THE *ENRICA LEXIE* AWARD AMID JURISDICTIONAL AND LAW OF THE SEA ISSUES

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Abstract

This article analyzes the Enrica Lexie *Arbitral Award, first of all, in relation to international law issues concerning the application of the United Nations Convention on the Law of the Sea (UNCLOS). The article then focuses on the question of the functional immunity of the two marines, from the point of view of the Tribunal's assertion of its incidental jurisdiction to deal with the matter, as well as of the Tribunal's affirmation of the existence of a customary international law rule applicable in the present case. Both conclusions appear unconvincing, also in light of the role of the two marines on board a merchant ship. In any case, the fact remains that the judgment has the merit of finally putting an end to a long-standing dispute, to the satisfaction of the two parties involved.*

Keywords: law of the sea; freedom of navigation; jurisdiction according to UNCLOS; incidental jurisdiction; functional immunity; State officials; governmental functions.

1. INTRODUCTION

The arbitral award in the *Enrica Lexie* case, issued on 21 May 2020 by a tribunal constituted pursuant to Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS), addresses numerous interesting legal issues. In particular, as evidenced by the writings contained in this *Focus*, the issues that determined the solution adopted, and on which the Tribunal therefore dwelts extensively, are the existence of a customary principle on the functional immunity from foreign criminal jurisdiction of the military as State bodies, and the scope of the notion of incidental jurisdiction.

The events that caused the judicial and diplomatic dispute between Italy and India and led to the Tribunal's pronouncement are well known and will therefore not be retraced here in detail.[1] On the other hand, it must be remembered that the

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[1] On 15 February 2012 the *Enrica Lexie*, an Italian tanker coming from Singapore and bound for Djibouti, was approached by the Indian fishing vessel *St. Antony* while it was about 20 miles off the State of Kerala in the Indian contiguous zone. The ship was carrying six Italian Navy riflemen in an anti-piracy function. Among them there were the sergeants Massimiliano Latorre and Salvatore Girone who, convinced that the *St. Antony* was about to launch a pirate attack against the *Enrica Lexie*, after having issued flash signals to the approaching vessel,

basis of the Tribunal's jurisdiction lay in UNCLOS, and was justified, according to Article 288, (1), insofar as it related to a "dispute concerning the interpretation or application of this Convention".[2] In the case in point, however, the central issue, the real and fundamental subject of the dispute, was the ascertainment of the competence to exercise jurisdiction over the matter, a problem resolved, as mentioned above, in light of the rules on immunity. Hence the use of an "enlarged" notion of incidental jurisdiction by the Tribunal, which, otherwise, would have had to declare itself not competent, since there was no need to rule under UNCLOS.

Contrary to what one might expect without having read the text of the decision, the law of the sea issues are therefore much less decisive. However, this does not mean that the decision in question does not present aspects of interest to law of the sea scholars, aspects on which we will focus in the following pages.

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fired some shots from which resulted the death of two Indian fishermen. Induced to enter the port of Kochi by the Indian authorities, the *Enrica Lexie* was detained and the Italian sergeants were subjected to Indian criminal proceedings for the murder of the two fishermen. These events led to a long judicial and diplomatic dispute between Italy and India regarding which State should exercise criminal jurisdiction over the incident. After more than three years of fruitless negotiations, in April 2015 Italy unilaterally activated the mandatory arbitration procedure provided for by Annex VII to the UNCLOS Convention (Art. 286). It also requested, first from the International Tribunal for the Law of the Sea (ITLOS) and then from the Arbitral Tribunal, the adoption of some precautionary measures. First, pending the constitution of the Arbitral Tribunal, Italy availed itself of the possibility provided for by Art. 290(5) UNCLOS and asked the ITLOS Tribunal to issue provisional measures against India consisting in the abstention from exercising its jurisdiction over the incident and the cessation of restrictions on the personal freedom of Sergeants Girone and Latorre. ITLOS, although not accepting the Italian request, with the order of 24 August 2015, established the obligation of both States to suspend the jurisdictional proceedings in progress and to refrain from initiating new ones. This precautionary measure also pursued the objective of avoiding that the continuation or initiation of jurisdictional proceedings could jeopardize, if not frustrate, the execution of any rulings of the then constituted Arbitral Tribunal. It also had the function of preventing the extension or escalation of the dispute, in accordance with ITLOS's constant orientation on provisional measures. Having constituted the Arbitral Tribunal at the Permanent Court of Arbitration on 8 September 2015, Italy also submitted to the latter a precautionary appeal pursuant to Art. 290(1) UNCLOS in which it requested that Sergeant Girone be allowed to return to his homeland pending a final ruling. By order of 29 April 2016, the Arbitral Tribunal, noting the absence of a legal requirement justifying Girone's physical stay in India, upheld the Italian appeal and established obligations of cooperation between the States in order to preserve their respective rights. For further information and insights please refer, in addition to the articles published in this *Forum*, to the review on the International Tribunal for the Law of the Sea and other Law of the Sea jurisdictions edited in this Volume by Treves. The issue was already dealt with in this Yearbook by Ronzitti, "The *Enrica Lexie* Incident: Law of the Sea and Immunity of State Officials Issues", IYIL, 2012, p. 3 ff.

[2] UNCLOS subjects the settlement of disputes (between States that have ratified it) relating to its interpretation and application to a mandatory regime. At the moment of ratification, as a rule, the State communicates its choice of instrument to be used for resolving disputes, selected among the various instruments proposed by the Convention itself. However, in the event of inconsistent declarations, as in the present case, the competence is attributed to an arbitral tribunal constituted in accordance with Annex VII of UNCLOS (Art. 287).

Only afterwards will we humbly but briefly allow ourselves to give our opinion also on the two main issues mentioned above.

