

INTERNATIONAL DECISIONS

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United Nations Convention on the Law of the Sea—jurisdiction—incidental jurisdiction—immunity for official acts—exclusive jurisdiction of flag state

IN RE ARBITRATION BETWEEN THE ITALIAN REPUBLIC AND THE REPUBLIC OF INDIA CONCERNING THE “ENRICA LEXIE” INCIDENT. PCA Case No. 2015-28. Award. At <http://www.pca-cpa.org>. UN Convention on the Law of the Sea Annex VII Tribunal, May 21, 2020.

On May 21, 2020, a Tribunal established under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS) rendered an Award regarding the 2012 *Enrica Lexie* incident, which involved the death of two Indian fishermen at the hands of Italian Marines. The Award is lengthy and wide-ranging, finding that: (1) Italy and India had concurrent jurisdiction over the incident; (2) the Tribunal had incidental jurisdiction to determine the immunity of the Italian Marines; (3) the Marines enjoyed immunity as state officials; but nevertheless that (4) India was entitled to compensation for the loss of life, physical harm, damage to property, and moral harm. The Award has been received more positively by Italy than India, but neither party has indicated that they intend to do anything other than comply with it.

While the *Enrica Lexie* incident may not live long in our collective memory, the Award to which it eventually gave rise is of real legal significance. It touches upon key aspects of the UNCLOS regime for jurisdiction over ships and their crew. On most of these, the Tribunal’s analysis is persuasive, not least in relation to Italy’s claims based on freedom of navigation under UNCLOS Article 87, and flag state jurisdiction under UNCLOS Article 92 and India’s counterclaims. More problematic were the Tribunal’s pronouncements regarding the scope of exclusive flag state jurisdiction and its competence to consider questions of incidental jurisdiction.

The incident at the heart of this dispute involves the *Enrica Lexie*, an Italian-flagged oil tanker whose crew included a vessel protection detachment of Marines from the Italian Navy. On February 15, 2012, the tanker found itself on a collision course with a small Indian-flagged fishing boat, the *St. Antony*, while passing through India’s exclusive economic zone (EEZ). When the fishing boat failed to respond to warnings, the crew of the *Enrica Lexie* mistakenly believed themselves to be under attack from pirates. The Marines opened fire, killing two Indian fishermen (paras. 79–117). Indian coast guard vessels were dispatched and escorted the *Enrica Lexie* to the Indian port of Kochi. Two Marines who had opened fire were detained and subjected to criminal proceedings before the High Court of Kerala

and the Supreme Court of India. Both courts denied their immunity. These proceedings were at the heart of the dispute between Italy and India (paras. 118–93).

Italy brought two sets of claims: first, that Indian maritime legislation on which India had allegedly exercised jurisdiction was incompatible with UNCLOS and could not form the basis for proceedings against the Marines; and, second, that India's exercise of jurisdiction over the Marines violated Italy's rights under UNCLOS (as flag state of the *Enrica Lexie*) and the immunity of the Marines as state officials exercising official functions. India for its part raised several counterclaims asserting that the conduct of the Marines (or the *Enrica Lexie*) had interfered with its rights under UNCLOS.

Pursuant to UNCLOS Article 288, the Tribunal's jurisdiction was limited to any dispute concerning the interpretation or application of that convention (para. 217). According to Italy, the "the real issue in the case" was which state had jurisdiction over the incident under UNCLOS (paras. 223–25). India, on the other hand, argued that "the real subject matter of the dispute" was whether the Marines were entitled to immunity from criminal proceedings, which it considered not to be covered by the treaty (para. 226). The Tribunal sided with Italy, holding that the dispute "may raise, but is not limited to, the question of immunity of the Marines" and as such fell within its jurisdiction (para. 243).

