

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

PCA Case No. 2015-28

Permanent Court of Arbitration
Peace Palace
The Hague
The Netherlands

Day 2

Thursday, 31st March 2016

Hearing on Request for
Provisional Measures

Before:

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

BETWEEN:

THE ITALIAN REPUBLIC
(APPLICANT)

-and-

THE REPUBLIC OF INDIA
(RESPONDENT)

-concerning-

THE "ENRICA LEXIE" INCIDENT

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1
2 **Thursday, 31st March 2016**

3 **(10.00 am)**

4 **THE PRESIDENT:** Good morning. The Arbitral Tribunal will
5 continue its hearing on the provisional measures, in
6 the case concerning the "Enrica Lexie" incident. We
7 will now hear the second round of Italy's oral
8 arguments. I give the floor to Sir Daniel Bethlehem
9 to begin his statement.

10 **ITALY'S SECOND ROUND OF ORAL ARGUMENT**

11 **SPEECH BY SIR DANIEL BETHLEHEM**

12 **SIR DANIEL BETHLEHEM:** Mr President, members of the
13 Tribunal, Italy's reply submission will be brief.
14 I will be on my feet for about 15 minutes. In the
15 course of my remarks, I will respond to three of the
16 questions put by the Tribunal last night. I will be
17 followed by Sir Michael Wood. He will also speak for
18 about 15 minutes and will respond to the remaining
19 question of the Tribunal. Ambassador Azzarello, the
20 Italian Agent, will conclude Italy's presentation with
21 a formal reading of Italy's submissions.

22 Mr President, members of the Tribunal, at the
23 start of his presentation yesterday afternoon,
24 Professor Pellet said as follows:

25 "I will not attempt to answer Italy's presentation

1 of this morning, although it happens that we had in
2 many respects anticipated their arguments."¹

3 Counsel for India failed to engage at all with
4 virtually anything that we said yesterday morning,
5 notwithstanding their anticipation of what we would
6 say. We accept, of course, that there were only two
7 hours between the end of our submissions and the start
8 of theirs, but in their anticipation, counsel for
9 India might have had in mind such issues as the *MOX*
10 *Plant* case, and analysis of the ITLOS Order, which
11 included the text of paragraph 132, and other key
12 issues. We imagine that our frustration will have
13 been shared by the Tribunal, as we were treated
14 largely to an oral recitation of India's Written
15 Observations. We heard nothing that we had not
16 already addressed in our opening presentation.

17 Mr President, members of the Tribunal, we did not
18 want to come here this morning and simply repeat what
19 we said yesterday morning. In reality, this hearing
20 has become a single round of pleadings. We opened our
21 submissions yesterday; India will reply to them this
22 afternoon. There will be no meaningful opportunity
23 for Italy to engage with India's substantive
24 arguments.

25 This said, our brief submissions this morning will

¹ Transcript, 30 March 2016, p. 134, lines 18 – 21

1 endeavour to draw together some key threads of Italy's
2 argument.

3 Mr President, members of the Tribunal, as we
4 reflect on it, your decision on Italy's request comes
5 down to one essential question. Everything else is
6 context and reasoning. The question at the heart of
7 these proceedings is the following: does the Tribunal
8 consider Italy's undertaking to return Sergeant Girone
9 to India, if this is required by a decision of the
10 Tribunal, to be reliable in fact and in law? If so,
11 the provisional measure that Italy has requested is
12 both appropriate and necessary. Quite apart from the
13 shortcomings of law in India's submissions on
14 pre-judgment and prejudice, which Sir Michael will
15 address shortly, India's arguments to this effect only
16 arise if you accept India's submission that Italy's
17 undertaking to return cannot be trusted. If it can
18 and should be trusted, no question of pre-judgment
19 even arises, because there would be no question of
20 pre-judgment as a matter of fact. If this is required
21 by a decision of the Tribunal, Sergeant Girone would
22 be returned to India to stand trial. India's rights
23 would have been comprehensively protected.

24 You heard yesterday from Professor Verdirame on
25 the jurisprudence addressing the presumption of
26 compliance. He also underlined the point that even in

1 the difficult politically charged circumstances of
2 this case, Italy has honoured its undertaking to
3 return the Marines in the past.

4 The reality is that the Marines did return to
5 India within the deadline stipulated. Indeed, this is
6 explicitly recorded in the Indian Supreme Court Order
7 of 2nd April 2013 that India submitted as an annex to
8 its Written Observations before ITLOS and which we
9 have now included at tab 16 of your folders². I don't
10 take you to that Order now, but I draw it to your
11 attention.

12 In response to the first question put by the
13 Tribunal last night, I cannot speak for Mr Bundy on
14 the question of what he had in mind when he spoke
15 about "intense diplomatic efforts". What we can say
16 is that there were at that point, as there have been
17 on other occasions, diplomatic exchanges between the
18 two States in an attempt to resolve the impasse of
19 this dispute. There were certainly diplomatic
20 exchanges at that time, and the Marines were returned
21 to India within the deadline that was required by
22 Italy's undertaking.

23 Mr President, members of the Tribunal, there are
24 four points that follow from this. The first point is

² Verbatim Record, ITLOS/PV.15/C24/1 (uncorrected), p. 13, lines 33-44 (Bethlehem) (Annex IT-34 (a)); India's ITLOS Written Statement, Annex 20, at para. 2

1 that Italy has in fact always honoured its
2 undertakings to India to return the Marines, and
3 indeed more generally in respect of this dispute³, and
4 there is no reason whatever to consider that Italy
5 would not do so again in the face of an undertaking
6 given before this Tribunal.

7 The second point is that this undertaking comes on
8 top of the obligation on Italy, and indeed on India,
9 under Article 11 of Annex VII of UNCLOS to comply with
10 the award of the Tribunal.

11 The third point is that the Indian Supreme Court
12 has required of Italy, and has accepted from Italy,
13 undertakings to return subsequent to the episode on
14 which India relies. If an undertaking is good enough
15 for its Supreme Court, India should be held to a high
16 burden to show why an undertaking to this Tribunal
17 would not suffice.

18 Mr President, members of the Tribunal, the fourth
19 point is more complex. It is that for the three and
20 a half years of this dispute, from 15th February 2012,
21 the point of the incident, to the Notification
22 instituting these proceedings on 21st July 2015, there
23 were diplomatic exchanges between the two States in
24 an attempt to resolve the dispute.

³ Transcript, 30 March 2016, pp. 50-51 (Swaroop); Verbatim Record, ITLOS/PV.15/C24/3 (uncorrected), pp. 4-5 (Bethlehem) (Annex IT-34 (c))

1 Those exchanges, however, as it turned out, were
2 akin to broken telephone conversations between
3 intermediaries representing what they thought were the
4 views of those for whom they spoke. The Parties have
5 misunderstood one another on this issue more than they
6 have understood one another.

7 Italy has on occasion brought applications before
8 the Indian courts because they thought they understood
9 from their Indian interlocutors that this was the way
10 to resolve the dispute, whereas in reality either
11 Italy misunderstood what India was saying, or those
12 speaking for India did not sufficiently understand the
13 complexity of the issues about which they were
14 talking.

15 Mr President, members of the Tribunal, the point
16 is simply that the Parties failed, in their diplomatic
17 dialogue, both to sufficiently understand one another,
18 and to find a way through the issues that divide them.

19 This, together with the risk of a critical
20 deterioration, was the reason why Italy commenced
21 these proceedings in July last year.

22 As I indicated yesterday, the ITLOS Provisional
23 Measures Order of last August brought a very welcome
24 calm and stability to this matter and to relations
25 between the Parties more generally, and I would note
26 in passing, in the light of what was said yesterday,

1 that the hope of resolving the dispute through
2 negotiation is the reason why Italy did not commence
3 proceedings before July 2015. Of course, before
4 proceedings commenced, there could be no question of
5 a provisional measures request.

6 Before I leave this point, let me turn to the
7 fourth question put by the Tribunal last night. With
8 great respect to our friend, the Ambassador, he is
9 simply wrong on this matter. We have here with us in
10 this hearing Italy's senior Indian counsel in the
11 Delhi proceedings on 16th December 2014. Both Italy
12 and India have also annexed to their respective
13 pleadings a press report on the hearing in question⁴.

14 It is accurate to say that Sergeant Girone's
15 petition was withdrawn. It is inaccurate to a quite
16 startling degree to say that the Government of India
17 did not oppose that petition.

18 It is equally inaccurate to suggest that Sergeant
19 Girone simply withdrew his petition. His petition was
20 withdrawn, and a decision made not to resubmit it, in
21 the face both of Indian Government opposition to the
22 petition, and a categorical statement by the
23 Chief Justice of India in the court that he would
24 reject the petition.

25 Mr President, members of the Tribunal, our

⁴ Annex IT-42; India's ITLOS Written Observations, Annex 45

1 esteemed colleague, the Indian Ambassador, was not
2 speaking from personal knowledge when he read what he
3 did. Whoever wrote it was simply wrong.

4 Mr President, members of the Tribunal, let me turn
5 to the ITLOS Provisional Measures Order. It is
6 important that I emphasise a point that may have
7 gotten lost in our analysis of the text of the Order
8 yesterday. We welcomed that Order in its detail and
9 in its nuance and in its careful and deliberate
10 consideration of the issues. We are not seeking to
11 undo it, or to appeal against it in any way.

12 By the present Request, we are seeking to open
13 a door that ITLOS explicitly left ajar. Paragraph 132
14 of the Order, which India's counsel failed to address
15 yesterday, made it clear beyond doubt that ITLOS was
16 not addressing the status of the Marines because it
17 considered that this was a matter that would be better
18 addressed by this Tribunal once it had been
19 constituted. We are not seeking a modification of the
20 ITLOS Order, because the ITLOS Order said in terms
21 that it was leaving the issue of the status of the
22 Marines to this Tribunal. Our Request in these
23 proceedings is passing the ITLOS baton to you.