As early as the stage of provisional measures, the Tribunal made some interesting statements relating to aspects of the law of the sea.[3] By order of 29 April 2016, the Tribunal, noting the absence of a legal requirement justifying the physical detention of one of the two Italian marines in India,[4] upheld the Italian appeal by establishing obligations of cooperation between the States in order to preserve their respective rights.[5] It is interesting to note that the Tribunal justified the precautionary measure not only by the need to prevent the dispute from escalating or spreading, but also because of "considerations of humanity" which were raised in relation to the limitation of the personal freedom of one of the two Italian marines.[6] In fact, the Tribunal, while not considering it necessary to dwell on the issue of possible violation of international human rights standards, stated that "social isolation has been recognized as a relevant factor in considering the relaxation of bail conditions" and it was therefore necessary "to give effect to the

[3] In fact, it is well known that, having constituted the Arbitral Tribunal at The Hague Permanent Court of Arbitration (PCA) on 8 September 2015, Italy submitted a precautionary appeal pursuant to Art. 290(1) UNCLOS in which it requested that also Sergeant Girone, one of the two "indicted" Marine riflemen (the other, Commander Latorre, was already in Italy for health reasons) could return to his homeland pending a final ruling. See Order of 29 April 2016, Request for the Prescription of Provisional Measures, PCA Case No. 2015-28. All documentation of the arbitration proceedings is available at: <www.pcacpa.org>.

[4] The interim measures ordered on 24 August 2015 by the ITLOS, which resulted in the suspension of all domestic court proceedings, were still in effect at the time. Thus, the Tribunal observed that "there would be no legal interest in Sergeant Girone's physical presence in India" and that, ultimately, "no material change would result for India" (Order, *cit. supra* note 3, para. 107). On the precautionary measures adopted by the two Courts, see VIRZO, "Le misure cautelari nell'affare dell'incidente della *Enrica Lexie*", Osservatorio Costituzionale, 2016, p. 1 ff.; PERROTTA, "Il caso *Enrica Lexie* e la tutela cautelare dei diritti individuali nelle pronunce del Tribunale internazionale per il diritto del mare e dell'*Annex VII Arbitral Tribunal*: tra *inherent powers* e *human rights approach*", Politica del diritto, 2016, p. 279 ff.; CANNONE, "L'ordinanza del Tribunale internazionale del diritto del mare sulla vicenda della *Enrica Lexie*", RDI, 2015, p. 1144 ff.; PAPANICOLOPULU, "Commento a margine dell'ordinanza del tribunale arbitrale nel caso *Enrica Lexie*", RDI, 2016, p. 763 ff.

[5] It should be noted that the Tribunal considered that the requirement of urgency of the measure, even if not expressly mentioned in Art. 290(1) UNCLOS, must be taken into account for the purposes of prescription of precautionary measures (Order, *cit. supra* note 3, para. 85). In the present case, the Tribunal wished to prevent the occurrence of a real and imminent risk of prejudice to the rights of the parties while waiting for its final decision, as this risk presented itself as "particularly pronounced".

[6] According to the Tribunal, the measures restricting the liberty of the Italian Navy rifleman, in light of the time presumably necessary for the conclusion of the arbitral proceedings and of the possible criminal trial in one of the two States, would most likely be in contrast with international human rights obligations. A significant exhortation to respect international human rights standards is also contained in the motivations of the award rendered by the Arbitral Tribunal constituted under Annex VII UNCLOS in the case of the *Arctic Sunrise Arbitration (Netherlands v. Russia)*, Award on the Merits of 14 August 2015, PCA Case No. 2014-02, para. 198.

concept of considerations of humanity".[7] These considerations of humanity came to the fore precisely because of a systematic and coordinated interpretation of the norms of the UNCLOS with the norms of general international law.[8] Systematic, because in UNCLOS there are provisions having as their object the protection of life at sea[9] and other human rights;[10] coordinated, because Article 293 UNCLOS provides that an international tribunal competent under UNCLOS may also apply other rules of international law, provided that they are not incompatible with it.[11] We agree with this evolutionary interpretation of UNCLOS, certainly in line with the value that the protection of human rights has assumed in the international order.

2. Freedom of Navigation. Who Violated It?

The Tribunal then dealt with the mutual accusations of violation of freedom of navigation between the two States. First of all, with regard to the impact on the freedom of navigation of the *Enrica Lexie* of the request by the Maritime Rescue Coordination Centre in Mumbai to the master to proceed to the port of Kochi when the vessel was 38 nautical miles from the coast, it was not relevant to establish, for this purpose, the exact location of the incident or the position of the

[7] See Order, *cit. supra* note 3, para. 104. Interestingly, the same concerns had also been expressed by Judge Jesus in his Separate Opinion attached to the 25 August 2015 ITLOS Order in which he stated (paras. 10-11): "[t]he detenction or restriction on the movement of persons who wait excessively long to be charged with criminal offenses is, per se, a punishment without a trial" and regretted the fact that ITLOS had not taken into account "the effects on the health of the marines and their family as a result of a detention that has continued […] for three and a half years".

[8] This consideration is made by Virzo, *cit. supra* note 4, p. 3 ff.; See also, for analogous statements, Papanicolopulu, *cit. supra* note 4, pp. 773-774. More generally on the issue of interpretation of UNCLOS provisions see Del Vecchio and Virzo (eds.), *Interpretation of the United Nations Convention on the Law of the Sea by International Courts and Tribunals*, Heidelberg, 2019.

[9] See Arts. 18, para. 2, and 98 UNCLOS.

[10] See, for example, Art. 73, para. 3, which affirms: "[t]his Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention".

[11] On the applicability of international human rights standards, reference is also made to the compatibility clause included in Art. 311, para. 2, UNCLOS, according to which: "[t]his Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention". For reference to international human rights standards, again in the case *Arctic Sunrise*, according to ITLOS (para. 198): "the Tribunal may, therefore, pursuant to Article 293, have regard to the extent necessary to rules of customary international law, including international human rights standards, not incompatible with the Convention, in order to assist it in the interpretation and application of the Convention's provisions that authorize the arrest or detention of a vessel and persons". In legal literature see Treves, "Human Rights and the Law of the Sea", Berkeley Journal of International Law, 2010, p. 1 ff.