The Tribunal dismissed Italy's first set of claims based on alleged inconsistencies between UNCLOS and India's maritime legislation. In fact, it found that India had not relied on specialized maritime legislation at all, but rather on general concepts of prescriptive jurisdiction, specifically territoriality and passive personality (para. 361). Moreover, India was entitled to do so as the fishermen had been killed onboard an Indian ship, which, for the purposes of jurisdiction, was to be treated like an extension of a state's territory—no matter that the shots had been fired from an Italian vessel. The relevant conduct (the killing of the fishermen) had begun on the *Enrica Lexie* and been completed on the *St. Antony*. Just as in the textbook cases of cross-border killings, each of the two states had concurrent jurisdiction over the offense on the basis of the (extended) territoriality principle (para. 366). Accordingly, subject to requirements of immunity (discussed below), both India and Italy could exercise jurisdiction over the incident.

But had India exercised its jurisdiction properly? Italy argued that India had violated various provisions set out in UNCLOS Part VII (notably freedom of navigation under Article 87, flag state jurisdiction under Article 92, and Article 97's prohibition on the exercise of penal jurisdiction over maritime incidents), which, by virtue of UNCLOS Article 58(2), also applied to conduct in the EEZ. India had also, according to Italy, violated the immunity of the Marines—an issue not expressly regulated by UNCLOS. The Tribunal rejected Italy's UNCLOS Part VII claims, but found India to have violated the Marines' immunity.

With regard to Part VII, the Tribunal relatively easily rejected Italy's claim based on UNCLOS Article 97. Under that provision, reversing the Permanent Court of International Justice's (PCIJ) central *Lotus* holding, only flag states and states of nationality are entitled to exercise penal or disciplinary jurisdiction over "persons in the service of the ship" in relation to "a collision or any other incident of navigation concerning a ship." In exercising jurisdiction, India was of course neither a flag state nor state of nationality. But the Tribunal clarified that the firing of shots between the *Enrica Lexie* and the *St. Antony* did not qualify as an "incident of navigation." In its view, the special rule of Article 97

only applied to incidents that had been caused by “the movement and manoeuvring of a ship” (paras. 650, 655).

The Award’s analysis of UNCLOS Articles 87 and 92 was largely fact-dependent. On Article 87, the Tribunal was not convinced that India had interfered with the navigation of the *Enrica Lexie*. As the party bearing the burden of proof, Italy had not established that the Indian Coast Guard had interdicted the *Enrica Lexie* or forced, directed, or tricked it to enter India’s territorial waters—where the freedom of navigation ceases to apply.

Based on largely the same factual findings, the Tribunal considered India not to have violated the principle of exclusive flag state jurisdiction per UNCLOS Article 92. In its view, the Indian Coast Guard had not carried out any enforcement measures (para. 536). While that might have been sufficient to reject Italy’s claim, the Tribunal emphasized the broad scope of Article 92, stating that the principle of exclusive flag state jurisdiction 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” (para. 527). As will be discussed below, this passage is one of most remarkable aspects of the Award. However, it had little impact on Italy’s failed Article 92 claim.

This left Italy’s argument that India had violated the immunity of the Italian Marines. The Tribunal had to address two questions: first, if it had jurisdiction to address Italy’s immunity claim; and second, if so, whether India had violated any such immunity.

Italy claimed that various UNCLOS provisions brought the question of immunity within the jurisdiction of the Tribunal by *renvoi* (para. 734), e.g., because they referred to the exercise of rights under UNCLOS in line with “other rules of international law”. The Tribunal was not convinced, holding that these references were not “pertinent,” as India had exercised jurisdiction over the Marines only in its internal waters and on land (para. 798). However, the majority found an alternative justification for it to exercise jurisdiction over the immunity issue (paras. 803–05). Crucially, the Tribunal found that to “provide a complete answer” to the question of which party was entitled to exercise jurisdiction, it was necessary to examine the Marines’ immunity (para. 808). The Tribunal thus considered immunity to be an “incidental question” (para. 806), and upheld its jurisdiction to determine the issue.¹