24 Mr President, members of the Tribunal, I have
25 three brief concluding points to make. The first
26 concerns the issue of whether Sergeant Girone is

1 formally subject to any criminal charges. Despite
2 Professor Pellet's repeated refrain yesterday that
3 Sergeant Girone knew that he was accused of murder, it
4 is in fact common ground between the Parties that
5 Sergeant Girone is not currently subject to any
6 charge. There is a debate as to why this is the case,
7 but who is right about this, and the underlying issues
8 of Indian law, are not matters that the Tribunal needs
9 to determine in these proceedings. It is common
10 ground that the Kerala charge sheet was invalid and
11 that there has not been a subsequent one⁵.

12 Mr President, members of the Tribunal, I should
13 add that Mr Bundy referred yesterday to four statutes
14 stipulated in the 18th January 2013 Supreme Court
15 Judgment, and he asserted that accordingly "it was
16 quite clear that the Marines were well aware of the
17 legal statutes under which they would be charged".
18 This is astonishing. The four statutes (which, for
19 example, included the entire Indian Penal Code)
20 together comprise over 1,000 legal provisions and
21 cannot by any stretch of a creative legal imagination
22 be understood as indicating with sufficient precision
23 the charges that might ultimately be brought.

24 The significance of this point for the Tribunal is

⁵ India's ITLOS Written Observations, paras. 1.17 and 2.13 (Annex IT-33); India's Written Observations (Annex VII Tribunal), para. 2.6; Transcript, 30 March 2016, p. 166, line 19-p. 167, line 1 (Bundy); *ibid.*, p. 176, line 16-p. 177, line 5 (Bundy)

1 that, when it comes to weighing everything in the
2 balance in determining your judgment on whether to
3 prescribe the provisional measure that Italy seeks,
4 the fact that Sergeant Girone has not ever been
5 subject to any lawful charge should weigh in favour of
6 Italy's request that his bail conditions should be
7 relaxed to enable him to return to Italy until the
8 Tribunal has rendered its final award in this case.

9 My second point goes to the second question posed
10 by the Tribunal last night concerning the reasons that
11 the "Enrica Lexie" was called to go into the port of
12 Kochi. As a preliminary matter, I note that this goes
13 to the merits and is therefore an issue that we will
14 address more fully by reference to the evidence in due
15 course. I confine myself for the moment, therefore,
16 to addressing this issue by reference to the
17 documentation that is already in the record.

18 The answer to the question comes in three parts.
19 The first part is the issue of what India communicated
20 to the "Enrica Lexie" at the time. The "Enrica Lexie"
21 was requested by India to proceed to Kochi to assist
22 in the investigation of an incident that the Indian
23 authorities, in their communication to the vessel,
24 characterised as involving a firing on skiffs
25 suspected of piracy. What the vessel subsequently
26 learnt was that the Indian authorities were not in

1 fact treating the incident as a suspected pirate
2 attack, but were simply saying as such to the "Enrica
3 Lexie". The communication gave no indication that the
4 vessel or anyone on board the vessel was suspected of
5 any wrongdoing⁶.

6 Second, the true reason for that request, which
7 was not communicated to the "Enrica Lexie" while it
8 was outside India's territorial sea, was to arrest the
9 ship and the individuals on board suspected of killing
10 the two Indian fishermen⁷.

11 Third, regardless of the reason given in the
12 communication, the "Enrica Lexie" had no choice but to
13 comply with India's direction and to enter India's
14 territorial sea and proceed to anchor at Kochi. The
15 vessel was interdicted in international waters. It
16 was encircled. It was directed to alter course. It
17 was continuously contacted and shadowed until it
18 arrived in Kochi⁸.

19 All of this evidence comes from Indian documents
20 which are on the record.

21 Mr President, members of the Tribunal, my
22 concluding point is the following: Italy has sought to

⁶ *Inter alia*, Annex IT-8, Annex IT-14, Annex IT-5, and Annex IT-39

⁷ Annex IT-9. In an Indian newspaper article of 18 February 2012 (Annex IT-39), the Regional Commander of the Indian Coast Guard was directly quoted as saying: "When Enrica Lexie officials confirmed they had an encounter with pirates, we asked them to sail to Kochi to identify the pirates. We informed them that they were under investigation for the murder of two fishermen only after they reached the outer anchorage off Kochi port."

⁸ *Inter alia*, Annex IT-9 and Annex IT-7

1 recognise and to accommodate India's need for
2 assurance that Sergeant Girone would be returned to
3 India if this is required by a decision of the
4 Tribunal.

5 Italy has gone out of its way to emphasise,
6 solemnly and publicly, time and again, that it
7 undertakes to return Sergeant Girone to India if
8 a decision of this Tribunal so requires. By this
9 undertaking, Italy assumes an international obligation
10 not just to India but also to this Tribunal, the
11 Tribunal to whom Italy chose to turn to resolve this
12 dispute.

13 Italy has also invited the Tribunal to impose
14 appropriate conditions on Sergeant Girone's return to
15 Italy, conditions that are akin to those to which he
16 is subject in India. Italy has further acknowledged,
17 by its use of the language in the present request of
18 a relaxation of Sergeant Girone's bail conditions,
19 that the Indian Supreme Court would continue to have
20 an interest in the matter. In all of these ways,
21 Italy has sought to recognise and accommodate India's
22 interest.

23 We have seen nothing similar from India. There
24 has been no recognition of Italy's interests, and of
25 the irreparable prejudice to Italy's rights. There
26 has been no endeavour to accommodate Italy's concerns.

1 India's rights and interests can be comprehensively
2 safeguarded by the undertaking offered by Italy.
3 Italy's rights and interests can only be safeguarded
4 by the prescription of the provisional measure that
5 Italy requests in these proceedings.

6 Mr President, members of the Tribunal, that
7 concludes my submissions. I thank you for your
8 attention. Mr President, may I invite you to ask
9 Sir Michael Wood to the podium, please?

10 **THE PRESIDENT:** Thank you, Sir Daniel Bethlehem. Now we
11 invite Sir Michael Wood to make his statement.

12 **SPEECH BY SIR MICHAEL WOOD**

13 **SIR MICHAEL WOOD:** Mr President, members of the Tribunal,
14 as Sir Daniel has just said, counsel for India have
15 yet to address the various points we made yesterday.
16 This includes those concerning Article 290,⁹ and in
17 this brief statement I shall therefore limit myself to
18 a few points that arose from what Professor Pellet and
19 Mr Bundy said on that matter yesterday, to note some
20 continuing differences, but also a couple of points
21 where India now seems to agree with Italy.

22 I shall then say a few words about India's
23 pre-judgment argument, and I shall end by replying to

⁹ Transcript, 30 March 2016, p. 23, line 19-p. 25, line 26 (Bethlehem); *ibid.*, p. 54, line 2-p. 62, line 2 (Wood)

1 the Tribunal's question no 3 from yesterday evening.

2 Counsel for India did not address what we said
3 about the very special nature of the jurisdiction of
4 ITLOS under the first sentence of paragraph 5 of
5 Article 290. Or what we said about the relationship
6 between that special jurisdiction and the regular
7 provisional measures jurisdiction under paragraph 1.

8 The unique paragraph 5 procedure was devised at
9 the Third United Nations Conference on the Law of the
10 Sea precisely to make Annex VII arbitration more
11 effective, and in doing so, to give a special role to
12 ITLOS.

13 It is the regular procedure under paragraph 1
14 which corresponds to the ICJ's jurisdiction under
15 Article 41 of its statute.

16 On two points concerning provisional measures, the
17 Parties now seem to be largely in agreement. First,
18 Professor Pellet conceded yesterday that
19 (notwithstanding what is said in India's Written
20 Observations¹⁰) provisional measures orders "are not
21 properly *res judicata*"¹¹. So, unlike the ICJ a couple
22 of weeks ago in the *Nicaragua v Colombia* case¹², this

¹⁰ See, for example, WO, para. 3.10 and fn 38

¹¹ Transcript, 30 March 2016, p. 137, lines 7-12 (Pellet)

¹² *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia), Preliminary Objections, Judgment of 17 March 2016, paras. 55-88*

1 Tribunal is happily not called upon to consider the
2 case law or the technicalities of the *res judicata*
3 principle.

4 Second, Mr Bundy now seems to take more or less
5 the same line as Italy on the role of urgency. As we
6 explained yesterday, if "urgency" is relevant in the
7 context of Article 290, paragraph 1, it refers to the
8 risk of irreparable harm suffered in advance of the
9 issuance of the final award¹³.

10 Mr Bundy seemed to accept as much yesterday when
11 he said, quoting from the *Ghana/Côte d'Ivoire* case,
12 that:

13 "... urgency ... in the sense of 'the need to
14 avert a real and imminent risk that irreparable
15 prejudice may be caused to the rights in interest', is
16 a fundamental condition for the prescription of
17 provisional measures"¹⁴.

18 What India has not done is address Italy's point
19 that Italy will suffer irreparable prejudice if the
20 Tribunal finds that Italy has jurisdiction, and from
21 now until the final award, Sergeant Girone remains in
22 India. This is the crucial point, and India has so
23 far said nothing about it.

24 In other respects, however, our friends opposite

¹³ Transcript, 30 March 2016, p. 71, line 9-p. 72, line 7 (Wood)

¹⁴ Transcript, 30 March 2016, p. 154, lines 11-17 (Bundy)

1 seem to maintain their unorthodox views about
2 provisional measures. For example, Professor Pellet
3 said that provisional measures had "no role to play
4 when an established situation does not threaten nor
5 jeopardise the outcome of the lawsuit".¹⁵ But that,
6 Mr President, is not the test.

7 The test is whether harm will be suffered prior to
8 the issuance of the award that could not be remedied
9 in the award. It cannot be denied that, if the final
10 award were in Italy's favour, the harm suffered by the
11 lengthy detention of Sergeant Girone in Delhi would be
12 irremediable.

13 Mr President, members of the Tribunal, I do not
14 really need to return to the modification versus new
15 measure debate, which forms a major thread in India's
16 written observations, but I cannot resist reacting to
17 Professor Pellet's remarkable assertion yesterday that
18 "clearly an addition is a modification"¹⁶.