Italian vessel and at the same time to ascertain whether the rules on the contiguous zone or the exclusive economic zone (EEZ) should apply, since in any case the Italian vessel would have been entitled to the same freedom of navigation as on the high seas. This is in accordance with Article 33 UNCLOS, which limits the permitted grounds for affecting foreign navigation in the contiguous zone to the prevention and repression of violations of customs, fiscal, health and immigration laws, and with Articles 87(1) and 92(1), which recognize, respectively, the principles of freedom of navigation and exclusive jurisdiction of the flag State on the high seas, applicable also in the EEZ by express provision of Article 58(1)[12] and 58(2)[13]

As far as the violation of the first principle is concerned,[14] Italy supported its thesis by referring to the Indian Maritime Zones Act of 1976. This piece of legislation is still in force despite its provisions being inspired by an excessively "patrimonialistic" vision of the EEZ that is rejected by UNCLOS, which, as is known, has achieved a compromise in this regard between the developing States theories and those of industrialized countries. This vision of the EEZ, however, often recurs in the practice and legislation of Asian countries, first and foremost China.[15] The Indian conception of the contiguous zone, as revealed by the judgment of the Indian Supreme Court of 18 January 2013, again in relation to the *Enrica Lexie*'s incident, does not appear to be entirely in accordance with international law. The Supreme Court upheld the jurisdiction of India over the two marines under the Indian Penal Code, the application of which was extended by

[12] *The "Enrica Lexie" Incident (The Italian Republic v. The Republic of India)*, Award of 21 May 2020, PCA Case No. 2015-28, para. 308.

[13] *Ibid*., para. 315.

[14] See Art. 87 UNCLOS ("Freedom of the high seas"), which recognizes that on the high seas States enjoy: "freedom of navigation; freedom of overflight; freedom to lay submarine cables and pipelines; freedom to construct artificial islands and other installations permitted under international law, subject to Part VI; freedom of fishing, subject to the conditions laid down in section 2; freedom of scientific research, subject to Parts VI and XIII".

[15] China has repeatedly objected, even with the use of force, to the conduct of military manoeuvers in its EEZ, for example almost ramming the US destroyer Decatur on 30 September 2018 near the Spratly Islands, occupied by China but also claimed by Malaysia, Taiwan, the Philippines, and Vietnam. Indeed, China claims to condition such operations on its consent, believing them to be a potential threat to its security, and not permitted by UNCLOS. In fact, this aspect of Chinese practice, which in any case conflicts with international practice and does not appear sustainable in the light of UNCLOS provisions, is part of a more general attempt to impose a peculiar interpretation of the institution of the EEZ. This State, in fact, manages its EEZ almost as if it represents its territorial waters, in particular in the South China Sea (or Oriental Sea, as defined by Vietnam), and this attitude is also part of China's attempt to assert its claims of exclusive control of that area, claims which are, however, disputed by other States bordering that same Sea and which in turn claim sovereignty or jurisdiction in those waters. In this regard, see FRANCKX and GAUTIER (eds.), *The Exclusive Economic Zone and the United Nations Convention on the Law of the Sea, 1982-2000: A Preliminary Assessment of State Practice*, Bruxelles, 2003; FRANCKX, "The 200-mile Limit: Between Creeping Jurisdiction and Creeping Common Heritage?", George Washington International Law Review, 2007, p. 467 ff.; BECKMAN, "The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea", AJIL, 2013, p. 142 ff.

the Maritime Zones Act of 1976 to the contiguous zone for reasons generically defined as "of security", and as such not included among the specific matters in relation to which the coastal State is allowed to exercise its powers within 24 miles from the coast.[16] However, the Tribunal, considering the reference to the provisions of the Indian law of 1976 concerning the EEZ and the contiguous zone irrelevant to the decision, stated that the Indian request to the *Enrica Lexie*'s captain to proceed towards the port of Kochi represented an interference too abstract to constitute a violation of the freedom of navigation.[17] The hypothesis that the entry of the *Enrica Lexie* in the Indian territory had been determined by the request to cooperate in an investigation related to piracy events which then turned out to be non-existent, and the consideration that if the *Enrica Lexie* had not complied with the request it could have been accused of violation of the UNCLOS provisions which impose obligations of cooperation between States in the fight against maritime piracy, in particular of Article 100 UNCLOS read in conjunction with Article 300, was thus dismissed without too much consideration.[18]

On the other hand, the Tribunal was of a different opinion with respect to Italy's responsibility for the interference with the navigation of the *St. Antony*, the Indian fishing vessel shot at by the Italian Navy's riflemen. According to the Tribunal, the change of course which the *St. Antony* was forced to make as a consequence of the Italian military action was the responsibility of the Italian State, constituting a violation of the freedom of navigation of the said vessel pursuant to Articles 87 and 90 UNCLOS.[19] On these grounds, the Tribunal ordered Italy to pay compensation for material and moral damages caused.[20]

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[16] Judgment of 18 January 2013 of the Federal Supreme Court of India in the case *Republic of Italy and others v. Republic of India and others*, available at: <http://www.sidi-isil.org/wp-content/uploads/2013/03/SUPREME-COURT-OF-INDIA-18.01.2013.pdf>. On the specific point see Wu, "The *Enrica Lexie* Incident: Jurisdiction in the Contiguous Zone?", Cambridge International Law Journal, 19 April 2014, available at: <http://cilj.org.uk/2014/04/19/enrica-lexie-incident-jurisdiction-contiguous-zone/>.

[17] Award, *cit. supra* note 12, para. 504, in which the arbitral tribunal addresses the Italian argument according to which: "the evidence on the record permits the conclusion that, since the 'Enrica Lexie' initially had no intention of proceeding to the Indian coast, there was a 'causal effect' of India's intervention on the 'Enrica Lexie''s turn for Kochi. While such a causal effect is undeniable, in the sense that, had the MRCC not requested the 'Enrica Lexie' to proceed to Kochi, the 'Enrica Lexie' would not have changed course, such effect is too remote to amount to 'interference' with Italy's freedom of navigation".

