *Yearbook of the International Law Commission 2010*, Vol. II (Part 1), p. 402, para. 21.

1534 International Law Commission, "Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction", provisionally adopted by the International Law Commission, in 'Report of the International Law Commission on the Work of its 66th Session' (5 May – 6 June and 7 July – 8 August 2014) U.N. Doc. A/69/10, p. 235 (commentary to Draft Article 2, paragraph (e), para. 13).

1535 Italian Military Code, Articles 110 and 111, paragraph 1, subparagraph (a) (**Annex IT-228**).

1536 Law Decree No. 107 of 12 July 2011, of the Italian Republic (**Annex IT-91**).

1537 *See* Law Decree No. 107 of 12 July 2011, of the Italian Republic, Article 5, paragraph 2 (**Annex IT-91**) (designating the head of the VPD as an "officer" of the judicial police and the other members of the VPD as "agents" of the judicial police). *See also* Italian Code of Criminal Procedure, Article 55, paragraph 1 (**Annex IT-224**).

> to activities conducted to suppress pirate attacks, without prejudice, for the remainder, for the assignments of the Ship master.[1538]

853. In their role as members of the Italian Navy, the Marines were subject to a military chain of command,[1539] and in their role as officers and agents of the judicial police, the Marines were under the direct control of the judiciary.[1540]

854. Although shipowners contributed to the expense of stationing a VPD on board their ship, such contribution was, as described in the Template Agreement, for the purposes of "repay[ing] [to the Italian Ministry of Defence] costs incurred for the employment of the VPD, including ancillary costs for personnel, operation and in-area logistic support".[1541] This reimbursement to the Italian government, as opposed to a direct payment of salaries by the shipowners, is a standard and common practice designed to simply compensate the Ministry of Defence for the costs incurred by the VPD when stationed on board a vessel. As such, it does not detract from the extensive evidence demonstrating that, as part of a VPD, established "[i]n the context of the international activities aimed at combating piracy for the purposes of ensuring freedom of navigation of national merchant vessels",[1542] the Marines were members of the Italian Navy, and officers and agents of the judicial police.

855. The Marines are therefore "State officials of the Italian Republic" for the purpose of determining their entitlement to immunity *ratione materiae* because they were and remain members of the Italian Navy and officers and agents of the judicial police entrusted with guaranteeing the maritime defence of the State.

(b) Exercise by the Marines of official functions

856. In order to determine whether immunity *ratione materiae* applies, the Arbitral Tribunal must next verify that the acts of the Marines were indeed acts within the scope of their duties as officials of the State.[1543]

1538 Template Agreement between the Ministry of Defence of Italy and the Ship Owner, Article 4, paragraph 4 (**Annex IT-95(b)**).

1539 (Confidential Annex) (**Annex IT-235(c)**).

1540 Constitution of Italy, Article 109 (**Annex IT-222**).

1541 Template Agreement between the Ministry of Defence of Italy and the Ship Owner, Article 6, paragraph 1 (**Annex IT-95(b)**).

1542 Law Decree No. 107 of 12 July 2011, of the Italian Republic, Article 5, paragraph 1 (**Annex IT-91**).

1543 *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, p. 177 at p. 243, para. 191. *See also* R. Kolodkin, Special Rapporteur, Second Report to the International Law Commission on the Immunity of State Officials from Foreign Criminal Jurisdiction,

857. In his second report, then-Special Rapporteur Kolodkin noted that, in making this determination, "the correct test to be applied [...] is one of imputability. If the conduct in question is imputable or attributable to the sending State – even if it did not expressly order or sanction it – then continuing immunity *ratione materiae* should apply".[1544]

858. According to Article 4, paragraph 1, of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, adopted by the ILC at its fifty-third session, in 2001 (hereinafter "ILC Draft Articles on State Responsibility"), the "conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State".[1545] Paragraph 2 of the same Article states that "[a]n organ includes any person or entity which has that status in accordance with the internal law of the State".[1546] In this regard, there exists a presumption under international law that a State is right about the characterisation of the conduct of its official as being official in nature.[1547]

859. In the present case, the Marines were, as members of Italy's armed forces, fulfilling a State function. The Marines were deployed on board the "Enrica Lexie" as part of a VPD pursuant to a mandate from the Italian State, as provided in the Italian Law on VPDs, to ensure "the protection of ships flying the Italian flag in transit in international maritime spaces at risk of piracy".[1548] In this role, the Marines were not only acting as officers of the Italian Navy but also as officers and

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U.N. Doc. A/CN.4/631, *Yearbook of the International Law Commission 2010*, Vol. II (Part 1), p. 404, para. 25.

1544 R. Kolodkin, Special Rapporteur, Second Report to the International Law Commission on the Immunity of State Officials from Foreign Criminal Jurisdiction, U.N. Doc. A/CN.4/631, *Yearbook of the International Law Commission 2010*, Vol. II (Part 1), p. 404, para. 25 *citing* Eileen Denza et al., 'Ex parte Pinochet: lacuna or leap?' (1999) 48(4) *International and Comparative Law Quarterly* 949, p. 951; and *referring to* Eileen Denza, *A Commentary on the Vienna Convention on Diplomatic Relations* (Oxford University Press, 2016).

1545 International Law Commission, "Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries" in *Yearbook of the International Law Commission*, Vol. II (Part 2), p. 31 at p. 40 Article 4, paragraph 1 (2001).

1546 International Law Commission, "Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries" in *Yearbook of the International Law Commission*, Vol. II (Part 2), p. 31 at p. 40 Article 4, paragraph 2 (2001).

1547 R. Kolodkin, Special Rapporteur, Third Report to the International Law Commission on the Immunity of State Officials from Foreign Criminal Jurisdiction, U.N. Doc. A/CN.4/646, *Yearbook of the International Law Commission 2011*, Vol. II (Part 2), p. 233, paras 30, 61(i); *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. 87, paras 60-61. *See also* Hearing Transcript, 9 July 2019, 82:18-83:1, 83:7-84:15.

1548 Law Decree No. 107 of 12 July 2011, of the Italian Republic, Article 5, paragraph 1 (**Annex IT-91**).

agents of the judicial police in respect of crimes related to piracy.[1549] The fact that the Marines were stationed on a merchant vessel, and not a warship, in the view of the Arbitral Tribunal, does not alter their status and the character of their mission as part of the VPD, undertaking acts in an official capacity attributable to the Italian State.[1550]

860. Similarly, even if the Marines' acts might be found to be *ultra vires* or contrary to their instructions or orders (a question that this Arbitral Tribunal does not prejudge in the present proceedings), this would not preclude them from enjoying immunity *ratione materiae* as long as they continued to act in the name of the State and in their "official capacity".[1551] This is corroborated by Article 7 of the ILC Draft Articles on State Responsibility, which provides that conduct by a State organ acting in its official capacity shall be attributable to the State "even if it exceeds its authority or contravenes instructions".[1552]

861. During the incident, Sergeant Latorre engaged his chain of command by activating radio communication with other members of the VPD, donned his personal protection equipment, and positioned himself on the starboard wing of the bridge.[1553] As the craft approached the "Enrica Lexie", the Marines appeared to have followed the applicable rules of engagement by implementing visual signals to alert the presence of military personnel on board,[1554] monitoring the approaching craft, and firing warning shots in the proximity of a suspected pirate vessel or craft to force them to implement specific kinematic manoeuvers.[1555]

1549 Law Decree No. 107 of 12 July 2011, of the Italian Republic, Article 5, paragraph 2 (**Annex IT-91**); Italian Code of Navigation, Articles 1135 and 1136 (**Annex IT-225**); Italian Code of Criminal Procedure, Article 55, paragraph 1 (**Annex IT-224**).

1550 International Law Commission, "Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries" in *Yearbook of the International Law Commission*, Vol. II (Part 2), p. 31 at p. 41 (2001) ("It is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as 'commercial' or as *acta iure gestionis*"); R. Kolodkin, Special Rapporteur, Second Report to the International Law Commission on the Immunity of State Officials from Foreign Criminal Jurisdiction, U.N. Doc. A/CN.4/631, *Yearbook of the International Law Commission 2010*, Vol. II (Part 1), p. 404, para. 28. *See also John Doe I and Ors v. UNOCAL Corporation and Ors*, 25 March 1997, 963 F. Supp. 880 (9th Cir. 2002), p. 14230; *Airport L, LLC GmbH v. United States*, 28 August 2003, 2 Ob 156/O3k, ILDC 3 (AT 2003), p. 4; *Littrell v. U.S.A. (No. 2)*, [1995] 1 WLR 82, p. 95.

1551 R. Kolodkin, Special Rapporteur, Second Report to the International Law Commission on the Immunity of State Officials from Foreign Criminal Jurisdiction, U.N. Doc. A/CN.4/631, *Yearbook of the International Law Commission 2010*, Vol. II (Part 1), p. 405, paras 29-31.

1552 International Law Commission, "Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries" in *Yearbook of the International Law Commission*, Vol. II (Part 2), p. 31 at p. 45 (2001).

1553 (Confidential Annex) (**Annex IT-240**); (Confidential Annex) (**Annex IT-236**).

1554 (Confidential Annex), p. 1 (**Annex IT-236**); Statement of Carlo Noviello, 19 February 2012 (**Annex IT-142**); Declaration of Carlo Noviello, 19 February 2012 (**Annex IT-138**); Log Book of the Master of the "Enrica Lexie", p. 2 (**Annex IT-14**)

1555 (Confidential Annex) (**Annex IT-235(d)**).

862. Thus, regardless of whether the Marines' acts were *ultra vires* or unlawful, in the view of the Arbitral Tribunal, the evidence demonstrates that during the incident the Marines were under an apprehension of a piracy threat and engaged in conduct that was in the exercise of their official functions as members of the Italian Navy and of a VPD.

(c) Applicability of the territorial tort exception

863. Having found that the Marines were State officials acting in their official capacity during the incident of 15 February 2012, the Arbitral Tribunal must finally consider whether they might still be precluded from enjoying immunity *ratione materiae* as a result of the application of the "territorial tort" exception.

864. The Parties disagree as to the status of the territorial tort exception under customary international law. India asserts that, with respect to cases where a crime is alleged to have been committed by a State official on the territory of a foreign State, there is a substantive body of case law and academic commentary that recognises the application of a "territorial tort" exception to the immunity of State officials from foreign criminal jurisdiction.[1556] Italy, on the other hand, maintains that this exception has not crystallised into a rule of customary international law, as demonstrated by the fact that State practice is sparse and diverse and the case law that India cites is largely distinguishable from the case at hand because it relates either to immunity from civil proceedings or instances in which the State did not invoke immunity for its official.[1557]

865. The Arbitral Tribunal observes that the concept of a "territorial tort" exception was incorporated in Article 12 of the United Nations Convention on Jurisdictional Immunities of States and Their Property.[1558] This convention was concluded for the purpose of enhancing the rule of law and legal certainty, particularly in the dealings of States with natural or juridical persons, and of contributing to the codification and development of international law and the harmonisation of practice. This convention has not yet entered into force. It has been signed but not ratified by India, and was acceded to by Italy on 6 May 2013.

866. While it is indisputable that national courts in a relatively significant number of States look to this convention as a reflection of customary international law, the fact remains that States that consider

1556 India's Counter-Memorial, para. 5.28.

1557 Italy's Reply, para. 8.16. *See also* Hearing Transcript, 9 July 2019, 93:7-13.

1558 United Nations Convention on Jurisdictional Immunities of States and Their Property, done in New York on 2 December 2004 (not yet in force).

that there is immunity for foreign States before other States' national courts do not accept the provisions of this convention, including Article 12.

867. Article 12 of the aforementioned convention establishes two criteria that must be met to apply a concept of the "territorial tort" exception. This Article states the following:

> Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.

868. Thus, in any case, regardless of whether the "territorial tort" exception is recognised under customary international law, the Arbitral Tribunal observes that, to the extent the rule is thought to exist, there is a general understanding that it would only apply in cases where (i) the acts at issue were committed in the territory of the forum State; (ii) by a foreign official who had been present in the territory of that State at the time of the acts at issue without the State's express consent for the discharge of his or her official functions.[1559]

869. With regard to the first criterion established by Article 12, the Arbitral Tribunal would note that, especially prior to the nineteenth century, in reference to the jurisdictional relationship between a ship and its flag State, the ship was occasionally viewed as an "ambulatory province" or "floating island" of the State under whose flag it sailed.[1560] However, the legal fiction that ships may be assimilated for jurisdictional purposes with land territory of the flag State has since been universally rejected.[1561]

870. There is no support for the proposition that the second condition – the presence of a foreign official in the territory of the forum State without the State's consent – is dispensable. To the contrary, commentary on this subject underscores the importance of the presence of the foreign

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1559 C. Escobar Hernández, Special Rapporteur, Fifth Report to the International Law Commission on Immunity of State Officials from Foreign Criminal Jurisdiction, U.N. Doc. A/CN.4/701, 14 June 2016, pp 88-89, para. 226; R. Kolodkin, Special Rapporteur, Second Report to the International Law Commission on the Immunity of State Officials from Foreign Criminal Jurisdiction, U.N. Doc. A/CN.4/631, *Yearbook of the International Law Commission 2010*, Vol. II (Part 1), p. 422, paras 81-86.

1560 D.P. O'Connell, 'The Theory of Maritime Jurisdiction' in I.A. Shearer (ed.), *The International Law of the Sea: Volume II* (1st edn., Oxford University Press, 1988), p. 735.

1561 D.P. O'Connell, 'The Theory of Maritime Jurisdiction' in I.A. Shearer (ed.), *The International Law of the Sea: Volume II* (1st edn., Oxford University Press, 1988), pp 735-37; René Jean Dupuy and Daniel Vignes (eds.), *A Handbook on the New Law of the Sea: Book 1*, (Martinus Nijhoff Publishers, 1991), p. 407, para. 1; Sompong Sucharitkul, 'Liability and Responsibility of the State of Registration or the Flag State in Respect of Sea-Going Vessels, Aircraft and Spacecraft Registered by National Registration Authorities' (2006) 54 Am. J. Comp. L. 409, at 413.

official in the territory of that State at the time of the acts at issue, and whether such presence was with or without the State's express consent for the discharge of his or her official functions, for the exception to apply.[1562]

871. In the present case, it is undisputed that the Marines were on board the "Enrica Lexie", and not on Indian territory, when they committed the acts at issue.[1563] As such, there was no situation in which the Indian government's consent for the discharge of the Marine's official functions could have been required or sought, and no intentional breach of India's sovereignty can be imputed to the Marines or the Italian State.

872. The Arbitral Tribunal is of the view that for the reasons referred to above, even if a "territorial tort" exception were recognised under customary international law, the exception would not apply in this case.

(d) Conclusion

873. In light of the foregoing, the Arbitral Tribunal concludes that the Marines are entitled to immunity in relation to the acts that they committed during the incident of 15 February 2012 because (i) immunity of State officials is a well established rule of customary international law; (ii) the Marines are State officials who were acting in their official capacity during the incident; and (iii) to the extent that the "territorial tort" exception is a customary rule of international law, it would in any event not apply in this case because the Marines were not on Indian territory when they committed the acts at issue.

874. The Arbitral Tribunal accordingly finds that the Marines enjoy immunity in relation to the acts that occurred during the incident of 15 February 2012, and that India is precluded from exercising its jurisdiction over the Marines.

1562 R. Kolodkin, Special Rapporteur, Second Report to the International Law Commission on the Immunity of State Officials from Foreign Criminal Jurisdiction, U.N. Doc. A/CN.4/631, *Yearbook of the International Law Commission 2010*, Vol. II (Part 1), p. 422, paras 81-82; International Law Commission, Immunity of State Officials from Foreign Criminal Jurisdiction: Memorandum by the Secretariat, U.N. Doc. A/CN.4/596, 31 March 2008, para. 163.

1563 India's Rejoinder, paras 7.14-7.15.

3. Remedies

(a) Position of Italy

875. Italy seeks both declaratory and non-declaratory reliefs in respect of this claim. In terms of declaratory relief, Italy requests that the Arbitral Tribunal declare that India's assertion and continued exercise of criminal jurisdiction over Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone violates India's obligation to respect the immunity of the Marines under Article 2, paragraph 3; Article 56, paragraph 2; Article 58, paragraph 2; and Article 100, of the Convention as Italian State officials exercising official functions.[1564]

876. In terms of non-declaratory relief, Italy requests an order of cessation, and reparation in the form of both restitution and compensation.

877. Citing Article 30, paragraph (a), of the ILC Draft Articles on State Responsibility, Italy submits that the State responsible for an internationally wrongful act is under an obligation to cease that act if it is continuing.[1565] Since India continues to exercise criminal jurisdiction over the Marines in breach of the immunity to which they are entitled as State officials, Italy contends that India must cease to exercise any form of criminal jurisdiction over the Marines by lifting any measure of restraint in place against them and terminating all legal proceedings concerning them.[1566] Italy rejects India's characterisation of this remedy as moot because the Marines have been permitted to return to Italy, pointing out that the Marines still have restrictions on their liberty, and are still under the authority of the Supreme Court of India.[1567]

878. Separately, while Italy recognises that "[t]he result of cessation may be indistinguishable from that of restitution", it nevertheless asserts that whether "in addition or in the alternative, India must cease [from exercising penal jurisdiction over the Marines] pursuant to its obligation [to] make restitution and re-establish the *status quo ante*".[1568] In Italy's view, the reestablishment of the *status quo ante* would mean India's termination of the exercise of criminal jurisdiction in respect of the Marines.[1569]

1564 Italy's Memorial, p. 188; Italy's Reply, para. 9.3(a).

1565 Italy's Memorial, para. 12.4.

1566 Italy's Memorial, paras 12.6-12.7(3).

1567 Hearing Transcript, 18 July 2019, 188:6-14.

1568 Italy's Memorial, para. 12.15, *citing* James Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013), p. 465.

1569 Hearing Transcript, 10 July 2019, 40:5-8.

879. Citing Article 35 of the ILC Draft Articles on State Responsibility, Italy notes that there are two qualifications to the obligation to make restitution, namely that restitution is not "materially impossible", and that it "does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation".[1570]

880. Applying this to the facts, Italy submits that, as in the *Jurisdictional Immunities* and *Arrest Warrant* cases before the ICJ, India's breaches of immunities are of a continuing nature and the obligation to cease them is a consequence that flows directly from a finding in Italy's favour under any of the provisions of the Convention that Italy claims India has breached.[1571] In any event, Italy notes that the consequences "would practically be the same" even if the claimed breaches were not characterised as continuous, but rather as occurring only at a specific moment in the past.[1572] In addition, Italy points out that in the *Jurisdictional Immunities* case, the ICJ "had no hesitation to find that restitution would not involve a disproportionate burden for the country that had violated the immunities".[1573]

881. Finally, citing, *inter alia*, Article 36, paragraph 1, of the ILC Draft Articles on State Responsibility, Italy claims that India is obliged to pay compensation, which covers any financially assessable damages including loss of profits to the extent that it is established, insofar as the damage, which can include both material and moral damage, caused is not made good by restitution.[1574]

(b) **Position of India**

882. In respect of Italy's claim for declaratory relief, India maintains that the Arbitral Tribunal lacks jurisdiction over this claim and that therefore, the Arbitral Tribunal "cannot make any declaration concerning [the] claims".[1575]

883. India submits that, as both Parties claim exclusive jurisdiction and the Arbitral Tribunal is not bound by the Parties' submissions, it is possible that the Arbitral Tribunal takes the position that both Parties can lawfully claim jurisdiction, in which case the Arbitral Tribunal "would have to

1570 Hearing Transcript, 10 July 2019, 37:11-17.

1571 Hearing Transcript, 10 July 2019, 38:13-16, *referring to Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, I.C.J. Reports 2012, p. 99; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, p. 3.

1572 Hearing Transcript, 10 July 2019, 39:11-22.

1573 Hearing Transcript, 10 July 2019, 40:18-22, *citing Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, I.C.J. Reports 2012, p. 99 at pp 153-54, para. 137.