19 Certainly not in this case, for the purpose of
20 deciding whether paragraph 2 of Article 290 is
21 applicable. What matters here is that there is no
22 request to modify the ITLOS Order. Both sides wish to
23 leave it untouched. Italy's request is a request for
24 a new measure, a measure not prescribed by ITLOS, not

¹⁵ Transcript, 30 March 2016, p. 186, lines 18-20

¹⁶ Transcript, 30 March 2016, p. 138, lines 4-5 (Pellet)

1 rejected in the *dispositif*, and, as we explained
2 yesterday, explicitly left by ITLOS to this
3 Tribunal¹⁷.

4 This is perhaps an unnecessary debate, since even
5 if a change of circumstances were required, as we
6 explained yesterday¹⁸, it is clear that the position
7 in which this Tribunal finds itself is entirely
8 different from that of ITLOS last August.

9 Professor Pellet insisted yesterday that in
10 August, ITLOS dismissed Italy's second request. Of
11 course, it did not prescribe the measure sought, but
12 what Professor Pellet completely overlooks is the
13 reason it gave, that it was more appropriate for this
14 Tribunal to consider any such request¹⁹.

15 Mr President, members of the Tribunal, yesterday
16 Professor Pellet repeated a number of submissions
17 under the umbrella of, as he put it, pre-judgment of
18 your final decision. I shall address the central
19 point he made. He sought to persuade you that Italy's
20 Request "would not only prejudice but purely and
21 simply prejudge your decision on the substance of the
22 case".

23 He did so by comparing the texts of Italy's

¹⁷ ITLOS Order, para. 132 (Annex IT-35)

¹⁸ Transcript, 30 March 2016, p. 54, lines 10-15 (Wood)

¹⁹ ITLOS Order, para. 132 (Annex IT-35)

1 submission in its Request with paragraph (d) of the
2 relief which Italy seeks in its Notification and
3 Statement of Claim. He contended that Italy's
4 *desiderata* are the same in both the Notification and
5 the Request, and the consequence, according to
6 Professor Pellet, is that:

7 "... you could not accede to Italy's Request
8 without, by the same token, granting Italy's claim;
9 that is by deciding that India must cease to exercise
10 any measure of restraint with respect to Sergeant
11 Girone, which is precisely one of the submissions in
12 the Notification of Claim by Italy."²⁰

13 Mr President, members of the Tribunal, that
14 argument is simply wrong. The same comparison of
15 texts could have been done in a number of cases where
16 no pre-judgment of the merits was found, and
17 provisional measures were prescribed. Let me recall
18 one important and relevant example, ITLOS's Order on
19 Provisional Measures in the *ARA Libertad* case between
20 Argentina and Ghana²¹.

21 In its Notification instituting proceedings, the
22 main relief sought by Argentina was that Ghana
23 "immediately cease" the violation of a number of

²⁰ Transcript, 30 March 2016, p. 186, lines 9-15 (Pellet)

²¹ "*ARA Libertad*" (*Argentina v. Ghana*), *Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012*, p. 332

1 international obligations which the Argentinian
2 Notification described as follows:

3 "(1) the international obligation of respecting
4 the immunities from jurisdiction and execution enjoyed
5 by such vessel ...

6 "(2) the exercise of the right to sail out of the
7 waters subject to the jurisdiction of the coastal
8 State and the right of freedom of navigation enjoyed
9 by the said vessel and its crew ..."

10 Argentina requested a provisional measure in the
11 following terms:

12 "... that Ghana unconditionally enables the
13 Argentine warship Frigate ARA Libertad to leave the
14 Tema port and the jurisdictional waters of Ghana and
15 to be resupplied to that end."

16 ITLOS then granted a provisional measure which
17 read as follows:

18 "Ghana shall forthwith and unconditionally release
19 the frigate ARA Libertad, shall ensure that the
20 frigate ARA Libertad, its Commander and crew are able
21 to leave the port of Tema and the maritime areas under
22 the jurisdiction of Ghana, and shall ensure that the
23 frigate ARA Libertad is resupplied to that end."

24 Mr President, members of the Tribunal, comparable
25 similarities between what was sought by a party as
26 relief on the merits and what was prescribed in

1 a provisional measures order have arisen in a number
2 of other cases before ITLOS, but I do not think I need
3 take you to them, since the point is the same²².

4 At this point, Mr President, I would like to
5 return to the *Tehran Hostages* case, which
6 Professor Verdirame addressed yesterday. The Order is
7 at tab 15, but I do not think you need turn it up.

8 There are two brief comments to add to what
9 Professor Verdirame said. The first is that in *Tehran*
10 *Hostages*, as in *ARA Libertad*, you will find the same
11 textual correspondence between the relief sought on
12 the merits and the provisional measure requested (and
13 granted) that Professor Pellet would like you to think
14 is determinative of the question of pre-judgment.

15 The relief sought by the United States in its
16 Application included that the Court adjudge and
17 declare that:

18 "... the Government of Iran is under a particular
19 obligation immediately to secure the release of all
20 United States nationals currently being detained
21 within the premises of the United States Embassy in
22 Tehran, and to assure that all such persons and all
23 other United States nationals in Tehran are allowed to

²² *Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, p. 10; *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, p. 280

1 leave Iran safely."²³

2 In the relevant part, the US request for
3 provisional measures was in virtually identical terms,
4 seeking "immediate release" and "prompt and safe
5 departure from Iran" of the affected US nationals²⁴.
6 The Court granted that request²⁵.

7 Mr President, the second point in connection with
8 the *Tehran Hostages* case concerns the nature of the
9 Order. In paragraph 28 of the Order, the Court
10 distinguished between an interim judgment and
11 a provisional measures order. In making its Order,
12 the Court said that what it was doing was different
13 from an interim judgment.

14 The Order was not based on a *prima facie*
15 determination of the merits in the United States'
16 favour. It was exclusively designed to preserve
17 rights.

18 Mr President, members of the Tribunal, the same is
19 true in our case. Contrary to what Professor Pellet
20 said²⁶, if you prescribe the measure sought, you will
21 not have prejudged any of the arguments that may be
22 raised on the merits. Nor will you have prejudged any

²³ *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Order of 15 December 1979, *I.C.J. Reports 1979*, p. 7, at p. 8, para. 1

²⁴ *Ibid.*, p. 9, para. 2

²⁵ *Ibid.*, p. 21, para. 47(1)(A).

²⁶ Transcript, 30 March 2016, p. 185 and pp. 13-19

1 of the issues of law and fact that are to be
2 determined at the merits stage.

3 In short, contrary to Professor Pellet's
4 conclusion, pre-judgment is not a matter of
5 appearances. It cannot be demonstrated by a mere
6 textual comparison between the relief sought and the
7 measure requested. It has to be properly assessed on
8 the facts of each case. In our case, the measure
9 Italy seeks would be provisional in the true sense,
10 and its effects could be entirely reversed if the
11 Tribunal so required in its final award.

12 Mr President, before concluding, I shall respond
13 to the Tribunal's third question from yesterday
14 evening. The Tribunal asked the Parties to comment on
15 any implications they believe paragraphs 134 and 135
16 of the ITLOS Order might have for the current
17 proceedings.

18 In these two paragraphs, ITLOS stated that it was
19 "aware of the grief and suffering of the families of
20 the two Indian fishermen" and "also aware of the
21 consequence that the lengthy restrictions on liberty
22 entail for the two Marines and their families". The
23 Tribunal evidently wanted to indicate that it did not
24 regard the human dimension of this inter-state dispute
25 as an abstraction.

26 It would not be correct, however, to read, as

1 Mr Bundy seemed to suggest yesterday²⁷, these two
2 paragraphs as defining the "balance to be struck" in
3 this case. This was clearly not the point of these
4 paragraphs. ITLOS was not trying to "split the
5 suffering". That could never be the way in which
6 justice, including international justice, can serve
7 the interests of victims.

8 Those interests are served principally by ensuring
9 that a proper process of law and as appropriate a fair
10 trial takes place, and that the truth of what happened
11 is established, and that anyone found guilty of an
12 offence at the end of a domestic criminal process
13 serve a punishment commensurate with the offence.

14 So far as concerns the families of the fishermen,
15 their interest is in seeing that justice be done. But
16 for reasons we have explained, that does not require
17 that Sergeant Girone, who is to be presumed innocent,
18 stay in India for a lengthy period during which no
19 trial can take place. So the families will not suffer
20 prejudice from the measure sought by Italy.

21 On the other hand, the consequences that "the
22 lengthy restrictions on liberty" entail for Sergeant
23 Girone and his family must certainly weigh in favour
24 of the provisional measure requested by Italy.

25 Mr President, members of the Tribunal, yesterday,

²⁷ Transcript, 30 March 2016, p. 152, line 18-p. 153, line 6 (Bundy)

1 Professor Pellet ended his speech by drawing attention
2 to Chapter 4 of India's Written Observations. He
3 claimed that India had "very moderately" chosen to
4 entitle Chapter 4:

5 "The Tendentious Character of Italy's Request."²⁸

6 In fact, in its Written Observations, India has
7 once again adopted an exaggerated and polemical tone.
8 There is no basis whatsoever for the serious assertion
9 that Italy's Request for a provisional measure
10 "constitutes an abuse of process"²⁹. To suggest that
11 Italy's request corresponds to the so-called
12 "definition" of abuse of process given by
13 Professor Kolb³⁰ is frankly pretty outrageous.

14 If it's meant to be dismissive of the serious
15 situation in which Sergeant Girone has found himself
16 over the last four years, and which, if India has its
17 way, will continue potentially for another four years
18 or so, it is unworthy of our friends opposite.

19 In its Order, ITLOS dealt robustly with similar
20 assertions³¹, and we trust that this Tribunal will do
21 likewise.

22 Mr President, members of the Tribunal, that

²⁸ Transcript, p. 187, lines 15-22 (Pellet)

²⁹ WO, paras. 4.1

³⁰ WO, para. 4.1 (where the quotation is incorrectly attributed to Professor Marcelo Kohen)

³¹ ITLOS Order, paras. 68-73 (Annex IT-35)

1 concludes what I have to say. I would be grateful if
2 you would invite the Agent of Italy, Ambassador
3 Azzarello, to the podium. I thank you.

4 **THE PRESIDENT:** Thank you, Sir Michael. I now give the
5 floor to the Agent of Italy, His Excellency,
6 Ambassador Azzarello, to present Italy's formal
7 submissions.