[18] On the possible violation by the Indian authorities of the principles of good faith and friendly relations between States see Avenia, "Una rilettura del caso Enrica Lexie e dei due fucilieri della marina militare italiana", Rivista della Cooperazione Giuridica Internazionale, 2016, p. 171 ff.

[19] Award, *cit. supra* note 12, para. 1043. On these aspects please refer to Ronzitti, "Il caso della Enrica Lexie e la sentenza arbitrale nella controversia Italia-India", RDI, 2020, p. 937 ff.

[20] Award, *cit. supra* note 12, para. 1088. In particular, the court ordered Italy to adopt measures of a satisfactory nature, such as the acknowledgement of the unlawful act, and to pay compensation for material damages relating to the killing and wounding of members of the crew of the *St. Antony* as well as for the "moral harm" suffered by the captain of the *St. Antony* and his crew. On 9 April 2021 the Indian Supreme Court declared that the case will be defini-

The reason that this finding has caused so much consternation is that the freedom of navigation was deemed to have been violated without first verifying the occurrence or not of the elements of legitimate defence. In other words, could the behaviour of the fishing boat give rise to the legitimate suspicion that it was in fact a pirate boat about to attack the *Enrica Lexie*? If the answer was positive, the interference would have been justified. It must be presumed that the Tribunal implicitly gave a negative answer to this hypothesis when it determined Italian responsibility for violation of freedom of navigation, despite the fact that the Tribunal itself has referred the merits of the legitimate defence question to the Italian courts. However, in our opinion, the fact that the Tribunal made its finding on freedom of navigation without having assessed a possible defence against liability is not acceptable.

Also with reference to the subjective attribution of the offence in question, Italy argued that no infringement could be attributed to it vis-à-vis India as the *St. Antony* was not identifiable as an Indian vessel, in that it was not flagged and was not registered in the maritime register of that country. On this point, the Tribunal correctly reaffirmed the customary principle, codified in Article 91(1) UNCLOS, that States enjoy a wide discretion in determining the criteria on which the attribution of the flag is founded and that the so-called requirement of a "genuine link" with the State (referred to in the last paragraph of Article 91(1) UNCLOS) cannot entail the consequence of third States challenging the link of nationality.[21] Therefore, since Indian legislation provides that small boats are not required to fly the flag and are exempt from registration in the maritime register, this circumstance had no weight in the assessment of the conduct attributable to Italy.[22]

3. Jurisdiction on the Case According to UNCLOS

Moreover, the question relating to the attribution of jurisdiction over the events that occurred was, of course, primarily addressed in light of the provisions of UNCLOS. Italy, first of all, proposing an extensive interpretation, affirmed the lack of Indian jurisdiction in light of Article 97 UNCLOS, which at paragraph 1 provides that

> In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service

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tively closed once the Italian State has paid the compensation granted (100 million rupees, equal to around 1.1 million euros) into an account of the Ministry of Foreign Affairs in Delhi.

[21] On this point see Ronzitti, "Il caso della Enrica Lexie", *cit. supra* note 19, p. 948. On the issue, in general, of the attribution of the flag and of the requirement of the "genuine link", we refer to the ITLOS Judgment of 1 July 1999 in the *M/V "Saiga" (N. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, ITLOS Reports, 1999, p. 10 ff., para. 63.

[22] Award, *cit. supra* note 12, paras. 1017-1035.

> of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national.

On this point, however, the Tribunal, accepting the Indian argument, held that this rule was not applicable to the case in question, since the event at issue could not be qualified as an accident of navigation, as "damage [to St. Antony] and mortal harm [to its crew] were not caused by the movement or manoeuvring of either ship", but from few shots fired at the *St. Antony*.[23] The argument had also been put forward by the Italian side before the Indian Federal Supreme Court which, in its above mentioned judgment of 18 January 2013, had expressed itself in terms quite similar to those used by the Tribunal, stating that "a homicide caused by the voluntary opening of fire cannot constitute an 'incident of navigation' within the meaning of this provision".[24]

In fact, the rule in question has a special character (otherwise it would not be possible to understand its rationale, as, at a general level, the principle codified in the already mentioned Article 92 UNCLOS applies) and finds its genesis in the famous case decided by the Permanent Court of International Justice (PCIJ) in 1927, concerning a collision between the ship *Lotus*, flying the French flag, and a Turkish steamer on the high seas with the consequent arrest, in Turkey, of the French officer held responsible for the event which caused the death of eight people.[25] The Court affirmed, on the basis of the principle of freedom of the seas, the unlawfulness of any authoritarian intervention on other nations' ships (e.g., the carrying out of police investigations, the arrest of persons, the collection of testimonies and the like, in short, all enforcement activities). However, the Court did not assert the unlawfulness of the exercise of jurisdiction (*judicial jurisdiction*) by a State within its own territory in relation to facts occurring in international waters. In order to overcome the uncertainties that the PCIJ had to remedy with its judgment, and not incidentally on a proposal by France, the International Law Commission (ILC) formulated in 1956 the rule inserted in the Geneva Convention of 1958 on the high seas and finally in Article 97 of UNCLOS. The rule is therefore applied, as correctly decided by the Tribunal, only in cases of navigation accidents occurring on the high seas. Thus, exclusive criminal juris-

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[23] Award, *cit. supra* note 12, para. 652.

[24] *Republic of Italy and others*, *cit. supra* note 16, para. 94.