As regards the scope of immunity, the Tribunal agreed with Italy in concluding that the Marines were entitled to immunity *ratione materiae* as state officials, given that they were members of the Italian Navy (para. 855) exercising official functions (para. 862). India nevertheless attempted to deny the Marines’ immunity by invoking the “territorial tort” exception, noting that the alleged crime was committed against Indian nationals, on an Indian flagged boat and that the Marines were found on Indian territory (para. 830). The Tribunal adopted a more restrictive understanding of the exception, which only covered conduct “in the territory of the forum State . . . by a foreign official . . . present in the territory of that State at the time of the acts” (para. 868). As the Marines had fired shots while aboard the *Enrica Lexie*, the territorial tort exception was inapplicable (para. 871). The Tribunal therefore decided that India must take the necessary steps to cease its exercise of criminal

¹ Case Concerning Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), Judgment, 1925 PCIJ (ser. A), No. 6, at 18 (Aug. 25), available at https://www.icj-cij.org/public/files/permanent-court-of-international-justice/serie_A/A_06/16_Interets_allemands_en_Haute_Silesie_polonaise_Competence_Arret.pdf.

jurisdiction over the Marines (para. 888), while taking note of Italy's assurances that it would resume its own criminal investigation into the incident.

After siding with Italy on the issue of immunity, the Tribunal turned to India's counterclaims. The Tribunal rejected several of them easily. It found that the *Enrica Lexie* had not interfered with India's sovereign rights under UNCLOS Article 56(2). Rather, the tanker was responding to a perceived pirate attack, with no evidence that the Marines intended to undermine or interfere with India's rights (paras. 953–55). Similarly, it rejected India's counterclaim that Italy failed to give “due regard” to India's rights of the coastal state in the EEZ under UNCLOS Article 58(3). In its view, these rights are not unlimited and the *Enrica Lexie*'s response to a perceived threat of piracy was not an unreasonable interference (para. 980).

India was more successful, however, with its counterclaims that Italy violated India's freedom of the high seas under UNCLOS Article 87 and right of navigation under UNCLOS Article 90. The Tribunal found that the act of shooting at the ship caused the *St. Antony* to change direction, preventing it from navigating its intended course, and as such amounted to a breach of the two provisions of the treaty (paras. 1041–42). The Tribunal found that India was entitled to compensation for loss of life, physical harm, material damage to property, and moral harm, and invited the parties to consult with a view to reaching an agreement on compensation (para. 1089). It decided to retain jurisdiction for one year in order to determine quantum should the parties fail to agree (para. 1090).

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Our discussion focuses on two problematic aspects of the Award: the Tribunal's firm pronouncement on the scope of flag state jurisdiction as a principle covering enforcement and prescriptive jurisdiction, and its treatment of immunity as an incidental question.

The Tribunal's analysis on the scope of flag state jurisdiction was surprising because it went against the traditional, more restrictive view that understands the principle of exclusive flag state jurisdiction to be limited to enforcement competence²—and because the dispute could have easily been addressed solely on the basis of this traditional view. Italy had, after all, accused India of having taken unlawful *enforcement* measures against the *Enrica Lexie*, which the Tribunal rejected. And yet the Tribunal was adamant that flag states enjoy exclusivity under Article 92 also with respect to *prescriptive* jurisdiction (para. 527). This was not an entirely novel claim: it followed ITLOS's 2019 *M/V “Norstar”* judgment, which had made the same point (and prompted a vigorous dissent).³ However, the *Enrica Lexie* Tribunal offered precious little justification to support its view, essentially holding that since UNCLOS Article 92 refers to flag state jurisdiction without qualification, exclusivity must attach to prescriptive and enforcement jurisdiction (paras. 525–27). This is unsatisfactory for three reasons.

Firstly, the Tribunal's expansive reading of UNCLOS Article 92 fails to take into account the larger regulatory context. The rules governing enforcement jurisdiction often grant one state exclusive competence (typically, the territorial state). In contrast, prescriptive

² For a clear exposition of this traditional view, see, e.g., Douglas Guilfoyle, *Article 92—Status of Ships*, in UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY, at 702–03 (Alexander Proelss ed., 2017).