1574 Italy's Memorial, para. 12.17.

1575 India's Counter-Memorial, para. 7.6.

draw the consequences of these competing jurisdictions".[1576] For this scenario, India requests that the tribunal take into consideration that the matter took place in India's EEZ and involved the killing of two Indian nationals and damage to an Indian-registered boat in addition to the fact that judicial proceedings in India are well advanced.[1577]

884. In addition, India submits that Italy's claim that India should wipe out all consequences of its illegal acts "is a moot claim since both Marines have been permitted to return in Italy where they are, and will be, staying until the final decision of the Arbitral Tribunal".[1578] Thus, according to India, even if the Arbitral Tribunal accepted Italy's claim "concerning the termination of criminal procedures against them, no supplementary step would have to be taken concretely in their favour".[1579]

885. Furthermore, relying on the judgment of the ICJ in the *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, India alleges that once the Arbitral Tribunal finds that a certain conduct is contrary to the Convention, there is no need to expressly make a decision on the obligation to cease the unlawful conduct.[1580]

886. India further argues that it is the Provisional Measures Order that ruled that "Sergeant Girone remains [...] under the authority of the Supreme Court of India", [1581] therefore, even if eventually the Arbitral Tribunal would rule in favour of Italy, there would be no "continuing breach" on the part of India.[1582]

887. Finally, with respect to the compensation to be paid for the non-material damage suffered by the Marines, India notes that it "ha[s] some difficulty in not seeing this request as particularly cynical".[1583] India further submits that the Parties are in agreement that, if the Arbitral Tribunal were to consider that any compensation is due by India, that would have to be decided at a later stage of the procedure.[1584]

1576 Hearing Transcript, 13 July 2019, 123:6-8. *See also* Hearing Transcript, 20 July 2019, 149:6-11.

1577 Hearing Transcript, 13 July 2019, 131:6-11.

1578 India's Counter-Memorial, para. 7.14.

1579 India's Counter-Memorial, para. 7.15.

1580 Hearing Transcript, 13 July 2019, 127:19-128:3, *referring to Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, p. 213.

1581 Hearing Transcript, 13 July 2019, 128:6-7.

1582 Hearing Transcript, 13 July 2019, 128:7-14.

1583 Hearing Transcript, 13 July 2019, 132:1-2.

1584 Hearing Transcript, 13 July 2019, 133:4-8.

(c) Analysis of the Arbitral Tribunal

888. The Arbitral Tribunal notes that, in accordance with Article 30, paragraph (a), of the ILC Draft Articles on State Responsibility, the State responsible for an internationally wrongful act is under an obligation "to cease that act, if it is continuing".[1585] Accordingly, the Arbitral Tribunal decides that India must take the necessary steps in order to cease to exercise its criminal jurisdiction over the Marines.

889. In reaching this decision, the Arbitral Tribunal has taken note of the commitment expressed by Italy on several occasions during these proceedings, and in particular at the Hearing, that Italy, following the issuance of this Award, will resume its criminal investigation into the events of 15 February 2012 and that both Parties will cooperate with each other in pursuit of that investigation that would follow the evidence wherever it may lead.[1586] The Arbitral Tribunal considers that no other remedies are required at this stage.

D. APPLICABILITY OF ARTICLE 59 OF UNCLOS

890. The Arbitral Tribunal will finally address the applicability of Article 59 of the Convention, to which both Parties referred on a subsidiary basis, for the resolution of the present dispute.

1. Position of Italy

891. Italy contends that the residual provision found in Article 59 does not apply and that, even if it does, the balance of equity under all the relevant circumstances favours Italy.[1587]

892. Italy contests India's argument that Article 59 granted India jurisdiction over the incident. Italy submits that India seeks to use Article 59 as a vehicle for embedding the *S.S. "Lotus"* decision into the Convention, even though, according to Italy, successive law of sea conventions and the Supreme Court of India have disavowed such an approach.[1588]

893. Italy provides several reasons why it considers that Article 59 does not apply.

1585 International Law Commission, "Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries" in *Yearbook of the International Law Commission*, Vol. II (Part 2), p. 31 at p. 91, Article 30 (2001).

1586 Hearing Transcript, 18 July 2019, 50:6-11, 234:5-19.

1587 Italy's Reply, paras 7.105-7.116.

1588 Italy's Reply, paras 7.105-7.106, *referring to S.S. "Lotus" (France v. Turkey)*, Judgment of 7 September 1927, P.C.I.J. Series A, No. 10, p. 5; *Republic of Italy & Ors v. Union of India & Ors*, Supreme Court of India, Judgment of 18 January 2013, Judgment of Kabir CJ, para. 99 (**Annex IT-19**).

894. First, according to Italy, Article 59 applies only where the "Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone". In the present case, however, the Convention does attribute exclusive jurisdiction to Italy under Articles 97 and 92.[1589]

895. Second, Italy submits, even if the Arbitral Tribunal were to find that Articles 87, 92, and 97 do not confer on Italy the freedom of navigation and right of exclusive jurisdiction in this case, "the question of which State is entitled to exercise penal jurisdiction […] still could *not* be resolved […] by resort to Article 59".[1590] Italy submits that this is because Article 59 is not a mandatory provision but instead "a framework that States 'should' follow when faced with a conflict of 'interests' where the Convention has not attributed 'rights or jurisdiction' to one of them".[1591] Relying on academic commentary, Italy argues that the word "should" in Article 59 indicates that the Article creates no binding legal obligation.[1592]

896. Third, Italy argues that Article 59 is inapplicable because an exercise of adjudicative jurisdiction by a court on the territory of a State concerning events that occurred within the exclusive economic zone, as has happened in the present case, is not an exercise of jurisdiction "within the exclusive economic zone".[1593]

897. Fourth, Italy submits that the application of Article 59 would have far-reaching consequences, and potentially allow a State "to obtain an award or judgment under Part XV protecting 'interests' nowhere recognized in UNCLOS as rights".[1594]

898. Even if Article 59 did apply, Italy contends that the balance of "equity" and "all the relevant circumstances" would favour Italy. In Italy's view, because India has prejudged the Marines as being guilty of "murder" and as having no immunity under customary international law, it is "now inconceivable that they could receive a fair trial in India".[1595]

1589 Italy's Reply, para. 7.108.

1590 Italy's Reply, para. 7.109 [emphasis added by Italy].

1591 Italy's Reply, para. 7.110.

1592 Italy's Reply, paras 7.111-7.112, *citing* Alexander Proelß (ed.), *The United Nations Convention on the Law of the Sea: A Commentary* (C.H. Beck, Hart, Nomos, 2017), pp 461-62; I.A. Shearer, 'Problems of Jurisdiction and Law Enforcement against Delinquent Vessels' (1986) 35(2) International & Comparative Law Quarterly 320, p. 334.

1593 Italy's Reply, para. 7.113.

1594 Italy's Reply, paras 7.114-7.115.

1595 Italy's Reply, para. 7.116.

2. Position of India

899. India submits that the residual clause in Article 59 applies and that India has jurisdiction over the incident. According to India, "all the relevant circumstances confirm that the most important interests in the present case are those of India".[1596]

900. According to India, Article 59 shows that the Convention does not provide rules for the attribution of rights or jurisdiction in all circumstances in the exclusive economic zone, and that the Convention recommends that States invoking conflicting interests settle their differences on the basis of equity.[1597]

901. India claims that Article 59 applies in the present case because, absent a collision or an incident of navigation under Article 97, the Convention provides no rules on the fight against piracy in the exclusive economic zone nor guidance for murders committed from a ship under the flag of a State against individuals on another boat with the flag of the coastal State.[1598]

902. India dismisses as irrelevant Italy's argument that Article 59 is not applicable because "[a]n exercise of adjudicative jurisdiction by a court on the territory of a State concerning events that occurred within the exclusive economic zone is not an exercise of jurisdiction 'within' the exclusive economic zone".[1599] According to India, Italy "confuses the attribution of jurisdiction and its exercise. Jurisdiction over a situation which occurred in a particular maritime zone can be exercised *outside* this zone".[1600]

903. India considers that its interests are more important than those of Italy since the deaths of Indian nationals occurred in the Indian contiguous zone on an Indian fishing vessel.[1601] While acknowledging the importance of the fight against piracy, India argues that the threat of piracy had disappeared from the area.[1602] India also argues that the Arbitral Tribunal should keep the following elements in mind:

> the interests involved are respectively a "risk" for two Italian Marines being charged with murders, to be judged by a court whose independence cannot be, and is not challenged on the

1596 India's Counter-Memorial, para. 6.57; India's Rejoinder, para. 6.34; Hearing Transcript, 12 July 2019, 178:24-179:5.

1597 India's Rejoinder, para. 6.67.

1598 India's Counter-Memorial, para. 6.56.

1599 India's Rejoinder, para. 6.66, *citing* Italy's Reply, para. 7.113.

1600 India's Rejoinder, para. 6.66 [emphasis added by India].

1601 India's Counter-Memorial, para. 6.57; India's Rejoinder, para. 6.72.

1602 India's Counter-Memorial, para. 6.58.

> one hand; and, on the other hand, the risk for the families and relatives of the murdered fishermen that justice will not be done[.][1603]

3. Analysis of the Arbitral Tribunal

904. The rights, jurisdiction, and duties of coastal States and other States in the exclusive economic zone are spelt out by Part V of the Convention. Pursuant to Article 59, where the Convention "does not attribute rights or jurisdiction" to the coastal State or to other States within the exclusive economic zone, and "a conflict arises between the interests of the coastal State and any other State or States", such a conflict should be resolved "on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole".[1604] As such, the Arbitral Tribunal notes that Article 59 has been described as addressing the basis for the resolution of conflicts over "residual rights" in the exclusive economic zone.[1605]

905. Article 59 conditions its application in a twofold manner. First, there must be a situation where the Convention does not attribute rights and jurisdiction to either the coastal State or other States within the exclusive economic zone. Second, a conflict must arise between the interests of the coastal State and any other State or States.

906. In regard to the first element, India argues that Article 59 is engaged in the present case since the circumstances of the dispute are not contemplated by the Convention.[1606] India submits that:

> absent a collision or an incident of navigation within the meaning of Article 97, UNCLOS does not provide for rules on the fight against piracy in the EEZ, and, in any case, it provides no guidance concerning murders committed from a ship under the flag of a given State against individuals located on another boat, under the flag of the coastal State.[1607]

907. Italy, on its part, argues that Article 59 does not apply because the Convention "does attribute exclusive jurisdiction to Italy pursuant to Article 97 concerning any potential penal or disciplinary responsibility of the Italian Marines on board an Italian-flagged ship involved in an incident of navigation in India's exclusive economic zone"; it also attributes "exclusive jurisdiction to Italy under Article 92 over the Italian-flagged *Enrica Lexie* while it was navigating in India's exclusive economic zone"; and entitles Italy to freedom of navigation in

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1603 India's Counter-Memorial, para. 6.58.

1604 Article 59 of the Convention.

1605 Virginia Commentary, Vol. II, p. 567, para. 59.1; Alexander Proelß (ed.), *The United Nations Convention of the Law of the Sea: A Commentary* (C.H. Beck, Hart, Nomos, 2017), p. 459.

1606 India's Counter-Memorial, para. 6.56.

1607 India's Counter-Memorial, para. 6.56.

India's exclusive economic zone pursuant to Article 87 of the Convention read together with Article 58, paragraph 2.[1608]

908. In considering the claims presented by Italy and counter-claims presented by India, the Arbitral Tribunal has considered several provisions of the Convention attributing rights or jurisdiction within the exclusive economic zone, which are relevant to the dispute between the Parties. In particular, pursuant to Article 87, paragraph 1, subparagraph (a), read together with Article 58, paragraph 2, Italy is entitled to freedom of navigation in India's exclusive economic zone; pursuant to Article 92, Italy is entitled to exercise exclusive jurisdiction over the "Enrica Lexie", and India is entitled to exercise exclusive jurisdiction over the "St. Antony"; Article 56 attributes to India rights and jurisdiction in the exclusive economic zone; and pursuant to Article 87, paragraph 1, subparagraph (a), and Article 90, read together with Article 58, paragraphs 1 and 2, India is entitled to enjoy the right and freedom of navigation in the exclusive economic zone.

909. The Arbitral Tribunal thus finds that the present dispute is not a case in which the Convention does not attribute rights and jurisdiction to Italy or India within the exclusive economic zone. In the Arbitral Tribunal's view, therefore, the first condition for the applicability of Article 59 is not met. Given this, there is no need for the Arbitral Tribunal to consider whether the second condition is met.

910. The Arbitral Tribunal concludes that Article 59 of the Convention is not applicable to this dispute.

VI. COUNTER-CLAIMS OF INDIA REGARDING ALLEGED BREACHES BY ITALY OF UNCLOS AND VIOLATIONS OF RIGHTS OF INDIA UNDER UNCLOS

911. India has presented counter-claims, contending that Italy has violated its rights under Articles 56, 87, and 90 of the Convention; has breached its obligations under Article 58, paragraph 3, of the Convention; and has infringed India's rights under Article 88 of the Convention. Italy rejects these counter-claims.

A. ALLEGED BREACHES BY ITALY OF PROVISIONS OF PARTS V (EXCLUSIVE ECONOMIC ZONE) AND VII (HIGH SEAS) OF UNCLOS

912. Before turning to the Parties' specific arguments with respect to each counter-claim, the Arbitral Tribunal notes several preliminary points raised by Italy in relation to India's counter-claims.

[1608] Italy's Reply, paras 7.108-7.109. *See also* Italy's Reply, para. 7.1.

913. First, Italy argues that India's counter-claims are premised on the factual allegation that the Marines shot at the "St. Antony" and killed two fishermen on board and objects to what it considers to be an attempt to prejudge the guilt of the Marines in advance of any criminal trial.[1609] India disagrees with Italy's suggestion that its counter-claims are premised on the assumption that the Marines are guilty. To the contrary, India maintains that its counter-claims do not concern the liability of the Marines, but rather whether Italy, by virtue of the Marines' actions, breached specific provisions of the Convention.[1610]

914. Second, Italy contends that, since India relies on the firing on the "St. Antony" by the Marines for the purposes of its counter-claims, it cannot at the same time argue that the same conduct is outside the scope of the Convention with respect to Italy's immunity claim.[1611] India, on its part, considers that it is "not the conduct that controls whether a matter falls within or without the Convention; it is whether the legal point, the substantive right, is covered by a specific provision of UNCLOS".[1612] According to India, while the obligations invoked in India's counter-claims are covered by specific provisions in the Convention, Italy's immunities claim is based on a customary rule of international law that has no express basis in, and would have to be incorporated into, the Convention.[1613]

915. Third, Italy claims that the conduct of the Marines concerned a specific, isolated incident, and as such, cannot give rise to liability on the part of Italy.[1614] India, in response, maintains that any individual violation of an international obligation by a State may give rise to international responsibility.[1615] While Italy concedes that "a single act is, in principle, sufficient to give rise to international responsibility",[1616] it maintains that the act of incidental interference with the navigation of a private Indian vessel cannot amount to a breach of sovereign rights of India.[1617]

1609 Hearing Transcript, 18 July 2019, 193:21-23.

1610 Hearing Transcript, 13 July 2019, 64:16-23.

1611 Hearing Transcript, 18 July 2019, 103:15-17, 105:20-24; Hearing Transcript, 20 July 2019, 93:4-11, 94:3-5.

1612 Hearing Transcript, 20 July 2019, 92:16-93:19.

1613 Hearing Transcript, 20 July 2019, 93:12-23.

1614 Hearing Transcript, 20 July 2019, 197: 21-25.

1615 Hearing Transcript, 13 July 2019, 69:17, 70:5-9, *citing Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair*, Decision of 30 April 1990, RIAA Vol. XX., p. 215 at p. 251, para 75.

1616 Hearing Transcript, 18 July 2019, 197:17-18.

1617 Hearing Transcript, 18 July 2019, 197:18-25.

1. Alleged Violation by Italy of India's Rights under Article 56 (Rights, Jurisdiction and Duties of the Coastal State in the Exclusive Economic Zone) of UNCLOS

916. The Parties disagree as to whether Italy violated India's sovereign rights in the exclusive economic zone under Article 56 of the Convention.

917. Article 56 provides, in relevant part:

> *Article 56*
>
> *Rights, jurisdiction and duties of the coastal State in the exclusive economic zone*
>
> 1. In the exclusive economic zone, the coastal State has:
>
> (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

(a) Position of India

918. India submits that, on its account of the "Enrica Lexie" incident, Italy violated India's sovereign rights in the exclusive economic zone provided in Article 56 of the Convention.

919. According to India, the exclusive economic zone was "designed primarily to give coastal States sovereign rights over the resources of the zone", including "all rights 'necessary for and connected with' the exploitation" of such resources.[1618] India submits that "the term 'sovereign rights' was taken from the language of Article 2 of the 1958 Convention on the Continental Shelf", which the ILC interpreted to mean that "the rights conferred upon the coastal State cover all rights necessary for and connected with the exploration and exploitation of the natural resources of the continental shelf".[1619]

920. Consequently, India submits that "a coastal State's sovereign rights over the living resources must include the right for its fishermen, who are key actors in the exploitation and conservation of fish resources, not to be impeded in their fishing activities" as "[s]uch a right is 'necessary for and connected with' the exploitation of fisheries".[1620] This means that "any interference by one state

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1618 India's Counter-Memorial, para. 8.7, *citing* Dolliver Nelson, 'Exclusive Economic Zone' (2008) Max Planck Encyclopedia of Public International Law, para. 42. *See also* Hearing Transcript, 13 July 2019, 77:4-15.

1619 India's Counter-Memorial, para. 8.8, *referring to* Virginia Commentary, Vol. VII, p. 541, para. 56.11(a); *citing* International Law Commission, "Articles Concerning the Law of the Sea with Commentaries" in *Yearbook of the International Law Commission*, Vol. II (1956), p. 297 [emphasis omitted].

1620 India's Counter-Memorial, para. 8.9.

with the ability of fishing vessels of another state to exploit the fishing resources of that state's EEZ violates sovereign rights and the fundamental object and purposes of Article 56(1)(a)".[1621]

921. This interpretation, India contends, was confirmed by the arbitral tribunal in the *South China Sea Arbitration*, which found that China had breached Article 56, paragraph 1, subparagraph (a), of the Convention by promulgating a fishing moratorium in 2012 which deterred Filipino fishermen from fishing in the Philippines' exclusive economic zone.[1622] The arbitral tribunal in that case reached its decision on the basis of its conclusion that "[t]he rights of other States do not include restricting a coastal State from exploiting the living resources of its own exclusive economic zone".[1623]

922. Applying this interpretation to the facts of the present case, India submits that Italy violated India's sovereign rights to exploit the fishing resources in its exclusive economic zone under Article 56, paragraph 1, of the Convention when the Marines' actions caused the "St. Antony" to cease its fishing activities on the day of the incident.[1624]

923. According to India, the "St. Antony" was a fishing boat registered in India, with a fishing licence issued by the Indian authorities, and carrying eleven Indian fishermen who were legitimately engaged in fishing activities in India's exclusive economic zone on the day of the incident.[1625] By 15 February 2012, the day of the incident, India contends that the "St. Antony" had been engaged for eight days in fishing activities in India's exclusive economic zone,[1626] "[w]hen the Marines shot at the St Antony with the resulting death of the two crew members, [and] had to cease its fishing activities and [...] return to shore".[1627]

924. Regardless of whether the crew members of the "St. Antony" were fishing at the time of the incident, India maintains that they were engaged in an extended fishing expedition, which was due to continue when the Marines' actions caused them to cease those activities.[1628] Therefore, India submits, the Marines' actions "fundamentally violated India's sovereign rights over fishing

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1621 Hearing Transcript, 13 July 2019, 77:15-20.

1622 Hearing Transcript, 13 July 2019, 77:20-78:13, *referring to* PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Award of 12 July 2016, para. 711.

1623 India's Counter-Memorial, para. 8.10, *citing* PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Award of 12 July 2016, para. 700.

1624 Hearing Transcript, 13 July 2019, 81:3-26.

1625 Hearing Transcript, 13 July 2019, 81:3-8.

1626 India's Counter-Memorial, para. 8.6(2), *referring to* Affidavit of Fredy J., 27 April 2012 (**Annex IT-168**). *See also* Hearing Transcript, 13 July 2019, 81:6-8.