[25] Judgment of 7 September 1927, PCIJ Reports, Series A, No. 10. On the basis of the compromise between France and Turkey, the PCIJ had to decide whether Turkey, by exercising criminal jurisdiction over a foreign national for acts committed on the high seas, "had acted in violation of the principles of international law – and if so, which ones". The Court affirmed that the territoriality of the criminal law, even if it implies that no State can exercise its punitive power in the territory of another State, is not an absolute principle, as demonstrated by the fact that "all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty" (*ibid*., p. 20).

diction is attributed to the flag State or to the national State of the authors of the incident, in cases limited to collisions and other navigation accidents such as, for example, the breaking of submarine telegraph or telephone cables, and damages however produced to ships or installations of other States. In other cases, the rule that the ship is subject to the exclusive power of the government of the flag State remains unchanged, but this is only in the sense that other States cannot perform acts of government on board and towards the ship itself.[26] By the same

[26] On this point please refer to CONFORTI, "In tema di giurisdizione penale per fatti commessi in acque internazionali", in *Scritti in onore di Giuseppe Tesauro*, Napoli, 2014, Vol. IV, p. 2619 ff. (in particular pp. 2624-2625). He states that: "It is known that the principle of international law applicable to criminal jurisdiction over the foreigner (jurisdiction always admitted over the citizen) is that it is exercisable always when and only when, even if it is about crimes committed in foreign territory, they present some connection with the territorial State and/or its subjects. Well, it is hard to see why this rule should not also apply when the foreign territory is… fluctuating. Moreover, even current practice, although not abundant, points in this direction. To summarize: it may be that the crime takes place entirely on a foreign ship. In this case there should be no doubt about the right of the State other than that of the flag to exercise jurisdiction if the victim is one of its nationals. In the case of an offense whose action is committed on board a foreign ship but the event occurs on board another ship and to the detriment of a national of the State to which such ship belongs, the latter has two titles to exercise jurisdiction: the nationality of the victim and the event occurring on the ship which has his nationality. This is a case of competing jurisdiction with that of the State of the flag or the national State of the perpetrator of the offence, a competition which will in fact be resolved in favour of the State in whose territory the offender is located, which will obviously be free to hand him over to one of the other States or will be obliged to hand him over if bound by an extradition treaty" (our translation from Italian). Recently, in the sense of considering accidents of navigation those caused by the movement of the ship, see MAGI, "Criminal Conduct on the High Seas: Is a General Rule on Jurisdiction to Prosecute Still Missing?", RDI, 2015, p. 79 ff., in particular pp. 89 ff. and 92. For a partially different thesis, regarding in particular the reading of Art. 92 in the sense that this rule provides for "both enforcing and prescriptive jurisdiction", and that therefore Art. 97 is redundant, see RONZITTI, "The *Enrica Lexie* Incident", *cit*. *supra* note 1, p. 3 ff. (14-15 in particular); ID., "La difesa contro i pirati e l'imbarco di personale militare armato sui mercantili: il caso della Enrica Lexie e la controversia Italia-India", RDI, 2013, p. 1073 ff., especially p. 1086 ff., who sets out examples of shipping accidents not requiring physical contact but which, on the one hand, seem to be oriented towards the first type of interpretation and, at the same time, raise the possibility of a more modern interpretation than the one we have called "restrictive", in order to take into account the evolution of practice and other accidents whose occurrence was unthinkable at the time of the adoption of UNCLOS. References to the possible restrictive or extensive interpretation of Art. 97 UNCLOS in light of the judgment of the Supreme Court of India of 18 January 2013, are in DEL VECCHIO, "Il ricorso all'arbitrato obbligatorio UNCLOS nella vicenda dell'*Enrica Lexie*", RDIPP, 2014, p. 259 ff., in particular p. 265. On the other hand, the individual opinion of Justice Chelameswar attached to the Indian Supreme Court's 2013 judgment that Art. 97 would not apply *ratione loci* anyway because it applies on the high seas and the incident had occurred in the EEZ appears to be unsustainable. Pursuant to Art. 58(2) UNCLOS, as already noted above, the high seas regime, and in particular Arts. 88 to 115 and "other relevant rules of international law", apply to the EEZ unless inconsistent with its regime. For greater detail on the different theories relating to Art. 97 and on the solution reached by the Tribunal on the issue see CANNONE, "L'interpretazione della espressione 'altri incidenti di navigazione' di cui all'art. 97 della Convenzione sul diritto del mare nella sentenza arbitrale del 21 maggio 2020 relativa alla vicenda della *Enrica Lexie* (*Italia* c. *India*)", Ordine internazionale e diritti umani, 2021, p. 283 ff.

token, the thesis according to which the term "navigation accident" is intended to mean exclusively an accident involving "navigation activities" due to fate and unforeseeable circumstances, and not to voluntary or intentional human acts, is confirmed by the preparatory works of Article 97,[27] and also by the formulation of another article of UNCLOS, namely Article 221(2) which, even if "for the purposes of this article", clarifies that "'maritime casualty' means a collision of vessels, stranding or other incident of navigation, or other occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo". This interpretation, moreover, combines in a systematic way the provisions of Article 97 with those of Article 94 UNCLOS(7) providing that:

> Each State shall cause an inquiry to be held by or before a suitably qualified person or persons into every marine casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State or serious damage to ships or installations of another State or to the marine environment. The flag State and the other State shall cooperate in the conduct of any inquiry held by that other State into any such marine casualty or incident of navigation.

As mentioned above, Italy was very insistent, both before the Indian courts and before the Tribunal, in its attempts to assert the applicability of Article 97 UNCLOS to the case at hand. The reason for this is intuitive. First of all, if this argument had been accepted by the Tribunal, the jurisdiction of the Tribunal would have been established in an incontrovertible manner, since it would have been undisputed at this point that what was at stake was a "dispute concerning the interpretation or application of this Convention", according to Article 288, paragraph 1, UNCLOS. Secondly, only the acceptance of the applicability of Article 97 could have excluded Indian jurisdiction altogether, as any other solution would have to deal, at least, with the two countries' competing theories on jurisdiction, and the Tribunal would have to determine who was entitled to exercise its jurisdiction on a priority or exclusive basis.

Having rejected the main argument of the Italian defence, the starting point was therefore that the concurring jurisdiction of the two countries should be recognized, but that, in concrete terms, it was necessary to determine the rules for its exercise in the case in question.[28] The Tribunal then assessed whether the exercise of Indian criminal jurisdiction was prevented by the duty to recognize

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[27] See NORDQUIST et al. (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Dordrecht, 1995, Vol. III, p. 167 ff.