8 **SUBMISSIONS BY THE AGENT**

9 **AMBASSADOR AZZARELLO:** Mr President, members of the
10 Tribunal, before I read out the formal submissions of
11 the Italian Republic, please allow me to express, also
12 on behalf of the members of the Italian delegation,
13 our profound appreciation and thanks to you,
14 Mr President, and the members of the Tribunal.

15 We would like to thank the Registrar of the
16 Permanent Court of Arbitration, Dr Pulkowski, the
17 staff and the court reporter, Ms Claire Hill. We also
18 are very grateful to all others who have worked hard
19 behind the scenes during this hearing.

20 I would like to express our appreciation and
21 thanks also, as I did at the beginning of our
22 speeches, to the Agent of the Republic of India, the
23 Co-Agent and her team.

24 Mr President, I shall now read Italy's final
25 submissions. They are as follows:

1 "For the reasons given in its Request for the
2 Prescription of Provisional Measures dated
3 11th December 2015 and in the course of the hearing,
4 the Italian Republic requests that the Arbitral
5 Tribunal prescribe the following provisional measure:

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

11 I thank you, Mr President.

12 **THE PRESIDENT:** Thank you, Ambassador Azzarello. This
13 concludes the oral arguments presented by Italy, as
14 well as this morning's session. We will continue the
15 hearing in the afternoon, at 4.30 pm, to hear the
16 second round of India's oral arguments.

17 The hearing stands adjourned.

18 **(10.43 am)**

19 **(Adjourned until 4.30 pm)**

20 **(4.40 pm)**

21 **INDIA'S SECOND ROUND OF ORAL ARGUMENT**

22 **SPEECH BY MR BUNDY**

23 **THE PRESIDENT:** Good afternoon. We will now hear the
24 second round of India's oral arguments, in the
25 arbitration case concerning the "Enrica Lexie"

1 incident. I would like to give the floor to Mr Rodman
2 Bundy to begin his statement.

3 **MR BUNDY:** Thank you very much, Mr President, members of
4 the Tribunal. In this presentation, I shall address
5 Italy's continuing failure to show that its request
6 for a provisional measure regarding Sergeant Girone is
7 justified either by reference to the basic criterion
8 of urgency, or because of an imminent risk of
9 irreparable prejudice, including on the grounds that
10 Sergeant Girone has been the subject of what is
11 alleged to be a violation of due process. I will also
12 respond to the first, second and fourth questions
13 posed by the Tribunal yesterday evening.

14 Following me, Professor Pellet will turn back to
15 the other issues raised by Italy on the interpretation
16 of Article 290 of UNCLOS and on the pre-judgment
17 issue.

18 The issues that divide the parties on these
19 matters are by this time tolerably clear and as
20 a consequence, I hope I can be relatively brief. Not
21 only have they been debated in these proceedings, but
22 virtually all of the issues were fully canvassed
23 before ITLOS.

24 Moreover, India feels confident that the Tribunal
25 is well placed to appreciate the reasons that underlay
26 ITLOS's Order of 24th August 2015, in which it did not

1 accept Italy's request to change the bail status of
2 Sergeant Girone.

3 That being said, India does not intend to respond
4 to Sir Michael's arguments about whether the Tribunal
5 prima facie has jurisdiction in order to prescribe
6 provisional measures, or the link between the measures
7 and the rights Italy seeks to protect.

8 In its Order of 24th August 2015, ITLOS dealt with
9 both of these points³², and unlike our opponents on
10 the other side of the bar, India does not intend to
11 second guess or seek to modify the Law of the Sea
12 Tribunal's conclusions on these matters.

13 So, Mr President, I can turn directly to the
14 question whether Italy has shown any urgency
15 sufficient to justify its request, and I have three
16 points to make in this connection.

17 First, as I pointed out yesterday, Sir Michael's
18 contention that unlike requests made under
19 Article 290, paragraph 5 of UNCLOS, urgency is not
20 a requirement for the prescription of provisional
21 measures under Article 290, paragraph 1, and I would
22 suggest that that contention flies in the face of the
23 jurisprudence of ITLOS and is contrary to the writings
24 of well-known recognised scholars on the subject.

25 Let me simply recall that the Special Chamber of

³² Order of 24 August 2015, paras. 54 and 85

1 ITLOS in the *Ghana/Côte d'Ivoire* case -- and I should
2 note that that case concerned not only a request for
3 provisional measures under Article 290, paragraph 1 of
4 UNCLOS, but also a request to the body that was tasked
5 with deciding the merits of the case -- the Special
6 Chamber of ITLOS stated:

7 "... urgency is required in order to exercise the
8 power to prescribe provisional measures."³³

9 That is as clear an expression of principle as you
10 can have, and three ICJ precedents were cited by ITLOS
11 when it made that statement.

12 Second, counsel's argument that India "conflates
13 the requirement of urgency under the first sentence of
14 Article 290, paragraph 5 (which relates to the time
15 when the tribunal has been constituted and is in
16 a position to function) with the requirement of a real
17 and imminent risk of irreparable prejudice prior to
18 a final decision of the arbitral tribunal" is neither
19 correct nor, as my good friend asserted, "a basic flaw
20 in India's reasoning"³⁴.

21 In fact, the requirement of a real and imminent
22 risk of irreparable prejudice is precisely what is
23 meant by urgency, and that was also made very clear by

³³ Order of 25 April 2015, para. 42

³⁴ Transcript, 30 March 2016, p. 72

1 the Special Chamber in the *Ghana/Côte d'Ivoire* case³⁵.

2 Obviously, in its order of 24th August, the Law of
3 the Sea Tribunal did not find that there was any
4 urgency justifying Italy's request to relax the bail
5 status of Sergeant Girone based on the circumstances
6 that existed at the time. The question really is
7 whether there are any new circumstances that have
8 arisen since the Order that now justifies Italy's new
9 request, and the answer to that is no, as we explained
10 yesterday.

11 Sir Michael tries to avoid this problem by
12 asserting that the two procedures set out in
13 paragraphs 1 and 5 of Article 290 are quite
14 different³⁶. His argument, and this gets to my third
15 point, is that there is a temporal difference between
16 provisional measures that may be ordered by ITLOS
17 under paragraph 5, which are only designed to deal
18 with the situation up to the time that the Annex VII
19 tribunal is constituted, and measures under
20 paragraph 1, which can last to the end of the
21 proceedings.

22 In both cases, however, a showing of urgency is
23 required based on the particular circumstances. That
24 is what lies behind the stipulation in Article 290,

³⁵ ITLOS Special Chamber, Order of 25 April 2015, para. 42

³⁶ Transcript, 30 March, p. 54

1 paragraph 1 that provisional measures must be
2 appropriate "under the circumstances", and in
3 paragraph 5, where there has to be a situation of
4 urgency.

5 Moreover, my learned friend's argument is contrary
6 to what Italy argued before ITLOS last August. There,
7 Sir Michael emphasised that the notion that there is
8 a temporal limitation to the duration of any
9 provisional measures under Article 290, paragraph 5
10 "is simply wrong". In Sir Michael's words:

11 "That is clear from the practice of this
12 Tribunal."³⁷

13 He was referring to the ITLOS Tribunal. He also
14 contended:

15 "When the Law of the Sea Tribunal acts under
16 paragraph 5 of Article 290, the measures it prescribes
17 may in principle last through to the arbitral
18 tribunal's final award on the merits."³⁸

19 That is precisely the basis on which Italy
20 formulated its second request before ITLOS. That
21 request was not for a short-term solution pending the
22 constitution of your Tribunal; rather Italy requested
23 a provisional measure to relax the bail conditions of
24 the two Marines, so that Sergeant Girone could return

³⁷ ITLOS/PV.15/CR24/3, p. 10

³⁸ ITLOS/PV.15/CR24/1, p. 23

1 to and stay in Italy "throughout the duration of the
2 proceedings before the Annex VII Tribunal".

3 The same request is made to your Tribunal. But
4 just as Italy had to demonstrate urgency last August,
5 based on the circumstances that then existed, so also
6 does it have to show that there is urgency based on
7 the circumstances existing at the time of its new
8 request.

9 Whether these are termed "new facts" or "changed
10 circumstances", as provided for in Article 290,
11 paragraph 2 of UNCLOS, really doesn't matter in this
12 respect, although paragraph 2 is important, as
13 Professor Pellet will discuss, in other ways.

14 But either way, circumstances have to exist now
15 that didn't exist last August justifying the request.
16 And this is what Italy has not been able to
17 demonstrate.

18 Apart from the issuance of ITLOS's Order in August
19 which did not accept Italy's second request, and thus
20 cannot constitute a reason for accepting the same
21 request now, nothing had changed as of 11th December
22 2015 giving rise to urgency or justifying the new
23 request.

24 At this point, Mr President, it may be helpful for
25 me to respond to the first and fourth questions posed
26 by the Tribunal after yesterday's session.

1 The first question was what were the "intense
2 diplomatic efforts" that were required to ensure the
3 Marines would return to Italy in 2013, and frankly,
4 Sir Daniel did not really contribute anything to the
5 question this morning. I will try and be more
6 complete.

7 The Tribunal will recall that Italy sent a Note
8 Verbale on 11th March 2013 to India saying that the
9 Marines would not return upon the expiry of the leave
10 they had been granted by India's Supreme Court in
11 February.³⁹

12 Italy's Note also indicated that Italy considered
13 that a controversy between the two parties, Italy and
14 India, had been established by that time, the
15 controversy had been established by that time, and
16 this was the reason for the Marines' non-return.

17 Note if you would, Mr President, and members of
18 the Tribunal, that Italy's view that a controversy had
19 been established by March 2013 was more than two years
20 before Italy filed its Annex VII Notification stating
21 that there was a dispute between the Parties and
22 indicating that Italy would seek provisional measures.
23 I mentioned yesterday that time lag is not conducive
24 to an argument based on urgency.

25 Italy's Note was contrary to the personal

³⁹ Annex 20 to Italy's Notification of 26 June 2015

1 undertaking that the Italian Ambassador had given in
2 support of the Marines' application for permission to
3 return to Italy for four weeks to vote in the Italian
4 elections.