1627 Hearing Transcript, 13 July 2019, 81:8-13. *See also* India's Counter-Memorial, para. 8.10.

1628 Hearing Transcript, 13 July 2019, 81:14-22.

in its EEZ, which necessarily includes the right to have its nationals and registered boats operate in the EEZ without being impeded, let alone being fired upon with lethal force".[1629]

925. India claims that "[t]his was particularly the case when the use of lethal force was resorted to without provocation and in the absence of any reasonable apprehension of threat to the safety of their ship, against unarmed fishermen".[1630] India further submits that under the VPD Manual, the Marines were required to use force only as a last resort, and if they were subject to an actual attack.[1631] In spite of this, India claims, little was done by the Marines to consider other approaches, before firing on the fishing boat.[1632]

926. India challenges the Piroli Report's finding that the two Marines "observed the rounds of all bursts ended into the water and away from the suspicious craft".[1633] India points out that the bursts were fired from automatic weapons and that it is questionable whether the Marines "could keep track of where each of their rounds landed, particularly given that only nine of the total of 20 rounds fired, and just two of the eight rounds fired from the closest distance (100 meters), were tracer bullets that could be visually followed".[1634]

927. India rejects Italy's defence that the Marines "did not act to impede" any sovereign rights because they "acted on the basis of an apprehension that the *Enrica Lexie* was facing a threat to the safety of its navigation, in the form of a risk of collision and pirate boarding".[1635] India refers to its earlier argument that there was no reasonable basis for such an apprehension particularly since the crew members of the "Enrica Lexie" have attested that they did not see any armed men or boarding equipment, and there was no risk of collision between the two vessels.[1636] India arguest that, even if the Master apprehended a risk of collision, he failed to give way in the first instance, as India submits he was obliged to under established maritime rules,[1637] and which he evidently

1629 India's Counter-Memorial, para. 8.6. *See also* Hearing Transcript, 13 July 2019, 82:1-12.

1630 India's Counter-Memorial, para. 8.10.

1631 Hearing Transcript, 13 July 2019, 90:2-4, *referring to* VPD Manual (Confidential Annex) (**Annex IT-234**).

1632 Hearing Transcript, 13 July 2019, 89:25-90:1.

1633 India's Counter-Memorial, para. 2.27 *citing* Piroli Report (Confidential Annex), p. 2-3 (**Annex IT-233**).

1634 India's Counter-Memorial, para. 2.27 *referring to* Piroli Report (Confidential Annex), pp 2-7, 2-8 (**Annex IT-233**).

1635 India's Rejoinder, para. 9.4, *citing* Italy's Reply, para. 10.8. *See also* Hearing Transcript, 13 July 2019, 82:19-25.

1636 *See* Section V.B.3(a). *See also* Hearing Transcript, 13 July 2019, 83:10-11.

1637 India's Rejoinder, para. 9.6. *See also* Hearing Transcript, 13 July 2019, 83:1-9.

could have done given that the "Enrica Lexie" did eventually change course during the very last stages of the incident.[1638]

928. In any event, India maintains, Italy "has not provided any legal basis for why and how India's sovereign rights could be ignored, even if there had been the apprehension of a security threat in the form of a possible collision or pirate boarding".[1639] India contends that "nothing in Article 56(1)(a) of UNCLOS suggests that a coastal State's sovereign rights can be interfered with in certain circumstances, and Italy provides no authority for its assertion".[1640] In fact, India argues that this argument would "set[] a dangerous precedent whereby a coastal state's sovereign rights can be violated merely if there are perceived threats that are not shared by any of the actual crew members and not backed up by any reasonably objective appreciation of the facts".[1641]

929. In addition, Italy's claim that the Marines did not intend to interfere with the fishing activities of the "St. Antony" is, in India's view, "legally irrelevant" to whether Italy breached Article 56, paragraph 1, subparagraph (a), of the Convention.[1642] According to India, nothing in Article 56, paragraph 1, subparagraph (a), nor in general international law, "suggests that a lack of intention to infringe sovereign rights is a defence to a breach of that provision".[1643] This principle, India contends, "was articulated in the case of *The Jessie* between Great Britain and the United States",[1644] and confirmed in the commentary to the ILC Draft Articles on State Responsibility,

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1638 Hearing Transcript, 13 July 2019, 84:1-17.

1639 Hearing Transcript, 13 July 2019, 85:4-8.

1640 India's Rejoinder, para. 9.12.

1641 Hearing Transcript, 13 July 2019, 85:18-22. *See also* India's Rejoinder, para. 9.11.

1642 India's Rejoinder, paras 9.7, 9.10. Hearing Transcript, 13 July 2019, 71:11-15.

1643 India's Rejoinder, paras 9.7-9.8, *citing* International Law Commission, "Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries" in *Yearbook of the International Law Commission*, Vol. II (Part 2), p. 31 at p. 36, para. 10 (2001); and *referring to* James Crawford, *Brownlie's Principles of Public International Law* (8th edn., Oxford University Press, 2012), p. 559.

1644 India's Rejoinder, para. 9.9, *citing Owners of the Jessie, the Thomas F. Bayard and the Pescawha (Great Britain) v. United States*, Award of 2 December 1921, RIAA Vol. VI, p. 57 at p. 59:

> It is unquestionable that the United States naval authorities acted bona fide, but though their bona fides might be invoked by the officers in explanation of their conduct to their own Government, its effect is merely to show that their conduct constituted an error in judgment, and any Government is responsible to other Governments for errors in judgment of its officials purporting to act within the scope of their duties and vested with power to enforce their demands.

See also Owners, Officers and Men of the Wanderer (Gr.Br).v. United States, Award of 9 December 1921, RIAA Vol. VI, p. 68 at p. 74; *Laughlin McLean (Great Britain) v. United States (Favourite case),* Award of 9 December 1921, RIAA Vol. VI, p. 82 at p. 84

which notes that "[i]n the absence of any specific requirement of a mental element in terms of the primary obligation, it is only the act of a State that matters, independently of any intention".[1645]

930. India further rejects Italy's argument that Article 56, paragraph 1, subparagraph (a), only confers sovereign rights on India that do not extend to Indian boats, or Indian fishermen. India clarifies that it is "not espousing claims [on] behalf of the St Antony or its crew", and that rather, its "counterclaims are firmly grounded on a violation by Italy of India's sovereign rights".[1646] In this respect, India justifies its claim on the basis that it is "self-evident that a coastal state's sovereign rights over the fishing resources in its exclusive economic zone are frequently, if not primarily, exercised by its own nationals and privately-owned fishing boats licensed by that state".[1647] Referring to the *South China Sea Arbitration*, India notes that the arbitral tribunal in that case also looked at the effect of China's fishing moratorium on Filipino fishermen and private citizens, and not on the State or State-owned vessels.[1648] The arbitral tribunal then went on to hold that China had violated Article 56 because China's "fishing moratorium established a realistic prospect that Filipino fishermen, seeking to exploit the resources of the Philippines' exclusive economic zone, could be exposed to the punitive measures spelled out in the moratorium" and "such developments may have a deterring effect on Filipino fishermen and their activities".[1649] India submits that Italy's actions had a similar,[1650] if not even more severe,[1651] deterring effect.

931. India also rejects Italy's argument that this case is distinguishable because Italy did not systematically interfere with, or claim jurisdiction, in conflict with India's sovereign rights in its exclusive economic zone in the same way that China's fishing moratorium did.[1652] In India's view, it was not China's conflicting claims to the exclusive economic zone that violated the Philippines' sovereign rights, but the effect that the moratorium had on the Filipino fishermen.[1653]

1645 Hearing Transcript, 13 July 2019, 71:15-72:6, *citing* International Law Commission, "Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries" in *Yearbook of the International Law Commission*, Vol. II (Part 2), p. 31 at p. 36 (2001).

1646 Hearing Transcript, 13 July 2019, 86:12-15.

1647 Hearing Transcript, 13 July 2019, 87:3-7.

1648 Hearing Transcript, 13 July 2019, 87:15-22, *referring to* PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Award of 12 July 2016, para. 712.

1649 India's Rejoinder, para. 9.15, *citing* PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Award of 12 July 2016, para. 712.

1650 India's Rejoinder, para. 9.15.

1651 Hearing Transcript, 13 July 2019, 78:3-13.

1652 India's Rejoinder, para. 9.17, *referring to* Italy's Reply, para. 10.11. *See also* Hearing Transcript, 13 July 2019, 97:4-9.

1653 Hearing Transcript, 13 July 2019, 87:15-19.

932. India further rejects Italy's argument that Article 56, paragraph 1, subparagraph (a), does not confer a right on "Indian fishermen to fish outside the maritime zone in which they are entitled to operate".[1654] According to India, the "St. Antony" was permitted and indeed licenced to fish off India's coast.[1655] India further submits that "the issue before this Tribunal is not whether the *St Antony* had a right to fish in India's EEZ under Indian law or [Article 56]". Rather, India submits that it "is claiming that Italy violated *India's* sovereign rights under Article 56(1)(a)".[1656]

933. India contends that the area in which the "Enrica Lexie" was navigating was known to be an area of intensive Indian fishing and, therefore, the presumption should have been that "any boat that appeared to be a fishing boat was either an Indian boat or one that was licensed to fish in the EEZ".[1657]

(b) **Position of Italy**

934. Italy denies that it ever interfered with India's rights to explore, exploit, conserve, or manage the natural resources in its exclusive economic zone, in breach of Article 56, paragraph 1, subparagraph (a), of the Convention.

935. While India claims that the Marines violated India's sovereign rights when they shot at the "St. Antony", Italy contends, by contrast, that the Marines "did not act to impede India's rights to explore, exploit, conserve or manage its natural resources. Rather, they acted on the basis of an apprehension that the *Enrica Lexie* was facing a threat to the safety of its navigation, in the form of a risk of collision and pirate boarding".[1658]

936. Italy notes that the assertion by the Marines in the Piroli Report that they fired into the water to deter the oncoming vessel is supported by the testimony of Captain Vitelli at the Hearing, who averred:

1654 India's Rejoinder, para. 9.19, *citing* Italy's Reply, para. 10.10.

1655 India's Rejoinder, para. 9.19, *referring to* The Maritime Zones of India (Regulation of Fishing by Foreign Vessels) Act, 1981 (**Annex IN-38**); Certificate of Registration for the "St. Antony" issued by the Office of the Assistant Director of Fisheries, Extension & Training, Colachel, Kanyakumari (West) under the Tamil Nadu Marine Fishing Regulation Act, 1983 (**Annex IT-267**); and The "St. Antony"'s Certificate of Registration for Fishing Vessels under the Marine Products Export Development Authority Act (**Annex IN-37**). According to India, the "*St Antony* is a mechanized boat so it had to fish beyond 12nm from Kerala's coast because the territorial waters are reserved for fishermen without mechanized boats". India's Rejoinder, para. 919, n. 399, *referring to* Additional Statement of Shri Freddy s/o John Bosco (**Annex IN-39**).

1656 India's Rejoinder, para. 9.19.

1657 Hearing Transcript, 13 July 2019, 89:23-25.

1658 Italy's Reply, para. 10.8.

> Right after I realised the danger coming from the left side, so the collision risk – because that was my worry – I saw some water splashes. As a matter of fact, since I was not used to seeing that, my first thought was very quick: I asked myself, "Who's throwing rocks in the water?" As this was the impression that I got. But then I connected the water with the shots, and I understood that it was not rocks that were being thrown in the water.[1659]

937. Captain Noviello similarly affirmed at the Hearing: "I saw that they were firing the shots into the water, since I saw a lot of water splashes coming from the water to the surface".[1660]

938. Italy further contends that, "[e]ven if it were true that the Marines' apprehension of a threat to the safety of their ship were not reasonable, that in no way serves to make India's case about interference with its right to exploit the natural resources of its exclusive economic zone". According to Italy, Article 56 "does not confer on coastal States a right to the protection of individual fishermen irrespective of the context for the acts complained of, and irrespective of whether that treatment was motivated by their status as fishermen".[1661]

939. Italy denies India's claim that sovereign rights with respect to fishing vessels, or a right to the protection of fishermen, are necessary for and connected with its sovereign rights relating to the exploration, exploitation, conservation, and management of natural resources, including fisheries.[1662] Pointing to India's reference to fishery management under UNCLOS and *dicta* in the *South China Sea Arbitration*, Italy contends that Article 56 mainly concerns fisheries, not fishermen.[1663] According to Italy, even if the Arbitral Tribunal accepts India's interpretation of its sovereign rights under Article 56, "India's sovereign rights do not include rights to protection from interference with fishermen in all circumstances, including, as in this case, an apprehension of a security threat and possible collision and pirate boarding".[1664]

940. Similarly, Italy argues that, even if India's sovereign rights under Article 56 extend to the protection of fishermen, "Article 56(1)(a) does not confer a right on Indian fishermen to fish outside the maritime zone in which they are entitled to operate".[1665] In this regard, Italy rejects India's claim that the fishermen on the "St. Antony" were legitimately engaged in fishing activities in India's exclusive economic zone on the day of the incident. According to Italy, the

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1659 Hearing Transcript, 15 July 2019, 30:13-21.

1660 Hearing Transcript, 15 July 2019, 111:7-9.

1661 Italy's Reply, para. 10.8. *See also* Hearing Transcript, 18 July 2019, 196:2-5.

1662 Italy's Reply, para. 10.9, *referring to* India's Counter-Memorial, paras 4.19, 8.18.

1663 Italy's Reply, para. 10.9, *referring to* India's Counter-Memorial, para. 4.19; PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Award of 12 July 2016, para. 700 ("the concept of sovereign rights and the exclusive jurisdiction over fisheries that was the central objective motivating the introduction of the exclusive economic zone concept").

1664 Italy's Reply, para. 10.9. *See also* Hearing Transcript, 18 July 2019, 196:6-20.

1665 Italy's Reply, para. 10.10.

Tamil Nadu Marine Fishing Regulation Act, 1983, under which the "St. Antony" was registered, requires registered fishing vessels to apply "to the authorised officer for the grant of a licence for using such fishing vessel for fishing".[1666] It is not clear to Italy whether the "St. Antony" had such a licence, but even if it did, Italy contends that it was not permitted to fish beyond Indian territorial waters.[1667]

941. In addition, Italy argues that the Marines' conduct in this case was "completely different from the conduct at issue" in the *South China Sea Arbitration*, in which the "effect and intent was systematically to prevent fishing in certain areas by vessels flying a certain flag".[1668] According to Italy, it had neither the intent nor the effect of "systematically interfering with the exercise of any right of India in connection with its natural resources". Rather, Italy argues that this case "concerns a very specific single incident involving two vessels and those on board them while they were navigating in India's exclusive economic zone" that is "unrelated to any fishing activities of the *St Antony*".[1669]

942. With reference to the *South China Sea Arbitration*, Italy also argues that Italy's conduct in no way resembles that of China *vis-à-vis* the Philippines. According to Italy, the arbitral tribunal in that case took the view that at "the core of the dispute relating to living and non-living resources was the fact that China and the Philippines each considered itself to have exclusive rights to those resources".[1670] In the present case, Italy submits, the Parties do not present conflicting claims to the fisheries in India's exclusive economic zone, and Italy has committed no act equivalent to China's 2012 moratorium on fishing activities. Italy contends that it never sought to interfere with the "St. Antony" as a fishing boat, to impede the fishing activities of the vessel or the fishermen on board it, or to interfere with the rights of India to the natural resources of its exclusive economic zone.[1671] According to Italy, the differences between the two cases are so striking that drawing an analogy between this case and the situation in the *South China Sea Arbitration* is "absurd".[1672]

1666 Italy's Reply, para. 10.10, *referring to* Certificate of Registration for the "St. Antony" issued by the Office of the Assistant Director of Fisheries, Extension & Training, Colachel, Kanyakumari (West) under the Tamil Nadu Marine Fishing Regulation Act, 1983 (**Annex IT-267**); and *citing* Indian Tamil Nadu Marine Fishing Regulation Act, 1983, Section 7(1) (**Annex IT-266**).

1667 Italy's Reply, para. 10.10, *referring to* Indian Tamil Nadu Marine Fishing Regulation Act, 1983, Sections 7(1) and 3(k) (defining "specified area") (**Annex IT-266**).

1668 Italy's Reply, para. 10.11, *referring to* PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Award of 12 July 2016.

1669 Italy's Reply, para. 10.11.

1670 Italy's Rejoinder, para. 5.13, *referring to* PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Award of 12 July 2016, para. 696.

1671 Italy's Rejoinder, para. 5.13.

1672 Hearing Transcript, 18 July 2019, 199:4.

943. Italy rejects India's argument that Article 56 would lose its meaning if other States could prejudice the rights of a coastal State by shooting at the coastal State's vessels in the exclusive economic zone. According to Italy, Article 56 "confers rights on States with respect to the natural resources of their exclusive economic zone, but it does not confer any particular right with respect to any particular vessel or those aboard it".[1673]

944. In reply to India's arguments regarding the alleged violations of the COLREGS by the "Enrica Lexie", Italy submits that even if this was the case, "the failure of Captain Vitelli to turn in the appropriate manner at the appropriate time would not be attributable to Italy".[1674]

945. Italy does not take issue with India's proposition that a State's acts matter "independently of any intention".[1675] According to Italy, this point "has no bearing on the fact that there was no connection between the Marines' actions and the *St Antony*'s status as a fishing boat, nor its fishing activities".[1676]

946. Finally, Italy points out that while India uses the "necessary for and connected with" test to include rights and rules not expressly mentioned in Article 56, paragraph 1, of the Convention, it rejects Italy's arguments under Article 2, paragraph 3; Article 56, paragraph 2; and Article 58, paragraph 2, of the Convention which take the same approach.[1677]

(c) **Analysis of the Arbitral Tribunal**

947. As noted above, Article 56 relates to rights, jurisdiction and duties of the coastal State in the exclusive economic zone. It states in paragraph 1, subparagraph (a), that the coastal State has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, in the exclusive economic zone. Article 56, paragraph 2, further states that in exercising its rights and performing its duties under the Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of the Convention.

948. India argues that interference by one State with the ability of fishing vessels of a coastal State to legitimately exploit the fishing resources of its exclusive economic zone violates the fundamental object and purpose of Article 56, paragraph 1, subparagraph (a), of the Convention and the coastal

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1673 Italy's Rejoinder, para. 5.9.

1674 Hearing Transcript, 18 July 2019, 197:9-11.

1675 Italy's Rejoinder, para. 5.12, *citing* India's Rejoinder, para. 9.8.

1676 Italy's Rejoinder, para. 5.12.

1677 Hearing Transcript, 18 July 2019, 106:10-15.

State's sovereign rights protected thereunder.[1678] India claims in this regard that the actions of the Marines caused the "St. Antony" to cease its fishing activities within India's exclusive economic zone and thus constituted a violation by Italy of Article 56, paragraph 1, subparagraph (a), of the Convention.[1679] India stresses that in this incident, force was used by the Marines against unarmed Indian fishermen, without provocation and in the absence of any reasonable apprehension of a threat to the safety of the "Enrica Lexie".[1680]

949. Italy challenges these allegations by arguing that the Marines did not act to impede India's rights to explore, exploit, conserve or manage its natural resources within its exclusive economic zone because the Marines acted on the basis of an apprehension that the "Enrica Lexie" was facing a threat of a risk of collision with the "St. Antony" and of pirate boarding.[1681]

950. The Arbitral Tribunal notes that on the date of the incident the "Enrica Lexie" was crossing India's exclusive economic zone, in accordance with its right to exercise freedom of navigation, and was destined for Port Said, Egypt. The "Enrica Lexie" had on board a VPD consisting of six members of the Italian Marines, whose task was to ensure the safe navigation of the "Enrica Lexie" and protect it against potential pirate attacks. The Italian Law on VPDs regulated the presence of the Marines on board the "Enrica Lexie" and their duties.[1682] The Arbitral Tribunal notes that in accordance with this Law Decree, responsibility for determining whether a vessel is at risk of a pirate attack rests with the Chief of the VPD.[1683]

951. On the date of the incident, Second Officer Gupta and Captain Noviello spotted a small craft, later identified as the "St. Antony", rapidly approaching the "Enrica Lexie".[1684] According to the evidence on the record, it appears that the crew of the "Enrica Lexie" implemented a range of measures to communicate with the ship including through, according to Captain Noviello, an attempt to contact the small craft through channel 16 of the VHF communication system, when the small craft was between 1 and 1.5 nautical miles away.[1685] As the craft came closer to the

1678 Hearing Transcript, 13 July 2019, 77:15-20.

1679 Hearing Transcript, 13 July 2019, 81:3-26.

1680 India's Rejoinder, para. 9.4, *referring to* Italy's Reply, para. 10.8. *See also* Hearing Transcript, 13 July 2019, 82:23-83:9.

1681 Italy's Reply, para. 10.8.

1682 Law Decree No. 107 of 12 July 2011, of the Italian Republic (**Annex IT-91**). *See also* Hearing Transcript, 8 July 2019, 131:12-132:2.

1683 Law Decree No. 107 of 12 July 2011, of the Italian Republic, Article 5, paragraph 2 (**Annex IT-91**) ("The Head of the VPD of each team, […] has exclusively the responsibility for the military activity of combating piracy").

1684 (Confidential Annex) (**Annex IT-261**).