[28] For the doctrine in favor of concurrent jurisdiction, see CONFORTI, "In tema di giurisdizione", *cit*. *supra* note 26, p. 2619 ff.; GUILFOYLE, "Shooting Fishermen Mistaken for Pirates: Jurisdiction, Immunity and State Responsibility", EJIL: Talk!, 2 March 2012, available at: <https://www.ejiltalk.org/shooting-fishermen-mistaken-for-pirates-jurisdiction-immunity-and-state-responsibility/>.

the immunity of the two soldiers, a thesis already supported by Italy both before the Indian internal judicial bodies and on a diplomatic level. The answer, according to the Tribunal, could not be sought in the UNCLOS itself, since the relevant rules in the Convention either concern limitations on coastal State enforcement in spaces other than those in which India had exercised its powers,[29] or, with respect to immunities, refer exclusively and specifically to warships or other ships used for non-commercial purposes.[30]

We certainly agree with these findings. At this point, however, having abandoned the "safe" ground represented by UNCLOS, before proceeding to the analysis of Italy's claim regarding the functional immunity of the Italian Marines from Indian criminal jurisdiction on the basis of customary law, the Arbitral Tribunal had first to establish whether it had jurisdiction over this specific claim.[31]

4. The Functional Immunity of the Italian Marines: An Incidental Question to the Application of UNCLOS

The analysis of this procedural issue appears rather complex and controversial; specifically, in order to determine whether it was entitled to exercise jurisdiction over Italy's claim regarding the immunity *ratione materiae* of the Marines, the Tribunal had first to determine what kind of relationship existed between two different questions: whereas a first question concerned the entitlement of jurisdiction over the incident, a second question concerned the immunity of the two Italian Marines from Indian criminal jurisdiction.

The issue arose because UNCLOS tribunals, like other international specialized tribunals and courts, have a limited competence *ratione materiae* which, as already said, is limited to disputes concerning the interpretation or application of UNCLOS.[32] Consequently, the jurisdiction of UNCLOS tribunals is limited to claims based on UNCLOS provisions. Thus, the Tribunal was certainly compe-

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[29] Award, *cit. supra* note 12, para. 798, in which the Tribunal states that these rules apply: "to the exercise of rights and duties in the territorial sea and the exclusive economic zone by coastal States, while the evidence in the present case demonstrates that India enforced its jurisdiction over the Marines only in its internal waters and on land, when the Marines were arrested and detained […]".

[30] Award, *cit. supra* note 12, para. 799, where the Tribunal affirms: "Articles 95 and 96, also invoked by Italy, do not address the immunity of persons, namely individuals who may be described as State officials. They address, first in Article 95, the immunity of warships, and second in Article 96, the immunity of ships 'owned or operated by a State and used only on government non-commercial service' […]".

[31] Award, *cit. supra* note 12, paras. 795-811.

[32] On the international instruments potentially available in order to solve the dispute between Italy and India, see Del Vecchio, "Il caso dei due Marò e i possibili strumenti di soluzione obbligatoria della controversia", in *Scritti in onore di Giuseppe Tesauro*, *cit*. *supra* note 26, Vol. IV, p. 2631 ff.; Milano, "Il caso 'Marò': alcune considerazioni sull'utilizzo di strumenti internazionali di risoluzione delle controversie", SIDIBlog, 3 April 2013, available at: <http://www.sidiblog.org/2013/04/03/il-caso-maro-alcune-considerazioni-sullutilizzo-di-strumenti-internazionali-di-risoluzione-delle-controversi/>.

tent to deal with the first question mentioned above concerning which State had jurisdiction over the *Enrica Lexie* incident, as the respective claims were based on a number of UNCLOS provisions. Yet, in theory, the Tribunal does not seem to have had competence to deal with the second question mentioned above, concerning the immunity of the Marines, which was mainly based, as we will see, on general international law.

The exclusion of certain issues *ratione materiae* can be explained by looking at the aim of compromissory clauses included in international treaties. Their aim is to distinguish the category of disputes which fall within their scope, from those which fall outside their scope.[33] Accordingly, in the present case, claims based on rules which fall outside UNCLOS provisions should normally be excluded. Exceptionally, however, international specialized tribunals can, to an extent, have incidental jurisdiction, depending on the instrument that grants them jurisdiction.[34] The latter, therefore, potentially provided a way forward for the Arbitral Tribunal to establish its exceptional jurisdiction over the second question concerning the immunity of the two Italian Marines. In essence, the Tribunal had to decide whether the two questions concerning the jurisdiction over the incident and the immunity over the Marines could be exceptionally decided together, considering the second question incidental to the first one.

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[33] On the role of compromissory clauses, see CANNIZZARO and BONAFÉ, "Fragmenting International Law through Compromissory Clauses? Some Remarks on the Decision of the ICJ in the Oil Platforms Case", EJIL, 2005, p. 481 ff.

[34] The term incidental jurisdiction is commonly used in doctrine to mean the jurisdiction of an international court or tribunal over an issue that would otherwise be outside the court or tribunal's jurisdiction *ratione materiae*, but that falls within the court or tribunal's jurisdiction *ratione materiae* because it is incidental to the dispute. See TZENG, "The Implicated Issue Problem: Indispensable Issues and Incidental Jurisdiction", New York University Journal of International Law & Politics, 2018, p. 447 ff. The doctrine is unambiguous in considering that international tribunals have the power to decide on certain matters external to the one over which they have jurisdiction *ratione materiae*. This would be possible in the presence of clauses in international treaties which expressly refer to external norms ("referral clauses") or when, in order to correctly interpret or apply particular provisions of the convention in question, it is necessary to have recourse to fundamental or secondary norms of general international law (such as, for example, the law of treaties or the norms of international State responsibility). This is in accordance with the principle of systemic integration laid down in Art. 31(3)(c) of the Vienna Convention on the Law of Treaties, 23 May 1969, entered into force 27 January 1980, according to which international treaties are to be interpreted taking into account any relevant rule of international law applicable in the relationship between the parties. On the requirements that UNCLOS tribunals must assess in order to determine incidental jurisdiction, see SCHATZ, "Incidental Jurisdiction in the Award in "The 'Enrica Lexie' Incident (Italy v. India) – Part I", Völkerrechtsblog, 23 July 2020, available at: <https://voelkerrechtsblog.org/de/incidental-jurisdiction-in-the-award-in-the-enrica-lexie-incident-italy-v-india-part-i/>. See also RAJU, "The Enrica Lexie Award – Some Thoughts on 'Incidental' Jurisdiction (Part II)", 22 July 2020, Opinio Juris, available at: <http://opiniojuris.org/2020/07/22/the-enrica-lexie-award-some-thoughts-on-incidental-jurisdiction-part-ii/>. On this subject see also LOVE, "Jurisdiction over Incidental Questions in International Law", ASIL, 2017, p. 316 ff.; FORTEAU, "Regulating the Competition between International Courts and Tribunals. The Role of *Ratione Materiae* Jurisdiction under Part XV of UNCLOS", The Law and Practice of International Courts and Tribunals, 2016, p. 195 ff.