5 India immediately responded on 12th March 2013 by
6 means of a diplomatic Note to Italy. India's Ministry
7 of External Affairs informed Italy that the latter's
8 position was not acceptable to the Government of
9 India, and that the failure of the Marines to return
10 within the stipulated time limit would be a breach of
11 the sovereign undertakings given by the Republic of
12 Italy to the Supreme Court of India.

13 The Secretary of the Ministry of External Affairs
14 responsible for Western Europe then met the Ambassador
15 of the European Union on 14th March 2013. In that
16 meeting, the Secretary conveyed the position that
17 Italy's decision not to send the Marines back at the
18 expiration of the permission granted to them was
19 a breach of Italy's undertakings. The EU Ambassador
20 was also informed that the breach of an express
21 undertaking by one of the EU Member States ran counter
22 to the EU's support for the propagation of the
23 principle of the Rule of Law and an independent
24 judiciary, values that the EU holds in the highest
25 regard. He added that India did not desire an
26 intervention by the EU on what was essentially

1 a bilateral issue.

2 In the event, the Marines did return within the
3 stipulated time, but this was as a result of what
4 I have said were intense diplomatic efforts.

5 The Tribunal's fourth question posed yesterday
6 concerns the petition that Sergeant Girone lodged with
7 the Supreme Court and later withdrew in December 2014.
8 The Tribunal asked how the apparent discrepancy
9 between India's statement that "in none of the
10 hearings mentioned, the Union of India objected to the
11 relaxation of bail conditions", and Italy's statement
12 that the Government of India, through its Assistant
13 Solicitor-General, "opposed the petition of Sergeant
14 Girone", how those two statements can be reconciled.

15 Yesterday evening, India checked the position with
16 the Assistant Solicitor-General, who was present at
17 the December 2014 session before the Supreme Court,
18 and who would have been here today but for the
19 unfortunate fact that he fell ill over the weekend.

20 India stands by what it said: the petition was not
21 opposed by India and the court took note of the
22 Marines' withdrawal of their petition and ruled
23 accordingly, without soliciting the views of India or
24 relying on them.

25 Italy itself has asserted that the petition was
26 withdrawn because the Supreme Court, not India, had

1 made it clear that the petition would be rejected.
2 The support for that statement by Italy is a news
3 account filed by it, which is in annex IT-42.

4 That account indicates that the Government of
5 India did not oppose Sergeant Latorre's application
6 because he made an application at the same time, and
7 it does not indicate that India took any different
8 position with respect to Sergeant Girone. Not a word
9 about Indian opposition to the petition is mentioned
10 in the press report.

11 As to how the Supreme Court would have ruled, it's
12 impossible to speculate, since the application was
13 withdrawn before a ruling could be made. But what we
14 do know from the record that is in this case is that
15 the subsequent applications of Sergeant Latorre which
16 were on health grounds were not opposed by India, and
17 were granted by the Supreme Court. But as I pointed
18 out yesterday, when it comes to Sergeant Girone, he
19 made no further application that the Supreme Court was
20 called upon to rule on after February 2013, that was
21 the application that led to the incident I just
22 discussed a few moments ago, in response to the
23 Tribunal's first question.

24 It was only in July 2015, 29 months later, that
25 Italy, in its request for provisional measures to
26 ITLOS, requested a measure to relax Sergeant Girone's

1 bail conditions. Again, as I said, that scarcely
2 supports the notion that Italy or the Marines
3 considered that there was urgency or a risk of
4 irreparable prejudice, a subject I will turn to next,
5 in connection with Italy's due process arguments.

6 Mr President, every one of Italy's counsel
7 yesterday harped on the argument that Sergeant Girone
8 has been deprived of due process, and Sir Daniel again
9 raised the point this morning.

10 Despite Sir Daniel's profession yesterday that
11 Italy's request was about the future, not the past⁴⁰,
12 he, as well as Mr Swaroop, Sir Michael,
13 Professor Politi and even Professor Verdirame dealt at
14 length with the allegation that India has deprived
15 Sergeant Girone of due process, particularly by not
16 filing formal charges against him for over three
17 years, and that this supports the appropriateness of
18 Italy's request.

19 I fully rebutted this argument yesterday when
20 I reviewed what actually happened with respect to
21 Italy's and the Marines' numerous applications before
22 the Indian courts, and I assure the Tribunal that I do
23 not intend to repeat that presentation this afternoon.
24 The record speaks for itself, and can be reviewed by
25 the Tribunal. There was absolutely no lack of due

⁴⁰ Transcript, 30 March 2016, pp. 21-22

1 process. The Indian courts reviewed and often acted
2 favourably to all of the Marines' petitions, whether
3 they were for the relaxation of bail conditions,
4 removing the case from Kerala, or other matters.

5 But due process entails a system of law-based
6 rules. And it is precisely because India is a Rule of
7 Law country that there are strict procedural steps and
8 requirements that must be adhered to in a criminal
9 case when it comes to investigating the facts, drawing
10 up a charge sheet, or framing charges.

11 The plain fact is that these matters were impeded
12 because of the Marines' constant applications
13 challenging the jurisdiction of the Kerala courts,
14 challenging NIA's right to carry out the
15 investigation -- an investigation which Italy itself
16 had stated it would provide all co-operation to --
17 challenging the jurisdiction of the Special Court, and
18 then finally asking, only in 2014, the Supreme Court
19 to rule on the question of jurisdiction and
20 immunities, only to change their mind a year later.

21 Italy and the Marines had every right to lodge
22 these applications, and to make use of the legal
23 remedies that were available under Indian law, and
24 they did so liberally, one might even say excessively.

25 But having resorted to these tactics, Italy cannot
26 now turn around and argue that Sergeant Girone has

1 been deprived of due process because he was never
2 formally charged, when that process was blocked
3 because of the very writs filed on behalf of the
4 Marines. No, Mr President, members of the Tribunal,
5 contrary to Professor Verdirame's assertion
6 yesterday⁴¹, there has been no failure of the Indian
7 legal system.

8 Moreover, I was also somewhat surprised by Sir
9 Daniel's statement this morning that Italy brought
10 applications before the Indian courts because it
11 understood from so-called interlocutors that this was
12 the way to resolve the dispute. With respect,
13 Mr President, that argument is not credible. The way
14 to resolve the dispute was not by filing applications
15 challenging every step in the process before the
16 Indian courts over a period of more than three years.

17 The fact of the matter is the Marines never filed
18 a writ of *habeas corpus* complaining that they were
19 being held without charges. Moreover, as early as
20 2012, and certainly by March 2013, when Italy sent its
21 Note Verbale stating that the Marines would not return
22 to India, and that a legal controversy with India was
23 established, Italy could have started these
24 proceedings and applied for provisional measures. It
25 did not.

⁴¹ Transcript, 30 March 2016, p. 105

1 Professor Politi argued that there is no **a priori**
2 level of "gravity" of an offence that may justify
3 non-compliance with protecting fundamental rights of
4 an accused. In his words:

5 "... even when the gravest crimes of international
6 concern are involved, guarantees of respect for the
7 rights of the accused are key elements of the legal
8 framework for their prosecution and punishment."⁴²

9 Yet the rights of the Marines have been respected
10 at every stage of the Indian judicial proceedings
11 where the Marines were never prevented or precluded
12 from resorting to judicial remedies.

13 That being said, the gravity of an offence
14 certainly can be a relevant factor when setting bail
15 conditions. Mr President, if I am accused of
16 shoplifting a chocolate bar from the convenience store
17 across the street from the Hilton Hotel, you can be
18 sure that my bail conditions will be different than if
19 I am accused of murdering a citizen of The Hague.

20 States have a right and duty to exercise criminal
21 jurisdiction, and to impose restrictions on the
22 liberty of movement of the accused in relation to, and
23 as a function of, the seriousness of the alleged
24 offence, and that is hardly a breach of due process.

25 Here, the conditions of Sergeant Girone's bail

⁴² Transcript, 30 March 2016, p. 83

1 cannot be said to be disproportionate when measured
2 against the gravity of the offence of which he is
3 accused.

4 But in addition to these factors, there is a more
5 general problem with Italy's approach to the "due
6 process/appropriateness" argument. This problem
7 emerged very clearly from Sir Michael's pleadings
8 yesterday when he said that there were important due
9 process considerations relevant in this case.

10 According to Sir Michael:

11 "Those due process considerations arise in
12 relation to India's unlawful exercise of jurisdiction
13 under UNCLOS, specifically an exercise of jurisdiction
14 over an Italian military official, Sergeant Girone, in
15 respect of his official functions, on behalf of
16 Italy."

17 And Sir Michael added:

18 "These considerations are intimately and
19 inextricably linked to Italy's rights at issue in
20 these proceedings."⁴³

21 But here is the problem, Mr President.

22 Sir Michael simply assumes what Italy has to prove at
23 the merits stage. He claims that due process
24 considerations are important for Italy's present
25 request because India acted unlawfully under UNCLOS

⁴³ Transcript, 30 March 2016, p. 76

1 and Sergeant Girone has immunity. But those are
2 merits issues. And that underscores the point that
3 Professor Pellet has made that Italy's request for
4 provisional measures does entail a pre-judgment of the
5 merits.

6 At this point, I begin to trespass onto
7 Professor Pellet's territory, so I will simply
8 conclude this main part of my intervention by saying
9 that Italy has not satisfied the necessary condition
10 of urgency for its request, and that its arguments
11 that its request is justified because Sergeant Girone
12 has been deprived of due process are unsustainable.

13 However, before asking that the floor be given to
14 Professor Pellet, permit me, Mr President, to respond
15 to the second question posed by the Tribunal. This
16 was:

17 "What were the reasons for the 'Enrica Lexie' to
18 be called to the port of Kochi?"

19 Kochi is the nearest port to the place of the
20 incident. The local police received information about
21 the incident through a call from the sea. The Coast
22 Guard and Indian Marine Rescue Co-ordination Centre in
23 Mumbai were alerted, and a preliminary analysis of the
24 situation from plotting showed that there were six
25 vessels, including the "Enrica Lexie", in the area
26 where the firing took place. Phone contacts were

1 obtained for each vessel, and the "Enrica Lexie" was
2 the first vessel to be contacted over the phone by the
3 Marine Rescue Co-ordination Centre.