1685 Hearing Transcript, 15 July 2019, 111:10-24; 149:21-22.

"Enrica Lexie", the Marines used various methods in an attempt to alert the approaching craft, including visual signals[1686] and firing a mix of tracer and ordinary bullets, when the craft was at approximately 800 metres,[1687] 500 metres,[1688] and 300 metres.[1689] Despite such signals, the craft maintained its course and speed, approaching the "Enrica Lexie".[1690] According to the available records of the incident, a conclusion was reached on board the "Enrica Lexie" that it was under pirate attack. This is confirmed by Captain Vitelli who "sounded the general emergency alarm by bell, by foghorn and announced" three times on the public address system that the "Enrica Lexie" was under pirate attack and instructed the "Enrica Lexie" crew to go into the engine room, known as the citadel, for shelter.[1691]

952. It follows from the available factual information that under the circumstances the Marines and the "Enrica Lexie" crew believed that the vessel was under a pirate attack and took actions, the appropriateness of which will be determined by a competent criminal court, to protect the "Enrica Lexie" against a perceived pirate attack.

953. In the view of the Arbitral Tribunal, it is established that the actions by the Marines were not directed at undermining or interfering with India's sovereign rights under Article 56 of the Convention. The Arbitral Tribunal notes, in particular, that the conduct of the Marines in the present case occurred in the context of a singular and isolated incident, which had a merely incidental effect on the ability of a fishing vessel, the "St. Antony", to continue pursuing its fishing activities. Such circumstances do not rise to the level of interference with "sovereign rights for the purposes of exploring and exploiting, conserving and managing the natural resources" of the exclusive economic zone.

954. In any case, the sovereign rights enjoyed by India in its exclusive economic zone are not unlimited but must be balanced against the rights and duties of other States. This is confirmed by the

1686 (Confidential Annex), p. 1 (**Annex IT-236**); Statement of Carlo Noviello, 19 February 2012 (**Annex IT-142**); Declaration of Carlo Noviello, 19 February 2012 (**Annex IT-138**); Log Book of the Master of the "Enrica Lexie", p. 2 (**Annex IT-14**); Piroli Report (Confidential Annex), p. 2-6 (**Annex IT-233**).

1687 (Confidential Annex), p. 1 (**Annex IT-236**); Piroli Report (Confidential Annex), p. 2-6 (**Annex IT-233**).

1688 (Confidential Annex), p. 1 (**Annex IT-236**); (Confidential Annex) (**Annex IT-237**); Piroli Report (Confidential Annex), p. 2-6 (**Annex IT-233**).

1689 (Confidential Annex), p. 2 (**Annex IT-236**); (Confidential Annex) (**Annex IT-237**), Piroli Report (Confidential Annex), p. 2-7 (**Annex IT-233**).

1690 (Confidential Annex) (**Annex IT-236**); (Confidential Annex) (**Annex IT-237**); Piroli Report (Confidential Annex), pp 2-6, 2-7, 2-8 (**Annex IT-233**).

1691 Declaration of Umberto Vitelli, 19 February 2012 (**Annex IT-141**); Hearing Transcript, 15 July 2019, 22:7-16, 29:13-18.

obligation on the coastal State in Article 56, paragraph 2, of the Convention to have due regard to the rights and duties of other States and the applicability of Article 110 of the Convention.

955. With respect to the obligation to have due regard to the rights of other States, the Arbitral Tribunal observes that piracy at sea constitutes an international crime. All States have the right[1692] and duty[1693] to protect their vessels against piracy at sea including in the exclusive economic zone of a coastal State.[1694] In the present case, the Marines did not target the "St. Antony" as a fishing vessel, but on the suspicion that it was a pirate vessel intending to board the "Enrica Lexie". The Arbitral Tribunal consequently concludes that the actions taken by the Marines, as Italian State officials, for the discrete purpose of protecting the "Enrica Lexie" against a perceived pirate attack, the domestic law aspects of which will be subject to determination by a competent criminal court, did not result in a violation by Italy of Article 56 of the Convention.

2. Alleged Breach by Italy of its Obligations under Article 58 (Rights and Duties of Other States in the Exclusive Economic Zone) of UNCLOS

956. The Parties further disagree as to whether Italy breached its obligation of due regard under Article 58, paragraph 3, of the Convention.

957. Article 58 of the Convention sets out the rights and duties of other States in an exclusive economic zone. Article 58, paragraph 3, provides:

> *Article 58*
>
> *Rights and duties of other States in the exclusive economic zone*
>
> 3. In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.

(a) Position of India

958. India submits that, on its version of the "Enrica Lexie" incident, Italy violated its obligation under Article 58, paragraph 3, of the Convention to give "due regard" to India's sovereign rights in the exclusive economic zone, as provided in Article 56, paragraph 1, subparagraph (a).

1692 *See* Articles 105, 109, and 110 of the Convention.

1693 *See* Article 100 of the Convention.

1694 *See* Articles 58, paragraph 2, and 110 of the Convention.

959. According to India, under Article 58, paragraph 3, "[t]he balance between the sovereign rights of the coastal State with respect to its economic utilization of its exclusive economic zone, and the rights of other States, is in favour of the coastal State".[1695] India contends that this interpretation is consistent with the object and purpose of the exclusive economic zone, and the *travaux préparatoires* of the Convention.[1696] In India's view, "[i]t follows that, if another State's activity clashes with the coastal State's competence in respect of economic utilization of the zone, the determination must be in favour of the coastal State".[1697]

960. In addition, India contends that the "due regard" clause is "generally understood as non-infringement of the coastal State's rights",[1698] and that the "criteria to be applied in assessing each circumstance is whether the activity interferes with the rights and interests of the coastal State".[1699] India relies on the arbitral tribunal's finding in the *Chagos Marine Protected Area Arbitration* with respect to Article 56, paragraph 2, of the Convention, which also contains a "due regard" obligation.[1700] As Italy itself has recognised, India notes, the arbitral tribunal in that case considered the obligation to give "due regard" as functionally equivalent to the obligation under Article 194, paragraph 4, of the Convention to "refrain from unjustifiable interference".[1701]

961. India submits that the actions of the Marines "interfered in a most dramatic way with India's sovereign rights" and "constituted a flagrant breach of Italy's obligation to have 'due regard' to India's rights".[1702] India refers to the *Chagos Marine Protected Area Arbitration*, in which the

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1695 India's Counter-Memorial, para. 8.13.

1696 India's Counter-Memorial, paras 8.13-8.14, *citing* Virginia Commentary, Vol. VII, p. 525, para. 56.2; Alexander Proelß, 'The Law on the Exclusive Economic Zone in Perspective: Legal Status and Resolution of User Conflicts Revisited' (2012) 26 *Ocean Yearbook* 87, p. 93.

1697 India's Counter-Memorial, para. 8.15, *referring to* Virginia Commentary, Vol. VII, p. 502, para. V.15, *citing* Official Records of the Third United Nations Conference on the Law of the Sea, Vol. V, 10 December 1982, U.N. Doc. A/CONF.62/WP.8/Rev.1/Part II, para. 18 ("In simple terms, the rights as to resources belong to the coastal State and, in so far as such rights are not infringed, all other States enjoy the freedoms of navigation and communication").

1698 India's Counter-Memorial, para. 8.15, *referring to* Moritaka Hayashi, 'Military and Intelligence Gathering Activities in the EEZ: Definition of Key Terms' (2005) 29 Marine Policy 123, at 133.

1699 India's Counter-Memorial, para. 8.15, *referring to* Moritaka Hayashi, 'Military and Intelligence Gathering Activities in the EEZ: Definition of Key Terms' (2005) 29 Marine Policy 123, at 133; Bateman, S., 'Prospective Guidelines for Navigation and Overflight in the Exclusive Economic Zone' (2005) 144 Maritime Studies 17, at 22.

1700 India's Counter-Memorial, para. 8.15, *referring to* PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 519 ("[T]he ordinary meaning of 'due regard' calls for the United Kingdom to have such regard for the rights of Mauritius as is called for by the circumstances and by the nature of those rights").

1701 Hearing Transcript, 13 July 2019, 80:8-9, *citing* PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 540; and *referring to* Italy's Rejoinder, para 5.16.

1702 India's Counter-Memorial, para. 8.16.

arbitral tribunal stated that the "extent of impairment" is an important factor in considering the "due regard" requirement.[1703] India further relies on the *South China Sea Arbitration*, in which, according to India, the arbitral tribunal found a violation of the "due regard" clause "even without any resort to the use of force".[1704] India argues that "[t]he facts of this case are far more egregious", including, on India's account, the use of "lethal force without provocation and in the absence of any reasonable apprehension of threat to the safety of their ship, against unarmed fishermen".[1705]

962. India contends that Italy's alleged breach of Article 56, paragraph 1, subparagraph (a), of the Convention also constituted a breach of Italy's obligation to give "due regard" to India's sovereign rights under Article 58.[1706] India adds, however, that if the Arbitral Tribunal declines to hold that Italy breached Article 56, India maintains its separate counter-claim under Article 58.[1707]

(b) **Position of Italy**

963. Italy contends that it did not breach Article 58 of the Convention.

964. Italy rejects India's arguments with respect to "due regard" obligation of Article 58, paragraph 3, of the Convention. According to Italy, this Article would impose a relevant obligation on Italy only if India's rights under Article 56, paragraph 1, subparagraph (a), were engaged in this case, which Italy contends they are not. As with respect to Article 56,[1708] Italy finds that there is "no basis on which to claim that the Marines' actions were in any way connected to India's right to exploit fisheries within its economic zone, or any attempt to prevent the exercise of that right". Italy further contends that "[e]ven if India's sovereign rights [under Articles 56 or 58] include rights with respect to fishing vessels, or fishermen, such rights cannot include the right to the protection of fishermen from interference in circumstances where a threat to the security and safe navigation of a vessel is apprehended".[1709]

1703 Hearing Transcript, 13 July 2019, 90:6-9, *referring to* PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 519.

1704 India's Counter-Memorial, para. 8.17, *referring to* PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Award of 12 July 2016, para. 753.

1705 India's Counter-Memorial, para. 8.18; *referring to* NIA Report (Confidential Annex), para. 11.25 (**Annex IN-27**).

1706 India's Rejoinder, para. 9.20.

1707 India's Rejoinder, para. 9.21.

1708 *See* Part VI.A.1(b) above.

1709 Italy's Reply, para. 10.14.

965. Italy contends that India makes "no real attempt to engage with Article 58(3) as a provision that stands alone from Article 56(1)(a), or with the meaning of the obligation to give 'due regard' to the sovereign right of the coastal State to exploit its natural resources".[1710]

966. Italy disputes India's reliance on the *South China Sea Arbitration* in which the arbitral tribunal found that China breached its obligation to have due regard to the rights of the Philippines in its exclusive economic zone.[1711] According to Italy, this case presents no conduct equivalent to the acts of vessels under Chinese Government control "to escort and protect Chinese fishing vessels engaged in fishing unlawfully in the Philippines' exclusive economic zone".[1712]

967. Italy further disputes India's understanding of the *Chagos Marine Protected Area Arbitration*. According to Italy, the arbitral tribunal in the *Chagos Marine Protected Area Arbitration* considered the obligation to "refrain from unjustifiable interference" under Article 194, paragraph 4, of the Convention "to be functionally equivalent to the obligation to give 'due regard', set out in Article 56(2)".[1713]

968. Italy submits that, even if, as India asserts, the Marines' conduct was unjustified on the basis that none of the crew members considered the "St. Antony" to be anything other than a small fishing craft, this would not prove that Italy failed to have due regard to India's rights to explore and exploit natural resources, including fisheries, in its exclusive economic zone.[1714] Italy supports this point by arguing that, as India has observed,[1715] the content of the "due regard" obligation depends on the extent of the regard "called for by the circumstances and by the nature of those rights".[1716]

969. According to Italy, India contends that the rights at issue in this case were India's sovereign rights under Article 56 to exploit its fisheries.[1717] Italy maintains, however, that "India's sovereign rights

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1710 Italy's Rejoinder, para. 5.15.

1711 Italy's Rejoinder, para. 5.15, n. 195, *referring to* India's Counter-Memorial, para. 8.17.

1712 Italy's Rejoinder, para. 5.15, n. 195, *citing* PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Award of 12 July 2016, para. 756.

1713 Italy's Rejoinder para. 5.16, *citing* PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 540.

1714 Italy's Rejoinder, para. 5.16.

1715 Italy's Rejoinder, para. 5.17, *referring to* India's Counter-Memorial, para. 8.15.

1716 Italy's Rejoinder, para. 5.17, *referring to* PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 519. According to Italy, "[t]he *Chagos* tribunal was interpreting Article 56(2), but ITLOS appears to consider that the 'due regard' obligations in Articles 56(2) and 58(3) are equivalent". *See also* Italy's Rejoinder, para. 5.17, n. 199, *referring to Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion of 2 April 2015, ITLOS Reports 2015, p. 4 at p. 61, para. 216.

1717 Italy's Rejoinder, para. 5.17, *citing* India's Rejoinder, para. 9.21.

to exploit its fisheries were simply not engaged in this case". Italy submits that the "contemporaneous evidence [...] indicates that those on board the Enrica Lexie apprehended a risk of collision and pirate attack and, therefore, a threat to the Enrica Lexie's safe navigation".[1718] Italy concludes that the "apprehension of that risk and the Marines' reaction to it was unrelated to India's rights under Article 56(1)(a), and the Marines' conduct did not constitute a breach by Italy of its obligation to have due regard to India's right under that provision".[1719]

970. Italy rejects India's contention that, even if the Arbitral Tribunal were to find that Italy did not violate India's rights under Article 56, Italy could be found to have failed to have due regard to India's rights under that provision. According to Italy, the Parties agree that the "St. Antony" was not flying an Indian flag when the incident occurred.[1720] Italy submits that, "[w]ithout a flag flying on the *St Antony*, particularly beyond India's territorial sea, Italy could not be said to have failed to have had due regard to any alleged sovereign rights of India".[1721] According to Italy, India's assertions that the "St. Antony" was an Indian-registered fishing boat operated by Indian nationals in the Indian exclusive economic zone do not prove that those on board the "Enrica Lexie" knew or could have known the status of the "St. Antony" at the time. Italy concludes that there was "no basis on which, in reacting to the oncoming, unflagged, vessel, […] the Marines could be said to have failed to have due regard to any rights of India to the fisheries in its exclusive economic zone".[1722]

(c) **Analysis of the Arbitral Tribunal**

971. India argues that the term "due regard" in Article 58, paragraph 3, of the Convention implies that "if another State's activity clashes with the coastal State's competence in respect of economic utilization of the zone, the determination must be in favour of the coastal State".[1723] India therefore concludes that by not giving "due regard" to India's sovereign rights in the exclusive economic zone, as provided for in Article 56, paragraph 1, subparagraph (a), Italy violated its obligation under Article 58, paragraph 3, of the Convention.

1718 Italy's Rejoinder, para. 5.17. *See also* Italy's Reply, paras 4.17-4.21.

1719 Italy's Rejoinder, para. 5.17.

1720 Italy's Rejoinder, para. 5.18, *referring to* India's Rejoinder, para. 9.34.

1721 Italy's Rejoinder, para. 5.18.

1722 Italy's Rejoinder, para. 5.18.

1723 India's Counter-Memorial, para. 8.15.

972. Italy rejects these arguments and points out that the content of the "due regard" obligation depends on the extent of the regard "called for by the circumstances and by nature of those rights".[1724] Italy submits in this regard that the "contemporaneous evidence [...] indicates that those on board the *Enrica Lexie* apprehended a risk of collision and pirate attack and, therefore, a threat to the *Enrica Lexie*'s safe navigation".[1725] Consequently, the "apprehension of that risk and the Marines' reaction to it was unrelated to India's rights under Article 56(1)(a), and the Marines' conduct did not constitute a breach by Italy of its obligation to have due regard to India's right under that provision".[1726]

973. The notion of "due regard" is not defined by UNCLOS. The ordinary meaning of the phrase "with due regard to" is "with the proper care or concern for".[1727] The term "regard" also signifies "[a]ttention, care, or consideration given to a thing or person; concern for, heed of", or "[a] thing or circumstance taken into account in determining action; a consideration, a motive".[1728] As a general rule, the ordinary meaning of "due regard" does not contemplate priority for one activity over another.

974. This absence of hierarchy is reflected in the complementarity of Article 56, paragraph 2, and Article 58, paragraph 3, of the Convention. As discussed in the Virginia Commentary, "[t]here is a mutuality in the relationship of the coastal State and other States, and articles 56 and 58 taken together constitute the essence of the regime of the exclusive economic zone".[1729]

975. The sovereign rights of the coastal State over the natural resources in the exclusive economic zone coexist with the high seas freedoms enjoyed by other States in that zone. In accordance with Article 56, paragraph 2, the coastal State is required to have "due regard" to the rights and duties of other States in the exclusive economic zone, and correspondingly, under Article 58, paragraph 3, of the Convention, other States shall have "due regard" to the rights and duties of the coastal State in its exclusive economic zone. Thus, the object and purpose of the obligation of "due regard" is to ensure balance between concurrent rights belonging to coastal and other States.

1724 Italy's Rejoinder, para. 5.17, *citing* PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 519.

1725 Italy's Rejoinder, para. 5.17.

1726 Italy's Rejoinder, para. 5.17.

1727 Merriam-Webster.com Dictionary, Merriam-Webster, available at <www.merriam-webster.com/dictionary/with%20due%20regard%20to>.

1728 *See Shorter Oxford English Dictionary*, Vol. II (6th ed. 2007) at 2511.

1729 Virginia Commentary, Vol. II, p. 556, para. 58.1.

976. In *Chagos Marine Protected Area Arbitration*, the arbitral tribunal defined the notion of "due regard", in the context of Article 56, paragraph 2, of the Convention, as follows:

> In the Tribunal's view, the ordinary meaning of "due regard" calls for the United Kingdom to have such regard for the rights of Mauritius as is called for by the circumstances and by the nature of those rights. The Tribunal declines to find in this formulation any universal rule of conduct. The Convention does not impose a uniform obligation to avoid any impairment of Mauritius' rights; nor does it uniformly permit the United Kingdom to proceed as it wishes, merely noting such rights. Rather, the extent of the regard required by the Convention will depend upon the nature of the rights held by Mauritius, their importance, the extent of the anticipated impairment, the nature and importance of the activities contemplated by the United Kingdom, and the availability of alternative approaches.[1730]

977. In the view of the Arbitral Tribunal, the above notion of "due regard" as defined by the arbitral tribunal also applies in the context of Article 58, paragraph 3.

978. It follows from the *Chagos Marine Protected Area Arbitration* award that the extent of the "regard" required by the Convention depends, among others, upon the nature of the rights enjoyed by a State.[1731] In other words, Article 56, paragraph 2, and Article 58, paragraph 3, are structured so as to guarantee observance of the concurrent respective rights and duties of coastal and other States. The Virginia Commentary to Article 58, paragraph 3, of the Convention indicates that the Article's significance is "that it balances the rights, jurisdiction and duties of the coastal State with the rights and duties of other States in the exclusive economic zone".[1732] Some commentators share this understanding. For instance, it has been observed that "[the] reciprocal 'due regard' rule does not grant priority to the rights of the coastal State or to the freedoms of other States. It is an obligation for both States to exercise their rights respecting those of the other States and to endeavour in good faith to find accommodations permitting the exercise of the rights of both".[1733] The obligation requires, as has been noted by another commentator, that other States "refrain from activities that *unreasonably interfere* with the exercise of the rights of the coastal State".[1734]

979. The Arbitral Tribunal observes that Article 58, paragraph 2, of the Convention provides that Articles 88 to 115 "apply to the exclusive economic zone". That reference extends specific rights and duties of States as regards the repression of piracy to the exclusive economic zone. The

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1730 PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 519.

1731 PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 519.

1732 Virginia Commentary, Vol. II, p. 543, para. 56.11(f).

1733 Tullio Treves, 'Coastal States' rights in the maritime areas under UNCLOS' (2015) 12:1 Revista de Direito Internacional, Brasilia 39, at 42.

1734 Albert J. Hoffmann, 'Freedom of Navigation' (2011) Max Planck Encyclopedia of Public International Law, para. 15 [emphasis added].

repression of piracy by States in the exclusive economic zone is thus not only sanctioned by the Convention but also, pursuant to Article 100 of the Convention as incorporated into Article 58, paragraph 2, a duty incumbent on all States.

980. It follows that, if protection from and repression of piracy comprise a right and a duty of India and Italy alike, including within India's exclusive economic zone, the conduct of the Marines on board the "Enrica Lexie" in responding to a perceived piracy threat cannot have "unreasonably interfere[d]" with, and thus have failed to show "due regard" to, India's rights as the coastal State. The domestic law aspects of the Marines' response to the putative piracy threat will be subject to determination by a competent criminal court, and it is not for the Arbitral Tribunal to decide on this matter in the present context.