At this point, it is worth noting that establishing whether an international specialised tribunal facing a multifaceted dispute can exercise an "incidental jurisdiction" over substantive matters that fall outside the scope of its principal jurisdiction is of key importance for the case of the *Enrica Lexie*, and, at the same time, of key importance for international law as such. As pointed out by Marotti in his contribution, "this question reflects the more general tension between the consensual paradigm of international jurisdiction and the need to settle disputes in a complete and – to recall the wording of the Arbitral Tribunal – 'satisfactory' way".[35]

From the above we may deduce that in order to establish its competence *ratione materiae* over the question of immunity, the Arbitral Tribunal should have demonstrated the existence in the case at hand of exceptional requirements since its competence is otherwise limited to the interpretation and application of UNCLOS provisions. In order for such a tribunal to be able to exercise incidental jurisdiction, there are two necessary requirements whose recurrence appears necessary: first, the preliminary determination of the external issue must be *indispensable* to resolving the main dispute; second, the external issue must also be *ancillary* to the main issue, since it cannot constitute the real issue of the case nor the object of the claim. These requirements have already been affirmed several times by Arbitral Tribunals established on the basis of Annex VII of UNCLOS. For example, in the decision of 18 March 2015 in the *Chagos Marine Protected Area Arbitration*,[36] and in the decision of 21 February 2020 in the dispute between Ukraine and Russia on *Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait*.[37] Indeed, the Arbitral Tribunal in the latter decision clarified that, in order to qualify an external issue as indispensable and ancillary, it is necessary for the tribunal to first define "how the dispute before it should be characterized" and thus ascertain wherein resides "the weight of the dispute".[38] There are serious doubts that in the *Enrica Lexie* case the Arbitral Tribunal followed this approach. In addition, we would have expected solid arguments since the delicate issue of incidental competence is of crucial relevance for both the present case and for future disputes having to deal with incidental questions. Conversely, after explaining that the question of immunity is not covered by

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[35] MAROTTI, "A Satisfactory Answer? The Enrica Lexie Award and the Jurisdiction over Incidental Questions", in this Focus. The importance of striking a fair balance between the consensual paradigm of international jurisdiction and the need to settle disputes in a complete way was underlined in the past by doctrine, see CANNIZZARO and BONAFÉ, *cit. supra* note 33, *passim*.

[36] PCA Case No. 2011-03, paras. 220-221. In this regard, please refer to SCHATZ, "Incidental Jurisdiction", *cit. supra* note 34.

[37] *Ukraine v. the Russian Federation, Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait*, PCA Case No. 2017-06. For a commentary see SCHATZ, "The Award concerning Preliminary Objections in Ukraine v. Russia : Observations regarding the Implicated Status of Crimea and the Sea of Azov", EJIL: Talk!, 20 March 2020, available at: <https://www.ejiltalk.org/the-award-concerning-preliminary-objections-in-ukraine-v-russia-observations-regarding-the-implicated-status-of-crimea-and-the-sea-of-azov/>.

[38] See para. 194 of the decision.

any UNCLOS provisions, and after referring to only one judicial precedent,[39] together with various legal literature on the topic, the Tribunal decided that the entire dispute in the *Enrica Lexie* case addressed a number of questions relating to the interpretation and application of the UNCLOS and that all these questions could not be properly decided in the absence of any reference to the question of the immunity of the Marines.[40]

This absence of strong legal arguments is particularly difficult to understand, as pointed out by Marotti in his article, given the presence of two strong dissenting opinions. Both opinions address the architecture of the dispute itself, but from different angles; on the one hand, Dr Rao begins his analysis from the premise that there exist two distinct questions – one concerning the jurisdiction over the incident of 12 February 2012, and one concerning the immunity of the Italian officials – which in his opinion should have been separately examined; on the other hand, Judge Robinson begins from the basis that the immunity constitutes the real central question of the whole dispute and not an external one. The latter, in our view, appears a particularly convincing conclusion which deserved more attention before being rejected by the majority. According to this judge, the lack of the *ancillary* requirement is evident because the external issue of the functional immunity of the Italian riflemen not only could not be qualified as a "minor issue", but represented "the core element of the dispute […] the real issue in the dispute between the Parties",[41] as it proved to be decisive for the attribution of jurisdiction to Italy. It is also evident that the external issue of immunity was not *necessary* in order to solve the main dispute,[42] since this could have been decided by the recognition of concurrent jurisdiction of Italy and India,[43] and therefore by the affirmation of the legitimacy of the Indian criminal jurisdiction.[44]

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[39] *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Judgment of 25 August 1925, PCIJ Reports, Series A, No. 6, p. 18 ff. (Award, *cit. supra* note 12, para. 808).

[40] See Award, *cit. supra* note 12, para. 808, in which the arbitral tribunal merely stated that the issue of functional immunity was "preliminary or incidental to the application of the Convention" and that, in the absence of its definition, it could not "provide a complete answer to the question as to which Party may exercise jurisdiction". On the point see again MAROTTI, *cit*. *supra* note 35.