³ The *M/V “Norstar”* Case (Pan. v. It.), Case No. 25, Judgment, para. 225 (ITLOS Apr. 10, 2019), available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.25/case_no_25_merits/C25_J_100419.pdf; cf. Joint Dissenting Opinion of Judges Cot, Pawlak, Yanai, Hoffmann, Kolodkin, and Lijnzaad and Judge *ad hoc* Treves, para. 19.

jurisdiction is seldom exclusive in international law. The Tribunal cited the “mother of all jurisdictional cases,” the PCIJ’s *S.S. Lotus* judgment,⁴ for the proposition that “on the high seas, no state may exercise any kind of jurisdiction over foreign vessels” (para. 467). However, the Tribunal did not mention the PCIJ’s caveat on prescriptive jurisdiction: “it by no means follows that a State can never in its own territory exercise jurisdiction over acts which have occurred on board a foreign ship on the high seas.”⁵ The Tribunal’s approach to UNCLOS Article 92 risks collapsing the distinction between jurisdiction to enforce and jurisdiction to prescribe.

Secondly, the expansive reading of Article 92 creates tensions within the system of UNCLOS Part VII. The Tribunal struggles to explain the existence of UNCLOS Article 97 as a special provision regulating the exercise of penal or disciplinary jurisdiction in relation to collisions or shipping incidents. Put simply, if UNCLOS Article 92 already precludes the exercise of prescriptive jurisdiction by non-flag states, would a further provision be required to exclude such states from applying the law against a ship’s crew? And given that it envisages such proceedings in the flag state *or* in the state of nationality, would UNCLOS Article 97—widely read as a restrictive rule limiting adjudicative jurisdiction—not rather be an exception to exclusive flag state jurisdiction?

Finally, the Tribunal’s emphasis on flag state exclusivity seems to overlook trends in international practice. In order to better protect interests of the international community, international law now regularly encourages states other than flag states to exercise their jurisdiction to prescribe. For example, the UN Food and Agricultural Organization’s Plan of Action on Illegal, Unreported and Unregulated Fishing relies on the active nationality principle when prompting states to “take measures or cooperate to ensure that nationals subject to their jurisdiction do not support or engage in [illegal, unreported, and unregulated] fishing.”⁶ Under the *Enrica Lexie* Tribunal’s broad understanding of exclusive flag state jurisdiction, the legality of such measures could be questioned. All of this means that the Tribunal’s expansive view of flag state jurisdiction is open to criticism—and required a much fuller analysis.

The same goes for the Tribunal’s treatment of incidental questions. The Tribunal justified what Judge Robinson described as its “sortie into the murky waters of the law on incidental questions” (diss op., Robinson, J., para. 33) by stating that it was “necessary” to do so in order to give “a complete answer” to the question of whether India could exercise jurisdiction over the Marines. And indeed, an award that would have stopped at recognizing that two states had concurrent jurisdiction without engaging with the exercise of such jurisdiction would have felt half-baked. But did the Tribunal, by seeking to offer a complete answer, overstep the limits of its jurisdiction under UNCLOS Article 288?

In the five short paragraphs in which it addressed the issue of incidental jurisdiction, the Tribunal did not seek to justify its approach. Curiously, while the Tribunal cited the seminal PCIJ case of *Certain German Interests*,⁷ it did not engage with subsequent case law under

⁴ S.S. “Lotus” (Fr. v. Turk.), Judgment, 1927 PCIJ (ser. A), No. 10 (Sept. 7), available at https://www.icj-cij.org/public/files/permanent-court-of-international-justice/serie_A/A_10/30_Lotus_Arret.pdf.

⁵ *Id.* at 25.