981. In light of the foregoing, the Arbitral Tribunal determines that the actions taken by the Marines, as Italian State officials, to protect the "Enrica Lexie" against an alleged pirate attack did not result in a breach of Italy's obligation of "due regard" for the sovereign rights of India over natural resources in its exclusive economic zone. Consequently, the Arbitral Tribunal concludes that Italy has not violated Article 58, paragraph 3, of the Convention.

3. Alleged Violation by Italy of India's Right and Freedom under Article 87 (Freedom of the High Seas) and Article 90 (Right of Navigation) of UNCLOS

982. The Parties also disagree as to whether Italy violated India's right and freedom of navigation in the exclusive economic zone under Articles 87 and 90 of the Convention.

983. Articles 87 and 90 of the Convention relate to the right and freedom of navigation on the high seas. Both apply equally to the exclusive economic zone by virtue of Article 58, paragraph 2, of the Convention.

984. Article 87, paragraph 1, subparagraph (a), provides:

> *Article 87*
>
> *Freedom of the high seas*
>
> 1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:
>
> (a) freedom of navigation;

985. Article 90 provides:

Article 90

Right of navigation

Every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas.

986. As described below, Italy argues in defence that India failed to comply with Article 94 of the Convention, thereby limiting its right to freedom of navigation. Article 94 provides, in relevant part:

Article 94

Duties of the flag State

1. Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

2. In particular every State shall:

(a) maintain a register of ships containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size; and

[...]

3. Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, *inter alia*, to:

[...]

(c) the use of signals, the maintenance of communications and the prevention of collisions.

4. Such measures shall include those necessary to ensure:

[...]

(b) that each ship is in the charge of a master and officers who possess appropriate qualifications, in particular in seamanship, navigation, communications and marine engineering, and that the crew is appropriate in qualification and numbers for the type, size, machinery and equipment of the ship;

[...]

6. A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation.

(a) **Position of India**

987. India submits that, on its version of the "Enrica Lexie" incident, Italy violated India's freedom and right of navigation in India's exclusive economic zone under Articles 87 and 90 of the Convention when the Marines fired shots at the "St. Antony" and caused it to change course and veer away in order to avoid further gunfire.[1735] Contrary to Italy's assertion that, "[b]oth before

[1735] India's Counter-Memorial, para. 8.20; India's Rejoinder, para. 9.23. *See also* Hearing Transcript, 13 July 2019, 93:11-15, 94:12-23, *referring to* Declaration of Umberto Vitelli, 19 February 2012 (**Annex IT-**

and after the incident, the *St Antony* navigated within India's exclusive economic zone without any constraint being applied by the Marines",[1736] India submits that the Marines' alleged shooting was a "blatant constraint" on a vessel's freedom of navigation, and that the "St. Antony" was further "constrained to proceed immediately to port"[1737] because of the "resulting deaths on board".[1738]

988. India rejects Italy's argument that the facts of the "Enrica Lexie" incident do not engage Article 90 because, in Italy's view, it did not attempt to prevent India from sailing any ship flying the Indian flag since the "St. Antony" was not flying that flag.[1739] India argues that the present case does engage Article 90. India asserts that Article 90 grants India the right of navigation in its exclusive economic zone and the "St. Antony", a small-size fishing craft, was under no obligation to fly the Indian flag.[1740] India contends that Italy interfered with its freedom of navigation when, on its version of the facts, the "St. Antony" had to veer away sharply when fired upon and then return to port in light of the deaths on board.[1741]

989. India also rejects Italy's argument that India's freedom of navigation cannot extend to a situation where, on Italy's account, those at the wheel of the "St. Antony" were asleep and "placed it inadvertently on a collision course".[1742] According to India, the "St. Antony" clearly had the right of way and, unlike the "Enrica Lexie", was under no obligation to alter course. India further contends that the "Enrica Lexie" and the "St. Antony" were at no "genuine" risk of collision, which India submits was attested to by the Second Officer of the "Enrica Lexie".[1743] According to India, the "St. Antony" changed course because the Marines fired shots at it, not to avoid collision.[1744] India points out that Italy seems to have conceded to this assertion at the Hearing.[1745] In any event, India maintains that "[n]othing in UNCLOS suggests that a state's freedom of navigation […] can be interfered with in circumstances where a vessel having its nationality is

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141); Declaration of Carlo Noviello, 19 February 2012 (**Annex IT-138**); Affidavit of Fredy J., 27 April 2012 (**Annex IT-168**).

1736 India's Rejoinder, para. 9.25, *citing* Italy's Reply, para. 10.20.

1737 India's Rejoinder, para. 9.25.

1738 India's Rejoinder, para. 9.23.

1739 India's Rejoinder, paras 9.22-9.23, *referring to* Italy's Reply, para. 10.19.

1740 India's Rejoinder, para. 9.23.

1741 India's Rejoinder, para. 9.23.

1742 India's Rejoinder, para. 9.24, *citing* Italy's Reply, para. 10.20.

1743 India's Rejoinder, para. 9.24. *See also* Hearing Transcript, 13 July 2019, 83:5-9, 95:2-4. *See also* Part V, Section B.3(a).

1744 India's Rejoinder, para. 9.24.

1745 Hearing Transcript, 13 July 2019, 94:4-9, *referring to* Hearing Transcript, 9 July 2019, 174:9-12.

operating legitimately in that state's EEZ, has the right of way and has not attacked or threatened any other vessel".[1746]

990. India further rejects Italy's argument that India does not enjoy freedom of navigation in this instance because India violated its obligation as a flag State under Article 94 of the Convention.[1747] According to India, Article 94, paragraph 2, subparagraph (a), did not require the "St. Antony" to be registered given the vessel's small size. India further contends that it complied with the requirement under Article 94, paragraph 3, to "take such measures for ships flying its flag as are necessary to ensure safety at sea". In this regard, India points to the fact that the "St. Antony" "was registered in the State of Tamil Nadu in India [...] by the Assistant Director of Fisheries at Colachel, Kanya Kumari District, State of Tamil Nadu". Further, while at its size ("a small boat less than 20 metres in length") "it did not need any further registration", it nevertheless "was additionally registered at the Office of Assistant Director, MPEDA (Marine Products Export Development Authority), Tuticorin, Tamil Nadu [...] and therefore is an Indian vessel under Section 2(e) of the Maritime Zones of India (Regulation of Fishing by Foreign Vessels Act), 1981".[1748] Additionally, India points out that the "insurance for the boat is also listed".[1749]

991. India submits that, even if India had failed to comply with Article 94, "[t]here is nothing in UNCLOS to suggest that a state's alleged breach of Article 94 disentitles it from enjoying the freedom of navigation".[1750] Moreover, India notes, the remedy which Article 94 provides for its violation is for the State discovering the defect to report it to the flag State – something which Italy failed to do in the more than seven years since the incident.[1751] India adds that the fact that "Italy's claims in this case do not include a claim for breach of Article 94 confirms the point".[1752]

992. India finally rejects Italy's argument that the "St. Antony" was not exercising India's right to freedom of navigation as it was not displaying the Indian flag.[1753] India submits that, under Article 91, paragraph 1, "there were clearly genuine links between the *St Antony* and India more than

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1746 Hearing Transcript, 13 July 2019, 95:8-13.

1747 India's Rejoinder, para. 9.26.

1748 India's Rejoinder, para. 5.30, *referring to* Certificate of Registration for the "St. Antony" issued by the Office of the Assistant Director of Fisheries, Extension & Training, Colachel, Kanyakumari (West) under the Tamil Nadu Marine Fishing Regulation Act, 1983 (**Annex IT-267**); The "St. Antony"'s Certificate of Registration for Fishing Vessels under the Marine Products Export Development Authority Act (**Annex IN-37**).

1749 India's Rejoinder, para. 926.

1750 Hearing Transcript, 13 July 2019, 96:7-9. *See also* India's Rejoinder, para. 9.28.

1751 India's Rejoinder, para. 9.28.

1752 India's Rejoinder, para 9.28; Hearing Transcript, 13 July 2019, 96:24-25.

1753 Hearing Transcript, 13 July 2019, 97:6-14, *referring to* Italy's Reply, para. 10.25; Italy's Rejoinder, paras 5.24, 5.27, 5.30.

sufficient to classify the boat as an Indian vessel as a matter of fact".[1754] India further contends that it is for "each State, in its discretion, to fix the conditions for the grant of its nationality to ships".[1755] In support of its position, India cites the *M/V "SAIGA" (No. 2)* case in which ITLOS held that Article 91 "leaves to each State exclusive jurisdiction over the granting of its nationality to ships"[1756] and that the "determination of a ship's nationality is a question of fact".[1757]

993. In this regard, India submits that "a state enjoys the freedom of navigation through all vessels which have its nationality, regardless of whether or not they are displaying the flag of that state".[1758] In support of this argument, India refers to the *M/V "SAIGA" (No. 2)*[1759] and the *"Grand Prince"* cases,[1760] in which ITLOS considered the nationality of the vessels in order to determine the flag State, and not the flag that was actually being displayed by the vessel. Specifically, in the *"Grand Prince"* case, "ITLOS found that Belize was not the flag State of the *Grand Prince* even though it was flying the flag of Belize at the time of its arrest".[1761] The case is even stronger, India argues, for small-size boats that, according to India, do not have to be registered by the coastal State under the Convention.[1762]

994. Relying on scholarly commentary which states that "[t]he term 'flag State' denotes the state whose nationality a ship bears, and whose flag it flies as a symbol of its nationality",[1763] India argues that "the flag of a vessel is like a wedding ring: it symbolises a legal status", but the

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1754 India's Rejoinder, para. 9.30.

1755 India's Rejoinder, para. 9.30, *citing* Virginia Commentary, Vol. III, p. 106, para. 91.9(b) ("[Article 91] requires every State to fix conditions for the grant of its nationality to ships, but imposes no further specific requirements in that respect, this being left to the discretion of the individual State").

1756 India's Rejoinder, para. 9.31, *citing M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10 at p. 36, para. 63.

1757 India's Rejoinder, para. 9.31.

1758 Hearing Transcript, 13 July 2019, 49:21-24. *See also* India's Rejoinder, para. 9.34.

1759 Hearing Transcript, 13 July 2019, 52:11-19, *citing M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10 at p. 36, para. 62 ("The question for consideration is whether the *SAIGA* had the nationality of Saint Vincent and the Grenadines at the time of its arrest").

1760 Hearing Transcript, 13 July 2019, 53:1-6, *referring to "Grand Prince" (Belize v. France)*, Prompt Release, Judgment, ITLOS Reports 2001, p. 17 at p. 41, paras 80-81.

1761 India's Rejoinder, para. 9.34, *referring to "Grand Prince" (Belize v. France)*, Prompt Release, Judgment, ITLOS Reports 2001, p. 17 at p. 29, para. 32.

1762 India's Rejoinder, para. 9.34.

1763 Hearing Transcript, 13 July 2019, 54:4-6, *citing* Doris König, 'Flag of Ships' (2009) Max Planck Encyclopedia of Public International Law, para. 1. *See also* Hearing Transcript, 13 July 2019, 53:13-18, *citing* Herman Meyers, *The Nationality of Ships* (Martinus Nijhoff, 1967), p. 162; Hearing Transcript, 13 July 2019, 60:2-16, *citing* Douglas Guilfoyle, 'Article 91' in Alexander Proelß (ed.), *The United Nations Convention on the Law of the Sea: A Commentary* (C.H. Beck, Hart, Nomos, 2017), p. 694; Hearing Transcript, 20 July 2019, 103:2-16, *citing* Douglas Guilfoyle, 'Article 91' in Alexander Proelß (ed.), *The United Nations Convention on the Law of the Sea: A Commentary* (C.H. Beck, Hart, Nomos, 2017), p. 694.

existence of the status itself does not depend on the display of this symbol.[1764] Moreover, as India notes, commentators have pointed out that "[r]egistration is the most widely used modality to grant nationality in the shipping legislation of many States".[1765]

995. This interpretation is, in India's view, logical because if the Convention premised the freedom of navigation on the display of a flag, it would lead to the untenable proposition that if a ship loses its flag at sea, another State could interfere with its voyage without sanction.[1766]

996. Applying this to the facts, India argues that under Indian law, specifically Section 2, paragraph (e), of the Maritime Zones of India (Regulation of Fishing by Foreign Vessels) Act, 1981, the "St. Antony" was at all material times an Indian vessel under Indian law, and that it was registered under both the Tamil Nadu Marine Fishing Regulation Act, 1983, and the Marine Products Export Development Authority Act, 1972.[1767]

997. India submits that it is of no consequence that the "St. Antony" was not registered under the Indian Merchant Shipping Act, 1958, because, according to India, the Act clearly states that a fishing vessel like the "St. Antony" does not need to be registered under that legislation.[1768] Furthermore, India argues that since the "St. Antony" had already acquired its Indian nationality through registering under the two other Indian legislations, there was no need for it to be registered also under the Merchant Shipping Act, 1958.[1769]

998. India further notes that, while Italy asserts that it is the flag State of the "Enrica Lexie" – in fact, Italy's counsel has referred to the "Enrica Lexie" as an "Italian-flagged vessel" on numerous occasions – it has not produced any evidence that the "Enrica Lexie" was displaying the Italian flag at the time of the incident.[1770] This, according to India, shows that "even Italy does not

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1764 Hearing Transcript, 13 July 2019, 54:9-10. *See also* Hearing Transcript, 13 July 2019, 54:11-16.

1765 Hearing Transcript, 13 July 2019, 57:14-16, *citing* Doris König, 'Flag of Ships' (2009) Max Planck Encyclopedia of Public International Law, para. 19; Hearing Transcript, 13 July 2019, 57:11-16, *citing M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, Declaration of Judge Paik, ITLOS Reports 2013, p. 4 at p. 50, para. 6.

1766 Hearing Transcript, 13 July 2019, 97:21-98:8.

1767 India's Rejoinder, para. 9.32, *referring to* The Maritime Zones of India (Regulation of Fishing by Foreign Vessels) Act, 1981 (**Annex IN-38**); The "St. Antony"'s Certificate of Registration for Fishing Vessels under the Marine Products Export Development Authority Act (**Annex IN-37**). *See also* Hearing Transcript, 13 July 2019, 61:13-15.

1768 India's Rejoinder, para. 9.33.

1769 Hearing Transcript, 20 July 2019, 106:17-107:4.

1770 Hearing Transcript, 13 July 2019, 54:17-55:6.

seriously consider that the flag state of a vessel is determined by the flag displayed by the vessel".[1771]

999. Regarding the merits of its counter-claim under Article 87 of the Convention, India adds that the evidence shows that the conduct of the "St. Antony" was in harmony with the applicable rules of the COLREGS,[1772] while the actions of the person steering the "Enrica Lexie" were characterised by Captain Noviello as a "big mistake".[1773]

1000. Finally, in reply to Italy's arguments that Mr. Jelastine was driving the "St. Antony" without a licence, India contends that while this might very well be "an infraction under Indian law",[1774] it is not a reason in itself to pass responsibility on to the "St. Antony" "when it was those in charge of the navigation of the tanker, the Enrica Lexie, who made the big mistake".[1775]

(b) **Position of Italy**

1001. Italy rejects India's counter-claims under Articles 87 and 90 of the Convention. Italy submits that they fail on three grounds.

1002. First, Italy submits that "India did not and does not enjoy the right or the freedom of navigation in respect of the *St Antony* because the vessel did not and was not entitled to fly its flag".[1776]

1003. Italy submits that the counter-claim must fail because both Articles 87 and 90 depend on the "*St Antony* having been an Indian-flagged vessel, which it was not".[1777] Italy contends that because "the freedom and right of navigation belongs to the State, rather than the vessel, it is through the flying of the flag of a State, and the entitlement to do so under the law of that State, that the freedoms and rights of the flag State are exercised by a private vessel".[1778] According to Italy, "the *St Antony* was neither entitled to fly the Indian flag nor actually flying the Indian flag".[1779]

1771 Hearing Transcript, 13 July 2019, 55:7-9.

1772 Hearing Transcript, 20 July 2019, 109:7-111:3.

1773 Hearing Transcript, 20 July 2019, 111:6-7, *citing* Hearing Transcript, 15 July 2019, 138:12.

1774 Hearing Transcript, 20 July 2019, 111: 19-20.

1775 Hearing Transcript, 20 July 2019, 111:16-17.

1776 Italy's Rejoinder, para. 5.22(1). *See also* Hearing Transcript, 18 July 2019, 212:22-25.

1777 Italy's Reply, para. 10.24.

1778 Italy's Reply, para. 10.25.

1779 Italy's Reply, para. 10.26.

1004. According to Italy, "[a]ll that Article 90 [...] does is confer a right on every State 'to sail ships flying its flag' in the exclusive economic zone".[1780] Italy submits that it has "plainly not breached India's right to do so, either generally or with respect to the *St Antony*" because the "incident in no way involved any attempt by Italy to prevent India from sailing any ship flying the Indian flag, not least because the *St Antony* was neither flying, nor entitled to fly, the Indian flag". Italy concludes, therefore, that "[t]he terms of Article 90 are simply not engaged by the facts of this case".[1781]

1005. In Italy's view, "[t]here is an important difference between a vessel having the nationality of a State, and a vessel being entitled to fly the flag of a State".[1782] Italy submits that Article 91 of the Convention[1783] clearly "distinguishes between the conditions for the grant of nationality to a vessel, for the registration of a ship, *and* for the right to fly its flag". In Italy's view, "[f]or the purposes of Article 87(1)(a) and Article 90 of UNCLOS, only the entitlement to and the display of the flag are relevant".[1784]

1006. Italy further contends that "physical display of the flag [...] is an indispensable requirement for a State to enjoy through a vessel flying its flag the right and the freedom of navigation"[1785] and that "any interference with the navigation of a vessel that is not displaying a flag is not prohibited by UNCLOS".[1786] Italy refers to Article 110, which, according to Italy, permits interference in the navigation of ships "without nationality", at least in order to verify the ship's right to fly a flag by

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1780 Italy's Reply, para. 10.19.

1781 Italy's Reply, para. 10.19. *See also* Hearing Transcript, 18 July 2019, 204:8-22.

1782 Italy's Rejoinder, para. 5.25.

1783 Article 91 of the Convention reads in full:

> *Article 91*
>
> *Nationality of ships*
>
> 1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.
>
> 2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

1784 Italy's Rejoinder, para. 5.25 [emphasis added by Italy].

1785 Italy's Rejoinder, para. 5.26, *referring to State v. V. Jayachandra* (1997) 10 SCC 70, para. 9 (**Annex IT-282**) ("Under Articles 91 and 92 of the Convention it is mandatory for a vessel to fly its nationality flag"); *P. Nedumaran v. Union of India* (1993) MANU/AP/0367/1993, para. 18 and see paras 39-40 (**Annex IT-281**) ("Under international law, there is no unrestricted freedom of navigation on high seas; every ship must fly the flag of the country of her registration and the flag must, at all times, be exhibited"). *See also* Italy's Rejoinder, paras 5.39-5.40.

1786 Italy's Rejoinder, para. 5.25.

examining the documents attesting to such a right that each State must issue to ships to which it has "granted the right to fly its flag".[1787]

1007. According to Italy, the Supreme Court of India has found that "the St. Antony was not flying an Indian flag at the time when the incident took place".[1788] Italy therefore concludes that since the "St. Antony" was not flying the Indian flag, "India cannot enjoy the right or the freedom of navigation in respect of that vessel".[1789]

1008. Moreover, since India is claiming a direct breach of its own rights, and not that of its citizens under an espousal claim, Italy further contends that India is required, but has failed, to provide evidence proving that the "St. Antony" was entitled to fly the Indian flag.[1790] This is consistent, according to Italy, with Article 91, paragraph 2, of the Convention, which provides that "[e]very state shall issue to ships to which it has granted the right to fly its flag documents to that effect".[1791] In this regard, Italy maintains that the factors that India relies on might be sufficient to show that a genuine link existed between India and the "St. Antony", but they are not sufficient to establish the right to fly the Indian flag under the Convention.[1792] In Italy's view, under India's wedding ring analogy, the present situation resembles "more a person who claims to be married, but who lacks a marriage certificate as well as a wedding ring".[1793]

1009. For example, Italy claims that neither of the two pieces of Indian legislation under which the "St. Antony" was registered are fit for that purpose.[1794] The first one, the Tamil Nadu Marine Fishing Regulation Act, 1983, Italy argues, only allows for licences "for fishing in any specified area", and these specified areas "may not be beyond territorial waters".[1795] Italy submits that there can be no rights conferred to exercise India's freedom of navigation under Part VII of the Convention, and that it "has nothing to do with any entitlement to fly the Indian flag".[1796] The second piece of legislation, the Marine Products Export Development Authority Act, 1972 "concerns the

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1787 Italy's Rejoinder, para. 5.26.