4 On enquiry, the captain and another officer on
5 board the "Enrica Lexie" confirmed that there was
6 a firing incident from the ship. The captain also
7 informed that they had sent a notice about the
8 incident to the United Kingdom Marine Trade
9 Operations.

10 On request from the Marine Rescue Co-ordination
11 Centre, the captain e-mailed a copy of the same to the
12 Centre the same day.

13 I would now like to read out from the e-mail sent
14 to the captain of the "Enrica Lexie" by the Centre in
15 Mumbai on the evening of the incident:

16 "Understand there has been piracy/firing incident
17 by your vessel on a suspicious skiff at 1600 hours LT
18 [local time] off Allepey ...

19 "You are requested to head to Kochi and establish
20 communication with Indian Coast Guard for further
21 deposition/clarification. Request ETA Kochi."

22 That communication, Mr President, by its plain
23 terms, indicates that there was no preconceived
24 mindset of the Indian authorities to arrest the ship
25 or anyone on board. While this is obviously clearly
26 a merits issue, the e-mail refers to two possibilities

1 confronted by the Indian authorities, piracy and
2 a firing incident. Therefore, in order to clarify
3 what happened, the vessel was requested -- those are
4 the words -- to head to Kochi, and there are no
5 grounds whatsoever for Sir Daniel's assertion this
6 morning that the purpose of the request was to arrest
7 the ship and the individuals on board suspected of
8 killing the two Indian fishermen.

9 It was only after four days of examination and
10 investigation, and after the local authorities were
11 satisfied that there was prima facie evidence that the
12 firing came from the two Marines resulting in two
13 unarmed fishermen being killed, that an arrest was
14 made on 19th February 2012.

15 Mr President, that concludes my presentation,
16 I thank the court for its attention, and I would be
17 grateful if Professor Pellet could now be called to
18 the podium.

19 **THE PRESIDENT:** Thank you, Mr Bundy. I now call on
20 Professor Pellet to make his statement.

21 **SPEECH BY PROFESSOR PELLET**

22 **PROFESSOR PELLET:** Thank you very much, Mr President.

23 Mr President, members of the Tribunal, a brief
24 preliminary remark, if I may. Our friends on the
25 other side are unfair when they complain that we have

1 not answered their yesterday morning's pleadings fully
2 during our first round. May I recall that we had two
3 hours to digest their three hours of pleadings
4 prepared during weeks?

5 Moreover, I note that they have had a full night
6 to answer our first round, and that they have chosen
7 to limit their reply to a strict minimum. Anyway,
8 somebody has to have the last word, and very
9 logically, this belongs to the Respondent.

10 This being said, as I did yesterday, I will deal
11 this afternoon both with: Italy's argument concerning
12 an alleged change in the circumstances which should
13 lead you to uphold the Italian submission concerning
14 Sergeant Girone, which the ITLOS declined to
15 prescribe; and I will also answer what Italy had to
16 say with respect to our pre-judgment argument.

17 In both cases, I will abstain from repeating what
18 I have said yesterday, which we fully maintain.
19 I will endeavour to answer Italy's argument from
20 yesterday and this morning's arguments, in as much as
21 we have not yet had the opportunity to fully respond.

22 In fact, Mr President, both issues relate to the
23 interpretation and application in this case of
24 Article 290 of UNCLOS. I will first show that we are
25 indeed facing a request to modify the ITLOS Order of
26 24th August, which demands evidence of a change of

1 circumstance by the Claimant.

2 I will then deal with the relationship between the
3 orders prescribed by the ITLOS on the one hand and
4 those emanating from Annex VII tribunals on the other
5 hand, and show that in the present case the possible
6 limitations on the jurisdiction of the Hamburg
7 Tribunal have played no role in its decision not to
8 grant Italy's submissions. The reason for this
9 decision was that it would not preserve equally the
10 rights of the Parties.

11 This remains valid absent any change in the
12 circumstances, a point I dealt with at some length
13 yesterday so I will only add brief considerations as
14 a rebuttal to some arguments made by Italy.

15 Lastly, I will come back briefly on the
16 pre-judgment argument.

17 Mr President, members of the Tribunal, contrary to
18 what my opponent and friend, Sir Michael, said
19 yesterday morning, it is in the nature of provisional
20 measures to enjoy some kind of stability, which
21 implies that they cannot be modified or supplemented
22 without good reasons. Indeed, the measures provided
23 for in Article 290 are no exception to the general
24 rule.

25 Leaving aside the other requirements for
26 prescribing provisional measures (*urgency, bonus fumus*

1 *juris* or *prima facie* jurisdiction) and I apologise to
2 Sir Daniel, who appears not to like Latin, leaving
3 these requirements aside, they have been already dealt
4 with by Rodman Bundy, I will show that this provision
5 does demand that modifications to an existing order
6 prescribing (or declining to prescribe) provisional
7 measures be justified by a material change of
8 circumstances.

9 Mr President, I am a bit ashamed to have to come
10 back to this not so complex but rather long and
11 precise provision with which my learned friend played
12 leapfrog. He described at length paragraph 1, then
13 jumped to paragraph 5. But between 1 and 5,
14 Mr President, there are 2, 3 and 4, all those
15 paragraphs totally passed over in silence by
16 Sir Michael, a very telling silence conspicuously
17 observed by all our colleagues on the other side of
18 the podium. And yet they are quite -- albeit
19 unequally -- relevant for our purpose.

20 Clearly, the crucial paragraph is paragraph 2, and
21 I read it:

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

25 This is the core principle. Provisional measures
26 may be modified in case of change or termination of

1 the circumstances which had justified their
2 prescription. A change of circumstances is needed,
3 contrary to Sir Michael's assertion⁴⁴.

4 Paragraphs 3 and 4 are less central but not
5 insignificant. They show that the same rules apply to
6 the prescription and the modification of provisional
7 measures. And this takes us to paragraph 1.

8 This is the general provision, I won't read it
9 again, I am sure you know it by heart, but,
10 Mr President, members of the Tribunal, let me draw
11 your attention to the most important aspects: (i)
12 I will come back a bit later to the preservation of
13 the respective rights of the parties; (ii) here again
14 it is an issue of circumstances, which clearly implies
15 that absent any change, any request for modification
16 of a previous order must be dismissed; and (iii)
17 please note that whatever may be the tribunal which
18 prescribes the provisional measures, whether the ITLOS
19 or an Annex VII Tribunal, they are, in principle, and
20 subject to paragraph 2, decided "pending the final
21 decision".

22 And then comes paragraph 5. It is reproduced in
23 full in your folders, but I only read what is of
24 direct relevance for us now:

25 "Pending the constitution of an arbitral tribunal

⁴⁴ Transcript, 30 March 2016, p. 53, line 21 (Mr Wood)

1 to which a dispute is being submitted under this
2 section, any court or tribunal agreed upon by the
3 parties or, failing such agreement within two weeks
4 from the date of the request for provisional measures,
5 the International Tribunal for the Law of the Sea ...
6 may prescribe, modify or revoke provisional measures
7 in accordance with this article if it considers that
8 *prima facie* the tribunal which is to be constituted
9 would have jurisdiction and that the urgency of the
10 situation so requires. Once constituted, the tribunal
11 to which the dispute has been submitted may modify,
12 revoke or affirm those provisional measures, acting in
13 conformity with paragraphs 1 to 4."

14 "... acting in conformity with paragraphs 1 to 4."
15 I emphasise this, we are clearly sent back to the
16 general conditions for either adopting or modifying
17 provisional measures.

18 Paragraphs 125 and 126 of the ITLOS Order of last
19 August build on these provisions: in these passages,
20 and you have them in your folders, ITLOS simply
21 describes the framework in which it acts, nothing
22 less, nothing more.

23 Mr President, members of the Tribunal, our
24 opponents have come down with a sledgehammer to try to
25 convince you that the ITLOS has only done half of
26 a job, and left the other half for this Tribunal. To

1 that end, Sir Michael, and, to a lesser extent, Sir
2 Daniel, relied heavily on, first, the separate opinion
3 of Judge Mensah appended to the Order of 3rd December
4 2001 of the ITLOS in the *MOX* case; second, Order no 3
5 of the Annex VII Tribunal in the *MOX* case of 24th June
6 2003; and the last August Order of the ITLOS.

7 I will briefly comment on each of these documents
8 in turn. Judge Mensah's opinion, appended to the 2001
9 ITLOS Order, first. Mr President, I have the greatest
10 and most sincere respect for Judge Mensah, but I note
11 that his Opinion is separate, which means that, in
12 spite of his well-known persuasive powers, his view
13 was not shared by the majority. And the Order
14 contents itself to mention that the ITLOS acts on the
15 basis of Article 290, paragraphs 1 and 5, without
16 discussing the relations between both provisions nor
17 the special limitations which would apply to the ITLOS
18 jurisdiction in this respect. I refer in particular
19 to paragraphs 63 to 66 of the Order of ITLOS⁴⁵.

20 I also note, Mr President, that Judge Mensah was
21 presiding the Annex VII Tribunal constituted in the
22 *MOX* case, which takes us to Order No 3 of that
23 Tribunal. I do not quite understand why my learned
24 colleagues, both Sir Daniel and Sir Michael, rely so

⁴⁵ ITLOS, Order, 3 December 2001, *The MOX Plant Case (Ireland v. United Kingdom), Provisional Measures*, paras. 63-66

1 heavily on this Order⁴⁶. It indeed does not help
2 Italy's case at all (the most relevant extracts are at
3 tab 6 of your folders).

4 First, I note that in paragraph 39, the Tribunal
5 confirmed that it was due to apply "the provisions of
6 paragraphs 2 to 4" of Article 290; and I stress, of
7 paragraph 2, the provision concerning the modification
8 of a previous Order on provisional measures.

9 Second, in paragraph 40, the *MOX* Tribunal accepted
10 that a longer delay than anticipated could constitute:

11 "... a change in the circumstances that would, if
12 necessary, warrant a modification [again,
13 a modification, Mr President] of the provisional
14 measures prescribed by ITLOS in accordance with
15 Article 290, paragraph 5 of the Convention."