⁶ Food and Agricultural Organization of the UN, International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (June 23, 2001), at <http://www.fao.org/publications/card/en/c/71be21c9-8406-5f66-ac68-1e74604464e7>; Guilfoyle, *supra* note 2, at 703.

⁷ *Certain German Interests*, *supra* note 1.

UNCLOS, such as *Chagos MPA* or *Ukraine v. Russia*.⁸ Its sparse justification of treating immunity as an incidental question was criticized in the dissents of Judge Robinson (diss op., Robinson, J., para. 33) and Dr. Rao (diss. op., Rao, Dr., paras. 29–30), and later by commentators.⁹

While the doctrine of incidental questions has a long pedigree, it is not particularly well-developed. As such, the Tribunal's summary treatment of the issue and failure to engage with recent relevant practice stand out. For instance, in *Chagos MPA*, the tribunal found that jurisdiction under Article 288(1) extends to "ancillary determinations of law as are necessary to resolve the dispute presented to it" (para. 765). The *Chagos* tribunal adopted a two-part test: the question must be (1) necessary to resolving the dispute which does fall within the tribunal's jurisdiction; and (2) ancillary, in the sense that it must be determined in order to answer the "real issue" in the case, but must not constitute part of the "real issue" itself. This approach contrasts with that of the Tribunal in *Enrica Lexie*, which chose to emphasize the necessity criterion alone (para. 806).

In doing so, the Tribunal avoided squarely addressing and justifying its approach to a number of difficult questions, including: was the immunity of the Marines really "incidental," or was it rather "the real issue" at the "heart of" the dispute? In that vein, the Tribunal would have had to consider the most general question of what makes a question "incidental" or "ancillary." Similarly, are there certain questions which lend themselves being considered incidental more than others such as immunity or responsibility? And so on.

It is arguable whether it is the role of Annex VII tribunals to engage with other tribunals in developing the doctrine of incidental questions. For some, this Award will be seen as a missed opportunity. For others it will reflect sage judicial economy in aid of the Tribunal's primary function: settling the dispute. But the Tribunal's approach is not value neutral. Under the circumstances, the Tribunal had to make a choice between according greater weight to certain relevant international legal principles over others. In providing a "complete" answer to the question by considering immunity an incidental question, the Tribunal accorded greater weight to the principle of effectiveness,¹⁰ even where this required interpreting its own competence expansively.

In contrast, in a recent case, the International Court of Justice struck a balance that appears to favor privileging state consent over effectiveness.¹¹ This was also the approach taken by

⁸ Chagos Marine Protected Area Arbitration (Mauritius v. UK), Case No. 2011-03, Award (Perm. Ct. Arb. Mar. 18, 2015), available at <https://files.pca-cpa.org/pcadocs/MU-UK%2020150318%20Award.pdf>; Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukr. v. Russ.), Award Concerning the Preliminary Objections of the Russian Federation (Perm. Ct. Arb. Feb. 21, 2020), at <https://pcacases.com/web/sendAttach/9272>.

⁹ Valentin J. Schatz, *Incidental Jurisdiction in the Award in "The Enrica Lexie" Incident (Italy v. India) – Part II*, VÖLKERRECHTSBLOG, (July 24, 2020), at <https://voelkerrechtsblog.org/incidental-jurisdiction-in-the-award-in-the-enrica-lexie-incident-italy-v-india-part-ii>; Aurel Sari, *Part I – Tanker, Jailer, Soldier, Sailor: Functional Immunity and the Enrica Lexie Award*, JUST SECURITY (Sept. 4, 2020), at <https://www.justsecurity.org/72284/part-1-tanker-jailer-soldier-sailor-functional-immunity-and-the-enrica-lexie-award>.

¹⁰ Peter Tzeng, *The Implicated Issue Problem: Indispensable Issues and incidental Jurisdiction*, 50 N.Y.U. J. INT'L L. & POL. 447, 478 (2018).