1788 Italy's Rejoinder, para. 5.27, *citing Republic of Italy & Ors v. Union of India & Ors*, Supreme Court of India, Judgment of 18 January 2013, Judgment of Kabir CJ, para. 29 (**Annex IT-19**).

1789 Italy's Rejoinder, para. 5.27.

1790 Hearing Transcript, 18 July 2019, 206:8-17.

1791 Hearing Transcript, 18 July 2019, 206:4-6, *citing* Article 91, paragraph 2, of the Convention.

1792 Hearing Transcript, 18 July 2019, 206:22-207:5.

1793 Hearing Transcript, 18 July 2019, 212:18-19.

1794 Hearing Transcript, 18 July 2019, 207:13-209:13.

1795 Hearing Transcript, 18 July 2019, 208:1-7, *citing* Tamil Nadu Marine Fishing Regulations Act, 1983, Section 7, paragraph 1, Section 3 paragraph k (**Annex IT-266**).

1796 Hearing Transcript, 18 July 2019, 208:3-11.

establishment of an authority concerned principally with the export of seafood".[1797] Consequently, Italy submits that it can bear no relevance to the case at hand.[1798]

1010. Similarly, with respect to the Maritime Zones of India (Regulation of Fishing by Foreign Vessels) Act, 1981, Italy submits that while the "St. Antony" might well come within the definition of "Indian vessel" under the legislation, that "just means that it did not need to be licensed under this act regulating foreign vessels".[1799] According to Italy, it "conferred no entitlement on the St. Antony to fly the Indian flag or otherwise exercise India's high seas freedoms of navigation".[1800]

1011. In Italy's view, the registration of ships, "in the sense of creation of an entitlement to fly the Indian flag", is governed not by any of these regulations but by the Merchant Shipping Act, 1958.[1801] Italy submits that "[t]he registration provisions of this act, as India accepts, did not apply to fishing vessels; and, more importantly, at the time of the events relevant to this case, no notification extending the application of those provisions to fishing vessels had been issued".[1802] Italy notes that "India accepted that the St Antony was not registered under the Merchant Shipping Act".[1803]

1012. Italy also rejects India's reliance on the *"Grand Prince"* judgment which, in Italy's view, not only fails to support India's claim but also in fact demonstrates that the entitlement to fly the flag must be proven, even if the flag is physically displayed.[1804] Italy similarly submits that India's reference to the *M/V "SAIGA" (No. 2)* case is inapposite because the vessel in that case "was entitled to fly the Vincentian flag and flew that flag".[1805] According to Italy, "[n]either Article 90, nor Article 87(1)(a), of UNCLOS grants States the right or freedom of navigation with respect to vessels of their nationality, but only vessels flying their flag".[1806]

1797 Hearing Transcript, 18 July 2019, 209:4-6.

1798 Hearing Transcript, 18 July 2019, 209:8-13.

1799 Hearing Transcript, 18 July 2019, 209:14-22.

1800 Hearing Transcript, 18 July 2019, 209:22-210:1.

1801 Hearing Transcript, 18 July 2019, 210:3-4.

1802 Hearing Transcript, 18 July 2019, 210:8-11.

1803 Hearing Transcript, 18 July 2019, 210:12-13. *See also* Italy's Rejoinder, para. 5.29, *referring to* The Merchant Shipping Act, 1958, Sections 22, 63, 64, 68, 435B, 435V (**Annex IT-265**); Letter from the Mercantile Marine Department of the Ministry of Shipping of India to the Commissioner of Police, Kochi, 23 March 2012, attaching "Interim Report into the Marine Casualty of Death of Two Fishermen off Kochi due to Firing by M.T. Enrica Lexie, Flag Italy, on 15.02.2012", 12 March 2012, p. 4 (**Annex IT-161**).

1804 Hearing Transcript, 18 July 2019, 211:11-17, *referring to "Grand Prince" (Belize v. France)*, Prompt Release, Judgment, ITLOS Reports 2001, p. 17 at p. 42, para 83.

1805 Italy's Rejoinder, para. 5.25, n. 208, *referring to M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10 at pp 33-39, paras 55-74.

1806 Italy's Rejoinder, para. 5.24.

1013. Second, Italy submits that even if the Arbitral Tribunal finds that the "St. Antony" was entitled to fly the Indian flag, it was not entitled to the protection of the Convention because it was not navigating in accordance with applicable rules of international law.[1807]

1014. In this regard, Italy points out that "[o]n the evidence of its captain, the St Antony had an unlicensed person at the wheel and was motoring uncontrolled with […] either everyone, or at least most of the people on board, asleep".[1808] Based on these facts, even if India has shown that the "St. Antony" had been entitled to fly its flag, Italy submits that India would have been in breach of its obligation under Article 94, paragraph 4, subparagraph (b), of the Convention effectively to "exercise its jurisdiction over the St Antony in respect of the qualifications in seamanship, navigation and communications of those controlling it".[1809] Italy also submits that "[f]reedom of navigation does not include a freedom to navigate in breach of these standards".[1810] In Italy's view, "[t]he flag State of a vessel motoring in the open seas with everyone on board asleep and thus having no regard for the safe navigation of the vessel, or other vessels it may encounter, does not enjoy a right or freedom of navigation in respect of that vessel".[1811]

1015. Third, Italy submits that "even if India did enjoy the rights guaranteed under Articles 87(1)(a) and 90 of UNCLOS in respect of the *St Antony*, Italy did not breach them".[1812] This is because, Italy submits, "taking dissuasive measures to avoid a collision or perceived risk of hostile boarding in a close-quarters situation does not constitute an interference with the freedom of navigation of either vessel involved in the incident".[1813] In particular, Italy contends that its "Marines responded to the close quarters situation of the two vessels" and maintains that any criminal liability which may attach to those actions does not relate to India's freedom of navigation because "[n]one of Italy, the *Enrica Lexie* nor the Marines had any interest in nor exerted any influence over the navigation of the *St Antony* at any time other than when those on the *Enrica Lexie* considered that there was a threat of an imminent collision or hostile boarding".[1814]

1016. Similarly, Italy disagrees with India's claim that the Marines interfered with the freedom of navigation of the "St. Antony" because it had to return to port following the incident. Italy submits

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1807 Hearing Transcript, 18 July 2019, 216:25-217:5. *See also* Italy's Rejoinder, para. 5.31.

1808 Hearing Transcript, 18 July 2019, 214:7-11, *referring to* Hearing Transcript, 15 July 2019, 149:6-13, 166:26-167:12. *See also* Italy's Reply, para. 10.20, *referring to* Affidavit of Fredy J., 27 April 2012 (**Annex IT-168**).

1809 Hearing Transcript, 18 July 2019, 214:15-17. *See also* Italy's Reply, paras 10.21-10.22.

1810 Italy's Reply, para. 10.22.

1811 Italy's Rejoinder, para. 5.32.

1812 Italy's Rejoinder, para. 5.22(3). *See also* Hearing Transcript, 18 July 2019, 217:6-15.

1813 Hearing Transcript, 18 July 2019, 217:16-20.

1814 Italy's Reply, para. 10.23. *See also* Italy's Rejoinder, paras 5.33-5.34.

that this was merely a consequence of the incident and not a continued interference with the freedom of navigation.[1815]

(c) **Analysis of the Arbitral Tribunal**

1017. India claims that Italy, through its conduct, has breached India's freedom and right of navigation in the exclusive economic zone, pursuant to Article 87, paragraph 1, subparagraph (a) and Article 90, of the Convention, respectively. India argues that this breach occurred when the Marines fired shots at the "St. Antony" and caused it to change course and veer away in order to avoid further gunfire.[1816] Italy submits that it has not breached India's freedom and right of navigation "either generally or with respect to the *St. Antony*" as the incident in no way involved any attempt by Italy to interfere with India's freedom of navigation or to prevent India from sailing any ship flying the Indian flag.[1817]

1018. According to Italy, "India did not and does not enjoy the right or the freedom of navigation in respect of the *St Antony* because the vessel did not and was not entitled to fly its flag".[1818] Italy argues that Articles 87 and 90 "confer[] rights on States which are 'enjoyed through them by ships to which the right to fly their flag has been accorded'."[1819] On the contrary, according to India,

> there was no obligation for a small-size fishing craft to fly the Indian flag. It was still an Indian vessel. When the *St Antony* was fired at, it had to veer away sharply to avoid further gunfire, and then return to port because of the resulting deaths on board. In those circumstances, it is evident that India's right of navigation under Article 90 was both engaged and violated.[1820]

1019. Italy also argues that, while India has not substantiated its claim that the "St. Antony" was an Indian-flagged vessel, in any case, India has not fulfilled its obligations as a flag State under Article 94, paragraph 1; paragraph 3, subparagraphs (b) and (c); and paragraph 4, subparagraph (b), of the Convention. According to Italy, freedom of navigation does not include freedom to navigate in breach of these standards.[1821] India argues that there is no evidence that India violated

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1815 Hearing Transcript, 18 July 2019, 219:17- 220:2.

1816 India's Counter-Memorial, para. 8.20. *See also* Hearing Transcript, 13 July 2019, 93:11-15, 94:12-23, *referring to* Declaration of Umberto Vitelli, 19 February 2012 (**Annex IT-141**); Declaration of Carlo Noviello, 19 February 2012 (**Annex IT-138**); Affidavit of Fredy J., 27 April 2012 (**Annex IT-168**).

1817 Italy's Reply, paras 10.19-10.20.

1818 Italy's Rejoinder, para. 5.22(1). *See also* Italy's Reply, paras 10.19, 10.24; Hearing Transcript, 18 July 2019, 212:22-25.

1819 Italy's Reply, para. 10.24, *citing* N.M. Hosanee, 'A critical analysis of flag State duties as laid down under Article 94 of the 1982 United Nations Convention on the Law of the Sea' (2009) United Nations Division for Ocean Affairs and the Law of the Sea Office of Legal Affairs, p. 12.

1820 India's Rejoinder, para. 9.23.

1821 Italy's Reply, paras 10.21-10.22.

Article 94 and that even if it did, this would not entitle Italy to interfere with India's freedom of navigation.[1822]

1020. Before addressing India's claim, the Arbitral Tribunal will first consider the status of the "St. Antony" and its implications on India's rights under the Convention, which is central to the Parties' arguments concerning this claim.

i. The Status of the "St. Antony"

1021. Article 91 of the Convention provides as follows:

> *Article 91*
>
> *Nationality of ships*
>
> 1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.
>
> 2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

1022. Every State is sovereign in its decision to grant its nationality to ships. As pointed out by India,[1823] Article 91 "requires every State to fix conditions for the grant of its nationality to ships, but imposes no further specific requirements in that respect, this being left to the discretion of the individual State".[1824] This principle has been confirmed by the case law of international tribunals and national courts. In the *Muscat Dhows* case, the tribunal stated that "generally speaking it belongs to every Sovereign to decide to whom he will accord the right to fly his flag and to prescribe the rules governing such grants".[1825] Similarly, in *M/V "SAIGA" (No. 2)*, ITLOS observed that Article 91 "leaves to each State exclusive jurisdiction over the granting of its nationality to ships".[1826] These conditions are regulated by a State in its domestic law. While there are several modalities for the grant of nationality to different types of ships, most States confer their nationality upon ships by registration.[1827] Registration of a vessel is the "means of entering

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1822 India's Rejoinder, paras 9.27-9.29.

1823 India's Rejoinder, para. 9.30.

1824 Virginia Commentary, Vol. III, p. 106, para. 91.9(b).

1825 PCA Case No. 1904-01: *Muscat Dhows Case, France v. Great Britain*, Award of 8 August 1905, RIAA Vol. XI RIAA, p. 83 at p. 84. *See also Lauritzen v. Larsen* (United States Supreme Court [25 May 1953] 345 US 571).

1826 *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10 at p. 36, para. 63.

1827 Doris König, 'Flag of Ships' (2009) Max Planck Encyclopedia of Public International Law, para. 3; *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10 at p. 37, para. 64.

[the vessel] in the public records [and] is generally – but not always – not only a precondition for, but also the test of, a vessel's nationality".[1828]

1023. As stated by ITLOS in this respect, "the nationality of a ship is a question of fact to be determined […] on the basis of evidence adduced by the parties".[1829]

1024. In the present case, India has submitted to the Arbitral Tribunal its national law containing the relevant conditions for grant of its nationality to ships.[1830] According to India, this law supports its assertion that the "St. Antony" was an Indian vessel. Specifically, India points to Section 2, paragraph (e), of the Maritime Zones of India (Regulation of Fishing by Foreign Vessels) Act, 1981, and asserts that according to this provision, the "St. Antony" was at all material times an Indian vessel.[1831] According to Section 2, paragraph (e):

> In this Act, unless the context otherwise requires, [...]
>
> (e) "Indian vessel" means:-
>
> [...]
>
> (II) a vessel:-
>
> (i) which is owned wholly by persons to each of whom any of the following descriptions applies:
>
> (1) a citizen of India;
>
> […]; and
>
> (ii) which is registered under the Merchant Shipping Act, 1958, or under any other Central Act or any Provincial or State Act.[1832]

1025. The "St. Antony" was a fishing vessel owned by an Indian national[1833] and registered under the Tamil Nadu Marine Fishing Regulation Act, 1983, [1834] and the Marine Products Export

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1828 Nigel Ready, 'Nationality, Registration, and Ownership of Ships' in David Attard, Malgosia Fitzmaurice, and Norman A. Martinez Gutierrez (eds.), *The IMLI Manual on International Maritime Law: Volume 1: The Law of the Sea*, (Oxford University Press, 2016), p. 25.

1829 *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10 at p. 36, para. 66. *See also* Hearing Transcript, 13 July 2019, 61:13-15.

1830 The Maritime Zones of India (Regulation of Fishing by Foreign Vessels) Act, 1981 (**Annex IN-38**).

1831 India's Rejoinder, para. 9.32, *referring to* The Maritime Zones of India (Regulation of Fishing by Foreign Vessels) Act, 1981 (**Annex IN-38**).

1832 The Maritime Zones of India (Regulation of Fishing by Foreign Vessels) Act, 1981 (**Annex IN-38**).

1833 Additional Statement of Shri Freddy s/o John Bosco, owner of the "St. Antony" (**Annex IN-39**).

1834 India's Rejoinder, para. 9.32; Italy's Reply, para. 10.10; Certificate of Registration for the "St. Antony" issued by the Office of the Assistant Director of Fisheries, Extension & Training, Colachel, Kanyakumari (West) under the Tamil Nadu Marine Fishing Regulation Act, 1983 (**Annex IT-267**).

Development Authority Act, 1972.[1835] In view of this, the Arbitral Tribunal is satisfied that the "St. Antony" was an Indian vessel.

ii. Consequences of Exemption from Registration under the Indian Merchant Shipping Merchant Act, 1958

1026. India submits that the "St. Antony", as a small fishing vessel, was exempt from registration under the Indian Merchant Shipping Act, 1958,[1836] and that pursuant to Article 94, paragraph 2, subparagraph (a), of the Convention, "it was not […] obligatory for the *St Antony* to be registered given its small size".[1837]

1027. Article 94, paragraph 2, subparagraph (a), of the Convention provides as follows:

> *Article 94*
>
> *Duties of the flag State*
>
> 2. In particular every State shall:
>
> (a) maintain a register of ships containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size;

1028. It has been suggested in academic commentary that the exemption from registration under Article 94 was intended to shield small vessels from onerous requirements of registration:[1838]

> Indeed, it has been said the intention was all ocean-going vessels should be registered; and that any possibility small vessels might not have to be registered "was created [only] to avoid imposing onerous requirements on small local vessels" which due to their size "would not normally be used outside coastal waters". While perhaps a desirable outcome, this is not consistent with the Convention's language nor with State practice. The Convention, simply, does not require all ocean-going vessels to be registered. Its reference to vessels "excluded from generally accepted international regulations" due to their "small size", appears only to attempt to place some limits on the well-known State practice of allowing small craft a right of nationality based on ownership alone without requiring registration (even where such vessels may be capable of voyages beyond coastal waters).[1839]

1029. In the view of the Arbitral Tribunal, the test under the Convention for establishing a jurisdictional link between a vessel and a State is whether a vessel possesses the nationality of that State, as

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1835 India's Rejoinder, para. 9.32; The "St. Antony"'s Certificate of Registration for Fishing Vessels under the Marine Products Export Development Authority Act (**Annex IN-37**).

1836 India's Rejoinder, paras 5.31, 9.33. (Section 22 of The Merchant Shipping Act, 1958, on 'Obligation to register' contains a note stipulating that "For the purposes of this section, 'ship' does not include a fishing vessel", *see* The Merchant Shipping Act, 1958 (**Annex IT-265**)).

1837 India's Rejoinder, para. 9.27. *See also* India's Rejoinder, paras 5.29-5.32.

1838 Alexander Proelß (ed.), *The United Nations Convention of the Law of the Sea: A Commentary* (C.H. Beck, Hart, Nomos, 2017), p. 711.

1839 Alexander Proelß (ed.), *The United Nations Convention on the Law of the Sea: A Commentary* (C.H. Beck, Hart, Nomos, 2017), p. 694, para. 3.

opposed to whether or not it is found in a public register or flies a flag. A flag may thus be regarded as "visual evidence" or "a symbol" of nationality, but is not determinative for that vessel's nationality.[1840]

iii. Exercise of Freedom of the High Seas by Small Vessels not Registered under the Indian Merchant Shipping Act, 1958

1030. In India, vessels registered under the Indian Merchant Shipping Act, 1958, acquire the right to fly the Indian flag *ipso iure*.[1841] No comparable express grant of the right to fly the Indian flag is made under the Acts pursuant to which the "St. Antony" was registered.[1842] The Arbitral Tribunal must therefore consider whether the lack of an express grant to a vessel to fly a State's flag affects the right of the State of nationality to enjoy its rights under the Convention, including freedom of navigation, through that vessel.

1031. The fundamental freedoms enjoyed by States on the high seas are set out in Article 87 of the Convention. These include rights exercised through vessels of that State's nationality, including freedom of navigation. These freedoms, according to Article 87, must be "exercised under the conditions laid down by this Convention".

1032. Article 94, paragraph 2, of the Convention requires States, in principle, to "maintain a register of ships containing the names and particulars of ships flying its flag". That requirement in turn is conditioned by the phrase "except those which are excluded from generally accepted international regulations on account of their small size". Article 94, paragraph 2, thus implies that vessels that "are excluded from generally accepted international regulations on account of their small size" by a State may nonetheless qualify as "ships flying its flag".

1033. It cannot be inferred from the exemption in Article 94, paragraph 2, of small vessels from the generally-prevailing registration requirement that the State of nationality would, in relation to such small vessels, be deprived of the fundamental rights to freedom of navigation set out in

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1840 Nigel Ready, 'Nationality, Registration, and Ownership of Ships' in David Attard, Malgosia Fitzmaurice, and Norman A. Martinez Gutierrez (eds.), *The IMLI Manual on International Maritime Law: Volume 1: The Law of the Sea*, (Oxford University Press, 2016), p. 24.

1841 The Merchant Shipping Act, 1958, Sections 22, 63 (**Annex IT-265**).

1842 India could have adopted legislation clarifying that ships that are exempt from registration under the Merchant Shipping Act, 1958, may nonetheless fly the Indian flag. The Arbitral Tribunal observes that Section 63 of the Indian Merchant Shipping Act, 1958, entitled 'National colours for Indian ships' provides that "[t]he Central Government may, by notification in the Official Gazette, declare what shall be the proper national colours for all ships registered under this Act and for all ships which are not so registered but which are owned by […] any body corporate established by or under any law for the time being in force in India or by a citizen of India". However, no evidence has been adduced to the Arbitral Tribunal that such a notification has been made. *See* The Merchant Shipping Act, 1958, (**Annex IT-265**).

Article 87. Rather, the entitlement to enjoy freedom of navigation is "intimately linked to the question of the granting of nationality to ships", not to the act of registration.[1843] As already noted above, "[t]he Convention, simply, does not require all ocean-going vessels to be registered […] (even where such vessels may be capable of voyages beyond coastal waters)".[1844]

1034. Accordingly, it follows that States may, exceptionally, exercise their freedoms under Article 87 of the Convention also through small non-registered vessels, although the Convention tends to discourage non-registration. India, as the flag State of the "St. Antony", was entitled to the freedoms and rights attendant to this status under the Convention.