16 But, first, in our case, the very special
17 circumstance which could have warranted such
18 a modification in the *MOX* case does not exist. As
19 a reminder, Order No 3, the one you have on the
20 screen, deals together with the "Request for Further
21 [looks very much like 'additional'] Provisional
22 Measures" and the "suspension of Proceedings on
23 Jurisdiction and Merits", and in this Order, the
24 Tribunal effectively decided "that further proceedings
25 in the case are suspended until not later than

⁴⁶ Transcript, 30 March 2016, pp. 23-25 (Mr Bethlehem) and pp. 56-57 (Mr Wood)

1 1st December 2003"⁴⁷.

2 For the sake of completeness, I recall that on
3 14th November 2003, the *MOX* Tribunal decided that:

4 "... further proceedings in the case shall remain
5 suspended until the European Court of Justice has
6 given judgment or the Tribunal otherwise
7 determines."⁴⁸

8 Of course, no such circumstance exists in the
9 present case. In August, the ITLOS was perfectly
10 aware of the approximate length of the present
11 proceedings. Second, in spite of this indisputable
12 new circumstance, which could not have been foreseen
13 by ITLOS in the *MOX* case when it adopted its Order,
14 the *MOX* Annex VII Tribunal dismissed Ireland's Request
15 for "further" provisional measures⁴⁹.

16 Third, in paragraph 41, the *MOX* Tribunal expressly
17 indicates that:

18 "Although the language of Article 290 is not in
19 all respects identical to that of Article 41 of the
20 Statute of the International Court of Justice, the
21 Tribunal considers that it should have regard to the
22 law and practice of that Court, as well as to the law

⁴⁷ *Ireland v. United Kingdom (MOX Plant Case)*, Order No. 3 on Suspension of Proceedings on Jurisdiction and Merits, and Request for further Provisional Measures, 24 June 2003, *dispositif*, point 1

⁴⁸ *Ireland v. United Kingdom (MOX Plant Case)*, Order No. 4, *Further Suspension of Proceedings on Jurisdiction and Merits*, 14 November 2003, *dispositif*, point 1

⁴⁹ *Ireland v. United Kingdom (MOX Plant Case)*, Order No. 3 on Suspension of Proceedings on Jurisdiction and Merits, and Request for further Provisional Measures, 24 June 2003, paras. 62 and *dispositif*, points 2 and 3

1 and practice of ITLOS in considering provisional
2 measures."

3 This directly contradicts Sir Michael's robust
4 assertion:

5 "Instead of referring you to that case [he was
6 speaking of the 2003 Order], the only case directly on
7 point, India seeks to rely on the limited case law of
8 the ICJ on the modification of provisional measures.
9 In our submission, such reliance is misplaced. In
10 none of the cases was the ICJ acting under
11 Article 290, paragraph 1, following a prescription of
12 provisional measures under the special procedure of
13 paragraph 5."⁵⁰

14 In that same paragraph, the *MOX* Tribunal stresses
15 that it is for the Party requesting provisional
16 measures to establish "that the circumstances are such
17 as to justify the measures sought". Not only Italy
18 has not proven such a change, but it denies that
19 a change of circumstance is necessary to get its
20 submission granted⁵¹.

21 Now, Mr President, let me go back to the question
22 of whether or not the ITLOS has limited itself to
23 prescribing provisional measures only in as much as
24 they are called for by extreme urgency, although

⁵⁰ Transcript, 30 March 2016, p. 58, lines 1-8 (Mr Wood)

⁵¹ *Ibid.* See also the second round presentation of Mr Bethlehem, par. 11

1 I deem this fascinating legal discussion totally
2 irrelevant for the present case.

3 Whether Judge Mensah is right or not does not
4 really matter, and I accept that he may well be right.
5 As Sir Michael noted yesterday morning⁵², India had
6 mentioned the idea, in the proceedings before the
7 ITLOS, that the ITLOS could only decide under
8 paragraph 5 of Article 290 if it considered that the
9 urgency is such that it requires the pronouncement of
10 provisional measures before the constitution of the
11 Annex VII Tribunal. This it did.

12 But this does not mean that its findings can be
13 turned down by this Tribunal absent any new
14 circumstance, or that its decision only applies until
15 the Annex VII Tribunal is constituted. Clearly, in
16 the present case, the ITLOS reasons for not granting
17 Italy's second submission are not based on, I would
18 say, its "pre-Annex VII Tribunal functions"; it bears
19 on the very substance of Italy's submission. It
20 discusses the Parties' arguments, and it concludes
21 that the submission is not appropriate. The same
22 reasons still hold true.

23 Let me then comment a bit more in depth on the
24 ITLOS Order of 24th August 2015. You will find the
25 relevant paragraphs in your folders under tab 7.

⁵² Transcript, 30 March 2016, p. 59, lines 20-21 and p. 60, lines 1-2 (Mr Wood)

1 According to Sir Daniel, in that Order, ITLOS
2 stated:

3 "... explicitly that it would not address the
4 situation of the Marines as that was a matter to be
5 addressed by this Tribunal, once constituted."⁵³

6 With respect this is not exactly what the ITLOS
7 said -- well, it is not *at all* what the ITLOS said.
8 The main passage of the Order for which Sir Daniel and
9 Sir Michael showed great enthusiasm (it was again
10 shown this morning)⁵⁴ is paragraph 132. It reads as
11 follows:

12 "Considering that, since it will be for the
13 Annex VII arbitral tribunal to adjudicate the merits
14 of the case, the Tribunal does not consider it
15 appropriate to prescribe provisional measures in
16 respect of the situation of the two Marines because
17 that touches upon issues related to the merits of the
18 case."

19 Therefore, it appears that one of the reasons why
20 the ITLOS has not granted Italy's submission (b) is
21 that it touched upon issues related to the merits of
22 the case. As I have shown yesterday⁵⁵, it touches on
23 the merits so much that adjudging it would amount to

⁵³ *Ibid.*, p. 26, lines 24-26 (Mr Bethlehem). See also *ibid.*, pp. 55-56 (Mr Wood)

⁵⁴ Mr Bethlehem, paras. 2 and 11 and Mr Wood, para. 8

⁵⁵ *Ibid.*, pp. 181-184

1 prejudging the merits.

2 In conformity with the constant jurisprudence of
3 both ITLOS and the ICJ, an Order on provisional
4 measures must not prejudge "any questions relating to
5 the merits"⁵⁶.

6 While it is indeed true that the ITLOS considered,
7 in paragraph 126, that the submissions by Italy "will
8 not equally preserve the respective rights of both
9 Parties until the constitution of the Annex VII
10 arbitral tribunal", this of course does not mean that
11 granting submission (b) now would better preserve the
12 rights of both Parties.

13 It is impossible to see why what was true in
14 August has become erroneous next March, and obviously,
15 for making this finding, the ITLOS has not based
16 itself on the exceptional urgency (or non-urgency) for
17 granting or refusing to grant the requested measure,
18 but the ITLOS exclusively based itself on the fact
19 that such a measure would not preserve India's rights.

20 This was true last summer, it is true today. Such
21 a finding has nothing to do with the timing, before or
22 after the constitution of this Tribunal; it is true or
23 not. If it is not, then the ITLOS erred. Contrary to

⁵⁶ ITLOS, Order, 22 November 2013, *The Arctic Sunrise Case (Kingdom of the Netherlands v. Russian Federation)*, Provisional Measures, para. 100 and I.C.J., Order, 13 December 2013, *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Reports 2013, p. 408, para. 38

1 Italy, we think that it was entirely right.

2 Now, Mr President, things being what they are,
3 I repeat, respectfully, that this Tribunal is neither
4 an appellate body nor a court of cassation: it is not
5 called to substitute its own appreciation for that of
6 the ITLOS. What it can do, however, is to admit that
7 a change of circumstances calls for a reversal of the
8 ITLOS decision. But indeed, first, it would be rather
9 extraordinary that, within the three months and a half
10 between 24th August (the date when the ITLOS Order was
11 issued) and 11th December 2015 (the date when Italy
12 made its new Request for provisional measures)
13 a change of circumstances justifying a modification of
14 the Order would have occurred.

15 Second, as very clearly recalled by the *MOX*
16 Tribunal that I have quoted a moment ago⁵⁷, the burden
17 of proof falls upon Italy. The Claimant State has not
18 discharged this burden.

19 I repeat, Mr President, that I do not intend to
20 reiterate what I have said yesterday at some length.
21 I will only pick up and summarily answer the points
22 made by Italy's counsel which might be seen as new or
23 incompletely answered.

24 In his general presentation of Italy's case, Sir
25 Daniel seemed to consider that the change of situation

⁵⁷ See above, para. **Error! Reference source not found.**

1 lay in the constitution of this Tribunal. This would
2 be the change of circumstance.

3 That, if I may, is not a credible proposition. Of
4 course the ITLOS, when it issued its decision, knew
5 that the Tribunal would be created on the basis of
6 Annex VII, and it had, as we all had, an idea of the
7 likely length of the proceedings. Contrary to what
8 was the case in the *MOX* case⁵⁸, there is no special
9 reason to envisage that this "idea of duration" would
10 have been wrong.

11 This Tribunal has been constituted rather quickly,
12 it works efficiently, the schedule it has fixed is
13 rather tight.

14 In the same vein, Sir Michael insists on the fact
15 that "both Parties have taken steps, following the
16 Order of 24th August, to suspend all criminal
17 proceedings"⁵⁹. As I said yesterday⁶⁰, this is
18 a rather bizarre and paradoxical argument. You ask
19 for provisional measures, they are partly granted, and
20 you invoke the order granting them for requesting
21 a modification of that order.

22 I am afraid, Mr President, that this is about all
23 I can say on the question of change of circumstances.

⁵⁸ *Ibid.*

⁵⁹ Transcript, 30 March 2016, p. 61, lines 2-4 (Mr Wood)

⁶⁰ *Ibid.*, pp. 138-141

1 Italy itself is so conscious of the absence of any
2 change of circumstance that Sir Michael, relayed by
3 Sir Daniel, bravely asserted that:

4 "Italy is not asking this Tribunal to 'modify,
5 revoke or affirm' the provisional measure prescribed
6 by ITLOS in August 2015 which concerned a stay of
7 proceedings. Instead, Italy requests this Tribunal to
8 prescribe a so-called additional provisional measure
9 under paragraph 1 of Article 290."⁶¹

10 May I recall that the ITLOS precisely declined to
11 prescribe this same measure? This morning,
12 Sir Michael made much of my assertions that an
13 addition is a modification;⁶² it might be debatable in
14 some cases, but certainly not when the "addition" is
15 made after the tribunal or another tribunal has
16 formally declined to grant the request.