¹¹ Immunities and Criminal Proceedings (Eq. Guinea v. Fr.), Preliminary Objections, Judgment, 2018 ICJ Rep. 292 (June 6), available at <https://www.icj-cij.org/public/files/case-related/163/163-20180606-JUD-01-00-EN.pdf>. On this and other relevant recent ICJ cases, namely *Certain Iranian Assets (Iran v. U.S.)*, Preliminary Objections, Judgment, 2019 ICJ Rep. 7 (Feb. 13), available at <https://www.icj-cij.org/public/files/case-related/164/164-20190213-JUD-01-00-EN.pdf>, see Eleni Methymaki & Christian J. Tams, *Immunities and Compromissory Clauses: Making Sense of Enrica Lexie (Part II)*, EJIL: TALK! (Aug. 27, 2020), at <https://www.ejiltalk.org/immunities-and-compromissory-clauses-making-sense-of-enrica-lexie-part-ii>.

another arbitral tribunal (albeit dealing not with immunity but another issue not expressly addressed by UNCLOS, territorial sovereignty) just months before in *Ukraine v. Russia*, upholding Russia's preliminary objections that the territorial dispute related to Crimea was not incidental but central to the dispute between the parties and that, as such, the tribunal did not have jurisdiction.¹² In this sense, the *Enrica Lexie* Tribunal's approach to its own jurisdiction tells us something about how it sees its role not only as a legal means for settling disputes between two states but also as actor in the international legal order.

Given the nature of immunity which is so rarely mentioned explicitly in framework conventions such as UNCLOS, on balance the Tribunal's finding that it had jurisdiction was the most desirable outcome. The alternative—namely, determining that both states had jurisdiction over the incident but stopping short of spelling out the consequences of that finding—would have been less satisfactory. However, the authority of the Tribunal's decision to tip the balance in favor of effectiveness rather than state consent is undermined by its failure to provide fuller reasoning and justification for doing so.¹³

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doi:10.1017/ajil.2021.25

DISPUTE CONCERNING DELIMITATION OF THE MARITIME BOUNDARY BETWEEN MAURITIUS AND MALDIVES IN THE INDIAN OCEAN (MAURITIUS/MALDIVES). Case No. 28. Judgment. At https://www.itlos.org/fileadmin/itlos/documents/cases/28/preliminary_objections/C28_Judgment_prelimobj_28.01.2021_orig.pdf.

Special Chamber of the International Tribunal for the Law of the Sea, January 28, 2021.

On January 28, 2021, a Special Chamber of the International Tribunal for the Law of the Sea (ITLOS) dismissed all of the respondent's preliminary objections in *Dispute Concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*. The proceeding arose out of Mauritius's long-running effort to regain sovereignty over the Chagos Archipelago, which was originally "detached" from Mauritius in 1965 by the United Kingdom (UK). Although the Judgment will allow the case to proceed to the merits, it is significant in its own right for its engagement with several earlier legal decisions, including the arbitral award in *Chagos Marine Protected Area Arbitration*¹ and the

¹² *Ukraine v. Russia*, *supra* note 8, paras. 195–96.

¹³ In terms of Razian practical authority, Annex VII tribunals have content independent authority (see JOSEPH RAZ, *THE AUTHORITY OF LAW*, at ch. 1 (1979)). In addition, however, robust justification and reasoning also provides such tribunals with a measure of content dependent authority. This content-dependent authority is arguably even more important in international law given its decentralized nature. See JOSEPH RAZ, *BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON*, at ch. 5 (2009).

¹ *Chagos Marine Protected Area Arbitration (Mauritius v. UK)*, Case No. 2011-03, Award (Perm. Ct. Arb. Mar. 18, 2015), available at <https://files.pca-cpa.org/pcadocs/MU-UK%2020150318%20Award.pdf> [hereinafter *Chagos* Arbitral Award]; David A. Colson and Brian J. Vohrer, *In re Chagos Marine Protected Area (Mauritius v. United Kingdom)*, 109 AJIL 845 (2015).