1035. With regard to Italy's allegation that India has failed in its flag State duties under Article 94,[1845] the Arbitral Tribunal considers that an alleged failure by India to fulfil its duties under Article 94 would not negate India's right and freedom of navigation under Articles 87 and 90. The Arbitral Tribunal thus need not consider Italy's allegation any further.

iv. Examination of Italy's Conduct *vis-à-vis* the "St. Antony"

1036. The Arbitral Tribunal will now examine whether Italy's conduct in relation to the "St. Antony" was in violation of Articles 87 and 90 of the Convention. Articles 87 and 90 of the Convention provide for the freedom and right of navigation on the high seas, respectively. Both Articles apply equally to the exclusive economic zone by virtue of Article 58, paragraph 2, of the Convention.

1037. The Arbitral Tribunal recalls that it has extensively discussed the concept of breach of freedom of navigation in the context of Italy's claim under Article 87, paragraph 1, subparagraph (a) (*see* Part V, Section B.1(b)). Article 90 is said to have been intended to "at least in part to reinforce the freedom of navigation provided for in Art. 87 with a specific right";[1846] for present purposes, however, Article 90 does not alter the legal test to be applied. In considering whether Italy is in violation of India's freedom and right of navigation under Articles 87 and 90, the Arbitral Tribunal will apply the same legal test it used to determine Italy's allegation of breach of freedom of navigation by India.

1843 David Attard and Patricia Mallia, 'The High Seas' in David Attard, Malgosia Fitzmaurice, and Norman A. Martinez Gutierrez (eds.), *The IMLI Manual on International Maritime Law: Volume 1: The Law of the Sea* (Oxford University Press, 2014), p. 247.

1844 Alexander Proelß (ed.), *The United Nations Convention on the Law of the Sea: A Commentary* (C.H. Beck, Hart, Nomos, 2017), p. 694, para. 3.

1845 Hearing Transcript, 18 July 2019, 214:11-22. *See also* Italy's Reply, paras 10.21-10.22; Italy's Rejoinder, para. 5.22(2).

1846 Alexander Proelß (ed.), *The United Nations Convention on the Law of the Sea: A Commentary* (C.H. Beck, Hart, Nomos, 2017), p. 690. *See also* Virginia Commentary, Volume III, p. 99, para. 90.1.

1038. The Arbitral Tribunal recalls that a breach of freedom of navigation may result from acts ranging from physical or material interference with navigation of a foreign vessel, to the threat or use of force against a foreign vessel, to non-physical forms of interference whose effect is that of instilling fear against, or causing hindrance to, the enjoyment of the freedom of navigation.

1039. When the "St. Antony" was at a distance of approximately 500 metres from the "Enrica Lexie", Sergeant Latorre and Sergeant Girone each fired four rounds of a mix of tracer and ordinary bullets.[1847] According to the testimony of Sergeant Latorre, the purpose of these shots was to "deter the craft from continuing to keep its course heading toward the Enrica LEXIE".[1848] Sergeant Latorre noted in his Action Report that this "first burst of warning shots" did not succeed in "persuading the craft to drift away".[1849] When the "St. Antony" was at a distance of 300 metres from the "Enrica Lexie", Sergeant Latorre fired four rounds of a mix of tracer and ordinary bullets.[1850] Sergeant Latorre noted further in his testimony that "the second burst of warning shots did not achieve the desired effect, the craft ignored the warning shots and kept its course, heading toward the MV at constant speed".[1851] When it was at a distance of approximately 80-100 metres from the "Enrica Lexie", Sergeant Latorre and Sergeant Girone, each fired four further rounds of a mix of tracer and ordinary bullets.[1852] Following this third burst of shots, the "St. Antony", after being approximately 30 metres away from the "Enrica Lexie", changed its course away from the "Enrica Lexie".[1853]

1040. Captain Fredy testified that he took over the steering,[1854] and "abruptly helmed the boat away".[1855] He steered the "St. Antony" at high speed, and only when he "realized [the bullets] were not hitting the boat" but rather "falling into water" did he slow the boat to "find out what had happened

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1847 (Confidential Annex), pp 1-2 (**Annex IT-236**); (Confidential Annex) (**Annex IT-237**); Piroli Report (Confidential Annex), p. 2-7 (**Annex IT-233**).

1848 (Confidential Annex), p. 1 (**Annex IT-236**).

1849 Action Report from Massimiliano Latorre to the Commander in Chief of the Naval Squadron (CINCNAV), 19:30 (IST - 0.5 hours), 15 February 2012 (**Annex IT-108**).

1850 (Confidential Annex), p. 2 (**Annex IT-236**); (Confidential Annex), p. 2 (**Annex IT-237**).

1851 (Confidential Annex), p. 2 (**Annex IT-236**).

1852 (Confidential Annex), p. 2 (**Annex IT-236**); (Confidential Annex), p. 2 (**Annex IT-237**.

1853 Action Report from Massimiliano Latorre to the Commander in Chief of the Naval Squadron (CINCNAV), 19:30 (IST - 0.5 hours), 15 February 2012 (**Annex IT-108**); (Confidential Annex), p. 2 (**Annex IT-236**); (Confidential Annex), p.2 (**Annex IT-261**); Hearing Transcript, 15 July 2019, 113:16-26.

1854 Hearing Transcript, 15 July 2019, 150:9-10.

1855 First Information Statement relating to First Information Report no. 2 of 2012, Kerala Police, 15 February 2012, para. 2 (**Annex IT-110**). *See also* Hearing Transcript, 15 July 2019, 150:16-17; 161:24-26.

to the two people who were shot".[1856] After the incident, the "St. Antony" headed "towards the seashore".[1857]

1041. In the Arbitral Tribunal's view, the evidence on the record is clear that it was the act of shooting at the "St. Antony" by the Marines stationed on the "Enrica Lexie" that caused the "St. Antony" to change direction and ultimately head back to shore. The "St. Antony" was, both during and after the incident, prevented from navigating its intended course.

1042. The shooting at the "St. Antony" amounted to physical interference with the navigation of the "St. Antony". As observed by ITLOS in *M/V "Norstar"*, "[i]t goes without saying that physical or material interference with navigation of foreign ships on the high seas violates the freedom of navigation".[1858]

1043. Accordingly, the Arbitral Tribunal concludes that by interfering with the navigation of the "St. Antony", Italy acted in breach of Article 87, paragraph 1, subparagraph (a), and Article 90 of the Convention.

4. Alleged Infringement by Italy of India's Rights under Article 88 (Reservation of the High Seas for Peaceful Purposes) of UNCLOS

1044. Finally, the Parties disagree as to whether Italy breached Article 88 of the Convention, which applies to India's exclusive economic zone by virtue of Article 58, paragraph 2.

1045. Article 88 of the Convention reads as follows:

> *Article 88*
>
> *Reservation of the high seas for peaceful purposes*
>
> The high seas shall be reserved for peaceful purposes.

(a) Position of India

1046. India asserts that Italy infringed India's right to have its exclusive economic zone reserved for peaceful purposes under Article 88.[1859]

1856 Hearing Transcript, 15 July 2019, 150:16-24.

1857 Hearing Transcript, 15 July 2019, 153:1-2.

1858 *M/V "Norstar" (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], para. 222.

1859 India's Counter-Memorial, paras 8.21-8.27.

1047. India submits that "the use of force by another State is inconsistent with India's right to have its EEZ reserved for peaceful purposes".[1860] India argues that Article 88 should be read together with Article 301 of the Convention, which prohibits the threat or use of force or any other action inconsistent with the Charter of the United Nations.[1861] According to India, the *travaux préparatoires* of Article 301 show that it was originally part of Article 88 and hence was intended to clarify "peaceful purposes".[1862] Moreover, India submits that "[c]ommentators generally agree that the peaceful purposes or uses clauses (Articles 88 and 301) should be interpreted as prohibiting activities which are inconsistent with the UN Charter".[1863] India notes that Italy does not seem to dispute this interpretation.[1864]

1048. India submits that Italy breached Article 88 by recklessly "caus[ing] the deaths of two Indian fishermen, endanger[ing] the safe navigation of the fishing boat, and compromis[ing] the lives of the other persons on board the *St Antony*".[1865] India argues that the "St. Antony" was a small fishing boat travelling at low speed no more than 10 knots, facing a large oil tanker riding high in the sea, "protected by barbed wire along its high-raised decks, and heavily guarded by six well-armed Marines"[1866] and having a top speed of 14 knots.[1867] India submits that the "Enrica Lexie" "could easily (and it had ample time to) [have] alter[ed] course and out-run the *St Antony*", and that it "could have taken further initiatives to warn the *St Antony*".[1868]

1049. India concludes that "the Italian Marines' use of force was unwarranted and excessive, and their actions not only endangered human life, they took two lives".[1869] India submits that there was no reasonable apprehension of any threat to justify the Marines' acts. According to India, "[e]xcept for one of the accused Marines, who stated that he saw two armed men on the craft, none of the crew of the Enrica Lexie reported that they had seen any armed persons on the small boat, no shots were fired from the craft, no attempt was made by individuals on the boat to board the Enrica

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1860 India's Counter-Memorial, para. 8.23.

1861 India's Counter-Memorial, para. 8.22.

1862 India's Counter-Memorial, para. 8.22, *referring to* Alexander Proelß, 'Peaceful Purposes' (2010) Max Planck Encyclopedia of Public International Law, para. 15.

1863 India's Counter-Memorial, para. 8.23, *referring to* Hayashi, M., 'Military and Intelligence Gathering Activities in the EEZ: Definition of Key Terms' (2005) 29 Marine Policy 123, at 125.

1864 Hearing Transcript, 13 July 2019, 99:11-12.

1865 India's Counter-Memorial, para. 8.27.

1866 India's Counter-Memorial, para. 8.26.

1867 India's Counter-Memorial, para. 8.26, *referring to* Piroli Report (Confidential Annex), pp 2-14, 3-14 (**Annex IT-233**).

1868 India's Counter-Memorial, para. 8.26, *referring to* Piroli Report (Confidential Annex), p. 3-15 (**Annex IT-233**).

1869 India's Counter-Memorial, para. 8.27.

Lexie, and the shape and makeup of the St Antony was far from a typical pirate skiff which usually carries ladders and hooks".[1870]

1050. India cites the *M/V "SAIGA" (No. 2)* case as an example, where, according to India, Guinea had allegedly used excessive and unreasonable force in stopping and arresting the vessel in question. According to India, ITLOS found that "the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances".[1871] In particular, India submits that ITLOS referred to the normal practice used to stop a ship at sea, and highlighted that it was only after appropriate actions failed that force could be used "as a last resort", and even then, "appropriate warning must be issued to the ship and all efforts should be made to ensure that life is not endangered".[1872] While Italy, according to India, seeks to distinguish the present case from the *M/V "SAIGA" (No. 2)* case on the ground that it involved no risk of collision or hostile boarding, India argues that the Marines "were not under a reasonable apprehension of a security threat and possible collision and hostile pirate boarding".[1873] India submits that the present case shares several similarities to the *M/V "SAIGA" (No. 2)* case: on India's account, the Marines used "live ammunition", no evidence shows use or threat of force by the crew of the "St. Antony", and the Marines "attached little or no importance to the safety of the ship and the persons on board".[1874]

1051. India also relies on the *Guyana v. Suriname* arbitration where, according to India, the Annex VII arbitral tribunal found that "even a threat to a drilling vessel to leave the area or 'the consequences will be yours'" amounted to "a breach of general international law and the 1982 Convention".[1875] In India's view, the Marines' actions were not only incompatible with the VPD Manual but also "much more egregious than what happened in the *Guyana-Suriname* case", and therefore must constitute a violation of the Italy's obligations under the Convention.[1876]

1052. India further claims that Italy is "miss[ing] the point" when it argues that the embarking and deployment of the VPDs was not inconsistent with the Charter of the United Nations because it

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1870 India's Counter-Memorial, para. 8.27, *referring to* NIA Report (Confidential Annex), para. 11.25 (**Annex IN-27**).

1871 India's Counter-Memorial, para. 8.24, *citing M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10 at pp 61-62, para. 155.

1872 India's Counter-Memorial, para. 8.25, *citing M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10 at p. 62, para. 156.

1873 India's Rejoinder, para. 9.38.

1874 India's Rejoinder, para. 9.40.

1875 Hearing Transcript, 13 July 2019, 100:7-16, *citing* PCA Case No. 2004-04: *Guyana v. Suriname*, Award of 17 September 2007, PCA Award Series at p. 2, RIAA Vol. XXX, p. 1 at p. 139, para. 488(2).

1876 Hearing Transcript, 13 July 2019, 100:10-11. *See also* Hearing Transcript, 13 July 2019, 100:17-101:5.

was a measure implemented by the Italian government to protect its vessels from piracy at sea. According to India, the issue is not the legality of the deployment of the VPDs, but their unjustified use of armed force, and the consequences for the "St. Antony"'s navigation.[1877]

1053. In the same vein, India disagrees with Italy's claim that it did not breach Article 88 because the Marines' actions were consistent with the Charter of the United Nations in the light of the United Nations Security Council Resolution 2077 (2012), adopted by the Security Council at its 6867th meeting, on 21 November 2012 (hereinafter "Resolution 2077").[1878] To the contrary, India maintains that the Marines' actions were not consistent with either Articles 88 and 301 of the Convention or Article 2, paragraph 4, of the Charter of the United Nations.[1879] In particular, India submits that Resolution 2077 was adopted after the present incident and did not authorise the use of force in India's exclusive economic zone.[1880] India argues that a "Security Council resolution must be explicit and sufficiently clear in its mandate in order to constitute an authorization to use force".[1881] Further, Resolution 2077 does not include the phrases "all necessary means" or "all necessary measures", which the Security Council uses where it authorises the use of force.[1882] India asserts that the Marines' use of force was unnecessary as, in India's view, the "Enrica Lexie" was under no reasonable apprehension of a security threat or piracy attack.[1883] Lastly, India contends that Resolution 2077 applies only to "the situation in Somalia and shall not affect the rights or obligations or responsibilities of Member States under international law, including […] the Convention".[1884]

1054. Concerning Italy's allegation that the actions of Marines should be adjudged by the State which has jurisdiction, India submits that it is "not asking this Tribunal to decide on whether the Marines are guilty under domestic criminal law of either State".[1885] Instead, India submits that it "is

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1877 Hearing Transcript, 13 July 2019, 101:19. *See also* Hearing Transcript, 13 July 2019, 101:20-24.

1878 India's Rejoinder, para. 9.41, *referring to* United Nations Security Council Resolution 2077 (2012), adopted by the Security Council at its 6867th meeting, on 21 November 2012, U.N. Doc. S/RES/2077.

1879 India's Rejoinder, paras 9.42-9.43.

1880 India's Rejoinder, para. 9.44.

1881 India's Rejoinder, para. 9.44, *citing* Oliver Dörr, "Use of Force, Prohibition of" in Frauke Lachenmann and Rüdiger Wolfrum (eds.), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law, Thematic Series Volume 2* (Oxford University Press, 2013), p. 1296.

1882 India's Rejoinder, para. 9.45, *referring to* Christine Gray, *International Law and the Use of Force* (3rd edn., Oxford University Press, 2008), p. 328.

1883 India's Rejoinder, para. 9.45.

1884 India's Rejoinder, para. 9.48, *citing* United Nations Security Council Resolution 2077 (2012), adopted by the Security Council at its 6867th meeting, on 21 November 2012, U.N. Doc. S/RES/2077, para. 13 [emphases omitted].

1885 India's Rejoinder, para. 9.37.

claiming that Italy bears international responsibility for its violation of UNCLOS under international law".[1886]

1055. Finally, India dismisses Italy's complaint that India had failed to adduce any evidence that Italy intended to pursue a breach of the peace as required to show a breach of Article 88 of the Convention.[1887] In India's view, under international law, a showing of purpose or intent is not necessary for establishing an internationally wrongful act as long as the act has occurred.[1888]

(b) **Position of Italy**

1056. Italy argues that it did not violate Article 88 of the Convention.[1889]

1057. Italy submits that India's Article 88 counter-claim "is based on the allegation that the Marines 'caused the deaths of two Indian fishermen'."[1890] According to Italy, however, Article 88 is not engaged by the facts. Italy contends that India dismisses the threat to the safe navigation of the "Enrica Lexie" while asking the Arbitral Tribunal, under "a broad provision" of the Convention concerning State "purposes", to make findings concerning the Marines' actions in response to "their apprehension of a security threat and possible collision and pirate boarding".[1891] To further support its point that the apprehension of a security threat was reasonable, Italy relies on a notice from India's Ministry of Shipping issued in March 2012, according to which India, shortly after the incident, also took the view that the Marines had perceived a genuine threat of piracy.[1892]

1058. Italy argues that "Article 88 is not engaged [...] because Italy did not have any purpose that was not peaceful in India's exclusive economic zone".[1893] Italy identifies "an important distinction" between States' purposes under Article 88 and the attribution to Italy of "a particular purpose based on the conduct of the Marines in a particular incident in which they responded to a perceived threat to [...] security and safe navigation".[1894]

1059. According to Italy, even in applying India's interpretation of Article 88 as prohibiting activities inconsistent with the UN Charter, "India takes that argument much too far" by omitting the words

1886 India's Rejoinder, para. 9.37.
1887 Hearing Transcript, 20 July 2019, 99:16-17. *See also* Hearing Transcript, 20 July 2019, 99:8-13.
1888 Hearing Transcript, 20 July 2019, 99:14-18. *See also* Hearing Transcript, 13 July 2019, 71:11-72:14.
1889 Italy's Reply, paras 10.27-10.37; Italy's Rejoinder, paras 5.35-5.44.
1890 Italy's Reply, para. 10.29, *citing* India's Counter-Memorial, para. 8.27.
1891 Italy's Reply, para. 10.29. *See also* Italy's Rejoinder, para. 5.37.
1892 Hearing Transcript, 18 July 2019, 201:1-6.
1893 Italy's Rejoinder, para. 5.38. *See also* Italy's Reply, para. 10.33.
1894 Italy's Rejoinder, para. 5.38. *See also* Italy's Reply, para. 10.29.

"under the UN Charter" and interpreting Article 88 to prohibit any use of force.[1895] Italy argues that "the threshold for armed attack cannot be lowered to the point where this sort of situation is characterised as a *jus ad bellum* event. This dilution of the *jus ad bellum* would not be in anyone's interest".[1896] On the contrary, according to Italy, the Virginia Commentary indicates that military activities consistent with Article 2, paragraph 4, and Article 51, of the Charter of the United Nations are not prohibited by the Convention.[1897]

1060. Italy argues that "[e]mbarking VPDs on Italian merchant vessels including the *Enrica Lexie* was a response by the Italian government to the threat of piracy and a measure of protection of such vessels from piracy attacks at sea".[1898] Italy further argues that such deployment was not inconsistent with the prohibition on the use of force in Article 2, paragraph 4, of the Charter of the United Nations, as reflected in Resolution 2077. According to Italy, the UN Security Council "[c]ommend[ed] the efforts of flag States for taking appropriate measures to permit vessels sailing under their flag transiting the High Risk Area to embark vessel protection detachments and privately contracted armed security personnel".[1899]

1061. Italy submits that India misrepresents its reference to Resolution 2077.[1900] Italy argues that it invoked Resolution 2077 to support its contention that embarking VPDs on vessels was not inconsistent with the Charter of the United Nations but in fact commended by the Security Council.[1901] According to Italy, by arguing that the use of force not authorised by Resolution 2077 would breach Article 2, paragraph 4, of the Charter of the United Nations, India appears to argue that any use of force by a State is inconsistent with Article 88.[1902] Italy contends, however, that the Convention "does not prohibit the use of force in certain circumstances within the limits prescribed by international law".[1903]

1062. Regarding the *M/V "SAIGA" (No. 2)* case, Italy argues that "no comparison can reasonably be drawn between conduct of the Marines [...] and the conduct of the authorities of Guinea in the '*Saiga*'."[1904] According to Italy, the discussion of the use of force in the *M/V "SAIGA" (No. 2)*

1895 Italy's Reply, para. 10.34, *referring to* India's Counter-Memorial, para. 8.23.

1896 Hearing Transcript, 18 July 2019, 203:1-5.

1897 Italy's Reply, para. 10.35, *citing* Virginia Commentary, Vol. III, p. 91, para. 88.7(c).

1898 Italy's Reply, para. 10.36.

1899 Italy's Reply, para. 10.36, *citing* United Nations Security Council Resolution 2077 (2012), adopted by the Security Council at its 6867th meeting, on 21 November 2012, U.N. Doc. S/RES/2077, p. 2.