17 In any case, Italy's tactic is clearly an
18 admission that it is incapable of establishing the
19 existence of a change of circumstance.

20 Mr President, I now turn to my last point, or,
21 say, my two twin last points: granting Italy's
22 submission would indeed preserve Italy's rights, but
23 would also indeed prejudice India's rights and
24 prejudice the outcome of the case.

⁶¹ *Ibid.*, p. 61, lines 13-19 (Mr Wood)

⁶² See para. 6 (Mr Wood)

1 Let me start with a curious argument made again by
2 Sir Michael:

3 "Sergeant Girone is only in India as a result of
4 conduct by India which Italy alleges [in these
5 proceedings] to have been unlawful."⁶³

6 This is exactly so, and it evidently confirms my
7 argument: granting Italy's request would mean that you
8 consider that India's conduct has been unlawful. This
9 is what Italy must prove. This is what it has not
10 proven, and what anyway it can prove only at the
11 merits stage. If you were to accept its submission,
12 it would necessarily decide -- and this means, in the
13 circumstances, prejudge -- that India's conduct was
14 unlawful.

15 I have also some doubts on Professor Verdirame's
16 assertions that:

17 "... principles that govern the question of
18 pre-judgment are found in the Order on provisional
19 measures of the International Court of Justice in the
20 *Tehran Hostages* case."⁶⁴

21 In any event, I note that in this judgment, the
22 Court dismissed Iran's claim that:

23 "The purpose of the United States request appears
24 to be not to obtain a judgment, interim or final, on

⁶³ *Ibid.*, p. 73, lines 5-7

⁶⁴ *Ibid.*, p. 107, lines 20-23

1 the merits of its claim, but to preserve the substance
2 of the rights which it claims *pendente lite*."65

3 What is important in this passage, also quoted by
4 Professor Verdirame66, is the emphasis put by the ICJ
5 on the purpose of the US "to preserve the substance of
6 its rights", but this cannot be the purpose of Italy
7 in the present case. The object of this case is to
8 determine whether India or Italy is entitled to judge
9 the accused. Sergeant Girone's stay in Delhi by no
10 means jeopardises the substance of Italy's claimed
11 right.

12 According to Italy, India's rights would be fully
13 preserved due to the undertaking that Italy is ready
14 to make, to undertake that it would return Sergeant
15 Girone to India in case the Tribunal decides in
16 India's favour67. Fair enough, but why such an
17 undertaking would be more valuable legally speaking
18 than India's guarantees? If the Tribunal decides in
19 favour of Italy, India would of course let Girone be
20 judged in Italy for the murder of which he is accused.

21 As for the assertions of good faith multiplied by
22 Italy's representatives, let me be clear,

23 Mr President: despite regrettable incidents in the

65 I.C.J., Order, 15 December 1979, *United States Diplomatic and Consular Staff in Tehran, Provisional Measures, Reports 1979*, p. 16, para. 28

66 Transcript, 30 March 2016, p. 109, lines 3-7

67 *Ibid.*, pp. 106-114 (Mr Verdirame)

1 past, India does not put into question the good faith
2 with which these proposals have been made before the
3 Tribunal. However, the doubts on Italy's ability to
4 comply remain.

5 However, Dr Chadha will come back on the question
6 just received from the Tribunal in some minutes.

7 Sir Michael declared to be surprised by the use of
8 the adverb "equally" in the ITLOS Order⁶⁸. This
9 astonishment confirms that Italy definitely does not
10 accept the ITLOS Order, and tries to obtain from this
11 Tribunal to put it into question.

12 It also shows that Italy considers that its rights
13 must prevail over India's rights. Mr President, are
14 not the deaths of two Indian fishermen, the pain and
15 sufferings of their families and relatives, at least
16 equal to the partial limitations of liberty endured by
17 Sergeant Girone? This is our interpretation of the
18 word "equally" deliberately inserted in the Order by
19 the ITLOS.

20 Clearly, Italy's interpretation of this equality
21 is different. Professor Verdirame, for example,
22 declared:

23 "While India's concerns about its rights are, of
24 course, important, the proper way of addressing these
25 concerns cannot be one that reduces an individual to

⁶⁸ *Ibid.*, pp. 74-75 (Mr Wood)

1 a sort of collateral to guarantee performance of
2 a State's obligations. Such an approach would be
3 incompatible with fundamental considerations of
4 humanity, due process and justice, and is not in any
5 way appropriate."⁶⁹

6 Not a word for the Indian victims, and this is
7 a constant trait of the Italian pleadings, as it was
8 in August⁷⁰.

9 Mr President, members of the Tribunal, thank you
10 very much for your kind attention, and Mr President,
11 I would like to ask you to call India's Agent,
12 Dr Neeru Chadha, to the bar.

13 **THE PRESIDENT:** Thank you, Professor Pellet. I give the
14 floor to Dr Chadha to make a statement and make the
15 final presentation.

16 **CLOSING STATEMENT AND SUBMISSIONS BY THE AGENT**

17 **DR CHADHA:** Thank you, Mr President. Mr President,
18 honourable members of this Tribunal, I will make some
19 brief concluding remarks, answer question 3 and the
20 question posed by the Tribunal to me a little while
21 ago, and present India's submission.

22 India, in its Written Observations and oral
23 pleadings, has demonstrated that the request for

⁶⁹ *Ibid.*, pp. 109-110 (Mr Verdirame)

⁷⁰ ITLOS/PV.15/C24/2, 10 August 2015, afternoon, pp. 43-44 (Mr Pellet) (Annex IT-34(b))

1 additional provisional measures by Italy is in fact
2 a request for modification of provisional measures
3 already prescribed by the International Tribunal for
4 the Law of the Sea by its Order dated 24th August
5 2015, and therefore is not in consonance with the
6 requirements of Article 290 of UNCLOS.

7 In the present context, India also wishes to
8 reiterate what was observed by ITLOS in its Order,
9 which was shortly also stated by Professor Pellet.
10 The Tribunal categorically held that it does not
11 consider both the requests made by Italy appropriate,
12 in view of the legal requirement of Article 290 of
13 UNCLOS that any provisional measure must protect the
14 rights of both parties. In this respect, India had
15 drawn the attention of the Tribunal to paragraphs 125
16 to 127 of the ITLOS Order.

17 Italy asserts that paragraph 125, where the
18 Tribunal talks of preserving the rights of both
19 parties, was relevant only until the constitution of
20 the Annex VII Tribunal, and it is open for this
21 Tribunal to relook at the matter.

22 Without going into further debate on this matter,
23 since Professor Pellet has dwelled at length on this
24 matter, India's concern is to reiterate, Mr President,
25 that the provisions of Article 290, paragraphs 1 to 4
26 remain relevant equally for this Tribunal. This

1 Tribunal is also obliged to equally preserve the
2 respective rights of both parties, as required by
3 Article 290, paragraph 1 of the Convention.

4 Coming to question 3 put by the Tribunal, asking
5 the parties to comment on paragraphs 134 and 135 of
6 the ITLOS Order, and any implication that the parties
7 believe it may have for the current proceedings, India
8 maintains that if one has to place the decision of the
9 ITLOS in its correct perspective, the fundamental
10 premise of the Order dated 24th August 2015, and
11 paragraphs 134 and 135, points to the need for
12 balanced provisional measures, capable of equally
13 protecting the interests and rights of both the
14 parties. This consideration, in India's view, remains
15 relevant in the context of the question put by the
16 Tribunal.

17 As regards the question raised by the Tribunal
18 today, which I will read: in light of Italy's request,
19 what commitments on the part of Italy would be
20 acceptable to India?

21 Mr President, India does not seek anything more
22 onerous than the benchmark set by the Supreme Court of
23 India, and some of these conditions were indicated by
24 Italy's counsel yesterday.

25 India needs to be assured that in case the
26 Tribunal finds that India has jurisdiction, the

1 presence of Sergeant Girone would be ensured. Towards
2 that end, India would deem it necessary that the
3 Tribunal itself fix these guarantees.

4 Before I read my formal submission, I would like
5 to thank you, Mr President, and the members of the
6 Tribunal for their attention, and giving us a patient
7 hearing. I would also thank the Registrar, Dr Dirk
8 Pulkowski, and all of the members of the Registry for
9 their co-operation and prompt assistance. I thank the
10 court reporter for making available the transcripts
11 quickly. I would also like to thank Ambassador
12 Azzarello, the Agent for Italy, and his team, for
13 their co-operation.

14 Mr President, I will now read India's submission.

15 For the reasons given by India in its Written
16 Observations and during the hearings, the Republic of
17 India requests the Arbitral Tribunal to reject the
18 submissions made by the Italian Republic in its
19 Request for the Prescription of Provisional Measures,
20 and to refuse to prescribe any new provisional measure
21 in the present case.

22 Thank you, Mr President.

23 **THE PRESIDENT:** Thank you, Dr Chadha. I understand that
24 this was the last statement by India during this
25 hearing. Therefore, unless there are further matters
26 for discussion, that brings us to the end of the

1 hearing. The parties will be provided shortly after
2 the hearing with verbatim transcripts of all sessions.
3 As is customary, the Registry will liaise with the
4 parties to ensure that any corrections may be required
5 can be incorporated.

6 As the Arbitral Tribunal decided in its Rules of
7 Procedure, the transcript will then be published on
8 the PCA case repository.

9 On behalf of the Arbitral Tribunal, I would like
10 to take this opportunity to express our appreciation
11 for the high quality of the presentations of the
12 representatives of both Italy and India. I would also
13 like to thank the Agents of both parties for their
14 spirit of co-operation in organising the present
15 hearing.

16 The Arbitral Tribunal will now withdraw to
17 deliberate, and will communicate its decision to the
18 parties in due course.

19 Thank you, and the hearing is closed.

20 **(5.51 pm)**

21 **(The hearing concluded)**

22