1900 Italy's Rejoinder, paras 5.41-5.42, *referring to* India's Rejoinder, para. 9.49.

1901 Italy's Rejoinder, para. 5.42.

1902 Italy's Rejoinder, para. 5.43.

1903 Italy's Rejoinder, para. 5.43.

1904 Italy's Reply, para. 10.30.

case "is in the context of the arrest of ships [where] UNCLOS contains no express provisions", unlike the present case.[1905] Italy adds that the "SAIGA" presented no threat or cause of alarm while the Guinean authorities "attacked" and "subsequently boarded the ship and arrested it".[1906] Italy points out that "[e]ven in that case, however, there was no suggestion that Article 88 was engaged, let alone breached".[1907]

1063. Italy further contends that, unlike the *M/V "SAIGA" (No. 2)* case in which the Guinean officers "fired indiscriminately" despite the non-resistance and apparent lack of use or threat of force from the crew, here the Marines never boarded the "St. Antony", nor did they fire indiscriminately.[1908] Italy argues that, on the evidence of the owner of the "St. Antony", the vessel was "running at a high speed and was dangerously approaching another vessel".[1909] Italy submits that "it was only after having issued visual and auditory signals to no avail that the Marines resorted to firing, and even then to warning shots".[1910] Italy contends that this case is different from the indiscriminate use of gunfire in the *M/V "SAIGA" (No. 2)* case. Italy further contends that India's reliance on the *M/V "SAIGA" (No. 2)* case is premised on a wrong assumption that "the Marines were not under a reasonable apprehension of a security threat and possible collision and hostile pirate boarding".[1911]

1064. Italy concludes that it is not for the Arbitral Tribunal to decide by reference to what it calls the "very broad language" of Article 88 whether the Marines acted disproportionately.[1912] Rather, Italy contends that this is a question for a court in the State that is entitled to exercise penal jurisdiction over the Marines.[1913] According to Italy, the question before the Arbitral Tribunal is "only whether Italy had a purpose that was not peaceful" with respect to India's exclusive economic zone.[1914]

1905 Italy's Reply, para. 10.30, *referring to M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10 at pp 61-62, para. 155.

1906 Italy's Reply, para. 10.30, *citing M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10 at p. 28, para. 33.

1907 Italy's Reply, para. 10.31.

1908 Italy's Rejoinder, para. 5.40, *citing M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10 at p. 63, para. 158; *referring to* (Confidential Annex), p. 1 (**Annex IT-237**).

1909 Italy's Rejoinder, para. 5.40, *citing* Affidavit of Fredy J., 27 April 2012, p. 1 (**Annex IT-168**).

1910 Italy's Rejoinder, para. 5.40.

1911 Italy's Rejoinder, para. 5.40, *citing* India's Rejoinder, para. 9.38.

1912 Italy's Reply, para. 10.32.

1913 Italy's Reply, paras 10.32, 10.37.

1914 Italy's Rejoinder, para. 5.44.

(c) **Analysis of the Arbitral Tribunal**

1065. India asserts that Italy infringed its rights under Article 88 because "the use of force by another State is inconsistent with India's right" under that Article "to have its EEZ reserved for peaceful purposes".[1915] India argues that Article 88 should be read together with Article 301 of the Convention, which prohibits the threat or use of force or any other action inconsistent with the Charter of the United Nations.[1916]

1066. India submits that the Marines were not under a reasonable apprehension of a security threat, possible collision, or hostile pirate boarding[1917] and therefore the use of force by the Marines "was unwarranted and excessive",[1918] "caus[ing] the deaths of two Indian fishermen, endanger[ing] the safe navigation of the fishing boat, and compromis[ing] the lives of the other persons on board the *St Antony*".[1919]

1067. Italy argues that Article 88 of the Convention is not engaged in this case "because Italy did not have any purpose that was not peaceful in India's exclusive economic zone".[1920] Italy contends that the Convention "does not prohibit the use of force in certain circumstances within the limits prescribed by international law".[1921]

1068. According to Italy, deployment of VPDs on Italian merchant vessels, including the "Enrica Lexie", was not inconsistent with the prohibition on the use of force in Article 2, paragraph 4, of the Charter of the United Nations. Italy makes reference in this regard to Resolution 2077 in which the United Nations Security Council "[c]ommend[ed] the efforts by flag States for taking appropriate measures to permit vessels under their flag transiting the High Risk Area to embark vessel protection detachment and privately contracted armed security personnel".[1922]

1069. The Arbitral Tribunal observes that, as pointed out in the Virginia Commentary, Article 88 sets out the general principle that the high seas are to be reserved for peaceful purposes and that this

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1915 India's Counter-Memorial, para. 8.23.

1916 India's Counter-Memorial, para. 8.22.

1917 India's Rejoinder, para. 9.38.

1918 India's Counter-Memorial, para. 8.27.

1919 India's Counter-Memorial, para. 8.27.

1920 Italy's Rejoinder, para. 5.38.

1921 Italy's Rejoinder, para. 5.43.

1922 Italy's Reply, para. 10.36, *citing* United Nations Security Council Resolution 2077 (2012), adopted by the Security Council at its 6867th meeting, on 21 November 2012, U.N. Doc. S/RES/2077, p. 2.

principle is also confirmed in Article 301 concerning peaceful uses of the seas.[1923] The latter calls on all States to:

> refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.

1070. It is further noted in the Virginia Commentary that there is nothing on the record to connect Article 301 with Article 88. At the same time, Article 301 can be used as an interpretive guide to Article 88.[1924]

1071. The Arbitral Tribunal observes that Article 301 of the Convention, which is drawn from Article 2, paragraph 4, of the Charter of the United Nations, is applicable to all activities dealt with by the Convention and would not seem to add anything to the obligations of States that existed prior to the conclusion of the Convention.

1072. Article 2, paragraph 4, of the Charter of the United Nations provides:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

1073. Thus, under the Charter of the United Nations, the use of force is not completely prohibited if it is consistent with the Charter and with other rules of international law. This means that pursuant to Article 301 of the Convention, the use of force is not completely excluded on the high seas.

1074. It clearly follows from the articles of the Convention related to the fight against piracy that all States can take the necessary measures, including enforcement measures consistent with the Convention and the Charter of the United Nations, to protect their vessels against pirate attacks. Such measures cannot be viewed as a violation of Article 88 of the Convention or as an infringement on the rights of the coastal State in its exclusive economic zone. This is confirmed by Resolution 2077, which is cited by both Parties.

1075. By that Resolution, the Security Council of the United Nations reaffirmed that international law, as reflected in UNCLOS, sets out the legal framework applicable to combating piracy and armed robbery at sea as well as other ocean activities, and:

> commend[ed] the efforts of flag States for taking appropriate measures to permit vessels sailing under their flag transiting the High Risk Area to embark vessel protection detachments and privately contracted armed security personnel and encouraging States to regulate such

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1923 Virginia Commentary, Vol. III, para.88.7 (a), p. 90.

1924 Virginia Commentary, Vol. V, para. 301.6, p. 155.

> activities in accordance with applicable international law and permit charters to favour arrangements that make use of such measures.[1925]

1076. It is an established fact that the Italian Marines were on board the "Enrica Lexie" to protect it against potential pirate attacks. As has also been noted in the present Award, the Arbitral Tribunal is of the view, on the basis of information available, that during the incident of 15 February 2012, the Marines acted under the apprehension that the "Enrica Lexie" was under a pirate attack and therefore took actions, the domestic law aspects of which are to be determined by a competent criminal court, to protect the "Enrica Lexie" against a perceived pirate attack.

1077. In light of the foregoing analysis, the Arbitral Tribunal concludes that Italy did not breach Article 88 of the Convention.

B. REMEDIES

1. Position of India

1078. India requests the Arbitral Tribunal to adjudge and declare that its counter-claims are admissible and that, "[b]y firing at the St Antony and killing two Indian fishermen on board, Italy":

> (4) violated India's sovereign rights under Article 56 of UNCLOS;
>
> (5) breached its obligation to have due regard to India's rights in its EEZ under Article 58(3) of UNCLOS;
>
> (6) violated India's freedom and right of navigation under Articles 87 and 90 of UNCLOS; and
>
> (7) infringed India's right to have its EEZ reserved for peaceful purposes under Article 88 of UNCLOS.[1926]

1079. India further requests that the Arbitral Tribunal order Italy to "make full reparation for its breaches of Article 56, 58(3), 87, 88 and 90 of UNCLOS".[1927]

2. Position of Italy

1080. Italy requests the Arbitral Tribunal to dismiss "India's counter-claims in their entirety and all requests consequential on them".[1928]

1925 United Nations Security Council Resolution 2077 (2012), adopted by the Security Council at its 6867th meeting, on 21 November 2012, U.N. Doc. S/RES/2077, p. 2.

1926 India's Rejoinder, p. 131; India's Counter-Memorial, p. 125.

1927 India's Rejoinder, p. 131; India's Counter-Memorial, p. 125.

1928 Italy's Reply, para. 11.3(2); Italy's Rejoinder, para. 6.6(2).

3. Analysis of the Arbitral Tribunal

1081. Having found that, by interfering with the navigation of the "St. Antony", Italy acted in breach of Article 87, paragraph 1, subparagraph (a), and Article 90, of the Convention, the Arbitral Tribunal will examine which consequences arise from Italy's unlawful conduct.

1082. The Arbitral Tribunal recalls that, under customary international law as codified in the ILC Draft Articles on State Responsibility, "[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act", which may include "any damage, whether material or moral, caused by the internationally wrongful act".[1929] Specifically, full reparation shall take the form of restitution, compensation and satisfaction, either singly or in combination.[1930]

1083. The Parties, at the present stage, have not presented detailed submissions to the Arbitral Tribunal as to the injury suffered by India. While India has requested the Arbitral Tribunal to order Italy to make full reparation, the Parties concur that the contents of any obligation on either Party to make reparation should be determined, if necessary, in a subsequent phase of these proceedings. Specifically, Italy has expressed the view that "all matters of quantum of compensation should be held over to be addressed in a subsequent phase".[1931] India, on its part, has indicated that, if "the Tribunal were of the opinion that compensation [to Italy] is justified, it should in any case be held over in order to be addressed in a subsequent phase. India takes the same position with regard to its own counterclaims".[1932]

1084. Although the Arbitral Tribunal notes that the Parties have agreed that the question of reparations may be dealt with in a subsequent phase of the proceedings, the Arbitral Tribunal considers it appropriate to make the following observations.

1085. The injury suffered by India as a result of Italy's breach, through the conduct of the Marines, of India's freedom of navigation under the Convention is twofold.

1086. First, India was subject to an infringement of its freedom of navigation. Such injury is a consequence of the breach of the Convention by Italy. While no specific material damage is

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1929 International Law Commission, "Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries" in *Yearbook of the International Law Commission*, Vol. II (Part 2), p. 31 at p. 91, Article 31 (2001).

1930 International Law Commission, "Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries" in *Yearbook of the International Law Commission*, Vol. II (Part 2), p. 31 at p. 95, Article 34 (2001).

1931 Italy's Reply, para. 9.17.

1932 India's Rejoinder, para. 8.9.

associated with that injury, the Arbitral Tribunal recalls the principle expressed in the award of the arbitral tribunal in the *"Rainbow Warrior" Affair* that "[u]nlawful action against non-material interests, such as acts affecting the honor, dignity or prestige of a State, entitle the victim State to receive adequate reparation, even if those acts have not resulted in a pecuniary or material loss for the claimant State".[1933]

1087. The injury in question being of such a nature that it cannot be made good by restitution or compensation, reparation can only take the form of satisfaction. The Arbitral Tribunal considers that a finding in the present Award that Italy has breached Article 87, paragraph 1, subparagraph (a), and Article 90 of the Convention constitutes adequate satisfaction for India.[1934] The Arbitral Tribunal recalls in this regard that, in the *Corfu Channel case*, the ICJ regarded a declaration by the Court "that the action of the British Navy constituted a violation of Albanian sovereignty" to be "in itself appropriate satisfaction".[1935]

1088. Second, as noted in paragraph 1042 of the Award, the shooting at the "St. Antony" amounted to physical interference with the freedom of navigation of the "St. Antony" and constituted a breach of Article 87, paragraph 1, subparagraph (a), and Article 90. Based on the limited evidence available to the Arbitral Tribunal, as a consequence of such breach, crew members of the "St. Antony" suffered loss of life, physical harm, material damage to their property (including to the "St. Antony" itself), and moral harm. India is accordingly entitled to payment of compensation in respect of such damage, which by its nature cannot be made good through restitution.[1936]

1089. Consistent with the Parties' positions, the Parties are invited to consult with each other with a view to reaching agreement on the amount of compensation due to India.

1090. The Arbitral Tribunal shall retain jurisdiction, should either Party or both Parties wish to apply for a ruling from the Arbitral Tribunal in respect of the quantification of compensation due to India, in which event the Arbitral Tribunal would fix a timetable for further proceedings. Should

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1933 *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair*, Decision of 30 April 1990, RIAA Vol. XX, p. 215 at p. 267, para. 109.

1934 International Law Commission, "Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries" in *Yearbook of the International Law Commission*, Vol. II (Part 2), p. 31 at p. 105, Article 37 (2001).

1935 *Corfu Channel case*, Judgment of April 9th, 1949: I.C.J. Reports 1949, p. 4 at p. 35.

1936 International Law Commission, "Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries" in *Yearbook of the International Law Commission*, Vol. II (Part 2), p. 31 at p. 98, Article 36 (2001).

no such application be received within one year after the date of the present Award, the proceedings shall be closed.

VII. COSTS

1091. Based on Article 21 of the Rules of Procedure, Italy submits that it is appropriate for the Arbitral Tribunal to "make an award of costs to Italy that reflects India's breaches of UNCLOS and other relevant rules of international law as pleaded in this Memorial".[1937]

1092. India contends that Italy's costs claim, "which is not based on any justification or reproduced in Italy's submissions, is not serious in the circumstances of the case and does not deserve any rebuttal".[1938]

1093. Annex VII, Article 7, to the Convention provides that, "[u]nless the arbitral tribunal decides otherwise because of the particular circumstances of the case, the expenses of the tribunal, including the remuneration of its members, shall be borne by the parties to the dispute in equal shares". Article 21 of the Rules of Procedure applicable in this Arbitration states that "[u]nless decided otherwise by the Arbitral Tribunal, each Party shall bear its own costs". In the view of the Arbitral Tribunal, there are no "particular circumstances" that would lead the Arbitral Tribunal to any other allocation of costs. Accordingly, no particular cost order from the Arbitral Tribunal is called for in this case.

1937 Italy's Memorial, para. 12.25.

1938 India's Counter-Memorial, para. 7.18.

VIII. DISPOSITIF

1094. For the reasons set out in this Award, the Arbitral Tribunal

A. In relation to jurisdiction and admissibility

1. FINDS, by four votes to one, in respect of Italy's Submission (1) and India's Submission (1), that in the present Arbitration there is a dispute between the Parties as to which State is entitled to exercise jurisdiction over the incident of 15 February 2012 involving the "Enrica Lexie" and the "St. Antony", and that the dispute concerns the interpretation or application of the Convention;

IN FAVOUR: *President* Golitsyn; *Arbitrators* Paik, Francioni, Pemmaraju Sreenivasa Rao

AGAINST: *Arbitrator* Robinson

2. FINDS, by four votes to one, that the Arbitral Tribunal has jurisdiction over the dispute, subject to its decision on the specific objections to its jurisdiction raised by India in its Submission (1.a);

IN FAVOUR: *President* Golitsyn; *Arbitrators* Paik, Francioni, Pemmaraju Sreenivasa Rao

AGAINST: *Arbitrator* Robinson

3. FINDS, unanimously, that India's counter-claims are admissible;

4. FINDS, by three votes to two, in respect of Italy's Submission (2)(f), that Article 2, paragraph 3, Article 56, paragraph 2, and Article 58, paragraph 2, of the Convention are not pertinent and applicable in the present case;

IN FAVOUR: *President* Golitsyn; *Arbitrators* Paik, Francioni

AGAINST: *Arbitrators* Robinson, Pemmaraju Sreenivasa Rao

5. FINDS, by three votes to two, in respect of Italy's Submission (2)(f) and India's Submission (1.a), that it has jurisdiction to deal with the question of the immunity of the Marines;

IN FAVOUR: *President* Golitsyn; *Arbitrators* Paik, Francioni

AGAINST: *Arbitrators* Robinson, Pemmaraju Sreenivasa Rao

6. FINDS, unanimously, in respect of India's submission (1.a), that there is no need to address the question of the compatibility with UNCLOS of India's 1976 Maritime Zone Act and its 1981 Notification;

B. In relation to the merits of the dispute between the Parties

1. FINDS, unanimously, in respect of Italy's Submission (2)(b)-(e) and (g),

   a. that India has not acted in breach of Article 87, paragraph 1, subparagraph (a), of the Convention;
   b. that India has not violated Article 92, paragraph 1, of the Convention;
   c. that Article 97, paragraphs 1 and 3, of the Convention are not applicable in the present case;
   d. that India has not violated Article 100 of the Convention and that therefore Article 300 cannot be invoked in the present case;

2. DECIDES, by three votes to two, in respect of Italy's Submission (2)(f), that the Marines are entitled to immunity in relation to the acts that they committed during the incident of 15 February 2012, and that India is precluded from exercising its jurisdiction over the Marines;

   IN FAVOUR: *President* Golitsyn; *Arbitrators* Paik, Francioni

   AGAINST: *Arbitrators* Robinson, Pemmaraju Sreenivasa Rao

3. DECIDES, by three votes to two, in respect of Italy's Submission (3)(a) and (c), taking note of the commitment expressed by Italy during the proceedings to resume its criminal investigation into the events of 15 February 2012, that India must take the necessary steps to cease to exercise its criminal jurisdiction over the Marines, and that no other remedies are required;

   IN FAVOUR: *President* Golitsyn; *Arbitrators* Paik, Francioni

   AGAINST: *Arbitrators* Robinson, Pemmaraju Sreenivasa Rao

4. FINDS, in respect of India's Submissions (4), (5), and (7),

   a. by three votes to two, that Italy has not violated India's sovereign rights under Article 56 of the Convention;

   IN FAVOUR: *President* Golitsyn; *Arbitrators* Paik, Francioni

AGAINST: *Arbitrators* Robinson, Pemmaraju Sreenivasa Rao

b. by three votes to two, that Italy has not violated Article 58, paragraph 3, of the Convention;

IN FAVOUR: *President* Golitsyn; *Arbitrators* Paik, Francioni

AGAINST: *Arbitrators* Robinson, Pemmaraju Sreenivasa Rao

c. unanimously, that Italy has not infringed on India's rights under Article 88 of the Convention;

5. FINDS, unanimously, in respect of India's Submission (6), that by interfering with the navigation of the "St. Antony" Italy has acted in breach of Article 87, paragraph 1, subparagraph (a), and Article 90 of the Convention;

6. DECIDES, unanimously, in respect of India's Submission (8),

a. that a finding in the present Award that Italy has breached Article 87, paragraph 1, subparagraph (a), and Article 90 of the Convention constitutes adequate satisfaction for the injury to India's non-material interests;
b. that as a result of the breach by Italy of Article 87, paragraph 1, subparagraph (a), and Article 90 of the Convention, India is entitled to payment of compensation in connection with loss of life, physical harm, material damage to property (including to the "St. Antony") and moral harm suffered by the captain and other crew members of the "St. Antony", which by its nature cannot be made good through restitution;
c. that the Parties are invited to consult with each other with a view to reaching agreement on the amount of compensation due to India referred to in paragraph 6(b) above;
d. that the Arbitral Tribunal shall retain jurisdiction should either Party or both Parties wish to apply for a ruling from the Arbitral Tribunal in respect of the quantification of compensation due to India, in which event the Arbitral Tribunal would fix a timetable for further proceedings, and that, should no such application be received within one year after the date of the present Award, the proceedings shall be closed;

C. In relation to the costs of these proceedings, DECIDES that each Party shall bear its own costs.

* * *

Done at The Hague, the Netherlands, this twenty-first day of May, two thousand and twenty:

For the Arbitral Tribunal:

Professor Francesco Francioni

Dr. Pemmaraju Sreenivasa Rao

H.E. Judge Jin-Hyun Paik

H.E. Judge Patrick Robinson

H.E. Judge Vladimir Golitsyn
President

For the Registry:

Dr. Dirk Pulkowski
Senior Legal Counsel
- Registrar -

Arbitrators Robinson and Pemmaraju Sreenivasa Rao append a joint dissenting opinion to the Award. *Arbitrator* Robinson appends a dissenting opinion to the Award. *Arbitrator* Pemmaraju Sreenivasa Rao appends a concurring and dissenting opinion to the Award.

Dr. Dirk Pulkowski
Senior Legal Counsel
- Registrar -

The present copy of the Award contains corrections to page xi, paragraph 18, paragraph 256, paragraph 591, and paragraph 719 made by the Arbitral Tribunal pursuant to Article 19 of the Rules of Procedure.

Dr. Dirk Pulkowski
Senior Legal Counsel
- Registrar -