[41] See Award, *cit. supra* note 12, Dissenting opinion of Judge Robinson, para. 81.

[42] At para. 239 the Arbitral Tribunal itself had in fact recognized that "it was conceivable that the dispute between the Parties would be decided without a determination on the question of immunity".

[43] And this on the basis of the criteria of active and passive territoriality already referred to in para. 367 which states: "the alleged offence was commenced on board the Italian vessel, 'Enrica Lexie', and completed on board the Indian vessel, 'St. Antony'. According to the territoriality principle, both Italy and India are entitled to exercise jurisdiction over the incident". Similarly, para. 839 provides that: "[p]ursuant to Article 58, paragraph 2, and Article 92, each Party has exclusive jurisdiction over their respective ship involved in the incident, namely, Italy over the 'Enrica Lexie' and India over the 'St. Antony'. The Parties therefore have concurrent jurisdiction over the incident".

[44] Award, *cit. supra* note 12, para. 840, under which: "At the same time, pursuant to the principle of objective territoriality, well established in international law, a State may assert its jurisdiction in respect of offences committed outside its territory but consummated within its

Notwithstanding the additional factor of having the two clear and well-grounded dissenting opinions, the Tribunal simply stated that the exercise of its jurisdiction over the incident could not be satisfactorily answered without addressing the question of the immunity of the Italian Marines. According to the majority of the judges, since immunity from jurisdiction "operates as an exception to an otherwise-existing right to exercise jurisdiction", such exception "forms an integral part of the Arbitral Tribunal's task to determine which Party may exercise jurisdiction over the Marines".[45]

In sum, we believe that by establishing that the question of immunity "belongs to those 'questions preliminary or incidental to the application' of the Convention", the award has probably focused on the need to solve the dispute in a complete and satisfactory way, but without taking into enough consideration the other side of the coin, regarding the consensual paradigm of international jurisdiction. We are not taking here any stance with respect to the specific choice of the Tribunal, but rather affirming that, in light of the above illustrated relevance, the analysis of this procedural question might have deserved additional attention. It has been argued that this arbitration decision represents a precedent on which to build a new concept of incidental jurisdiction, such as to overcome the traditional definition.[46] Such a reconstruction does not seem to us to be acceptable, since the application of a surprisingly broad notion of incidental jurisdiction, without respecting the requirements that have evolved from jurisprudential practice, may instead result in an unlimited expansion of the jurisdiction of international tribunals. As has been clearly stated by the ICJ, it is necessary, given the unquestionable difficulty of balancing the need to adopt a satisfactory and complete decision and the need to safeguard the will expressed by the States by signing the international treaty and the arbitration clause contained therein, that international courts "must not exceed the jurisdiction conferred upon [them] by the Parties" but at the same time "exercise that jurisdiction to its full extent".[47]

5. The Functional Immunity of the Italian Marines: A Missed Opportunity to Ascertain Customary International Law

After having determined its competence over Italy's claim regarding the functional immunity of the Italian officials from Indian criminal jurisdiction, the Arbitral Tribunal also had to assess the merit of this claim. In this respect, the Tribunal established that India must be precluded from the exercise of its crimi-

territory or, as stated in 1926 by the PCIJ in the S.S. 'Lotus' judgment, 'if one of the constituent elements of the offence, and more especially its effects, have taken place [in its territory]'".

[45] Award, *cit. supra* note 12, paras. 809-811.

[46] Methymaki and Tams, "Immunities and Compromissory Clauses. Making Sense of Enrica Lexie (Part I)", EJIL: Talk!, 27 August 2020, available at: <https://www.ejiltalk.org/immunities-and-compromissory-clauses-making-sense-of-enrica-lexie-part-i/>.

[47] See *Continental Shelf* (*Libya*/*Malta*), Judgment of 3 June 1985, ICJ Reports 1985, p. 13 ff., para. 19.

nal jurisdiction over the Italian Marines, since the latter enjoy immunity *ratione materiae*.

The point to which we wish to draw attention, is that this clear-cut stance is based on customary international law. Namely, in the absence of a specific provision of the UNCLOS dealing with the matter of the functional immunity of State officials, the majority of the judges maintained that general international law may fill in this normative gap. Confirming the approach adopted to assess the procedural aspect, the Tribunal, in order to reach and support its conclusion on the merits of the immunity issue, simply relied on two precedents – one set by the International Criminal Tribunal for the Former Yugoslavia and one by the ICJ – and on the ILC's Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction.[48] In addition, the Tribunal took into consideration the fact that India, in its counter-claim, had not specifically questioned the existence of a general rule of international law with respect to the immunity from criminal jurisdiction of State officials.[49]

In effect, according to unanimous legal doctrine, as well as to international and domestic jurisprudence, a provision of customary international law which accords criminal (and civil) immunity to State officials, in respect of their official acts or in respect of the acts performed in their official capacity, exists.[50] However, the existence of such norm is crystal clear only when it comes to specific categories of State officials, such as diplomatic agents, heads of governments or States, and ministries of foreign affairs.[51] Yet, with the exception of these senior and diplomatic categories of State officials, unanimity with respect to other categories of State officials is far from being reached. On the one hand, we find both ILC Rapporteurs working on a study on the functional (as well as personal) immunity of State officials from foreign criminal jurisdiction, who have expressly accepted the old theory on immunity, according to which *all* State officials have, in principle, the right to functional immunity from foreign jurisdiction regarding their official acts.[52] This study certainly deserves attention and it is not surprising that the Arbitral Tribunal took it into account. This study alone, however, cannot be considered decisive for the resolution of the dispute between Italy and India or for other more recent cases. On the other hand, indeed, we find that the rule of customary international law regarding the functional immunity of State officials

[48] Award, *cit. supra* note 12, paras. 843-845.

[49] Award, *cit. supra* note 12, para. 846.

[50] CONFORTI, "In tema di immunità degli organi statali stranieri", RDI, 2010, p. 5 ff.

[51] To underline the fact that these categories of State officials should enjoy the benefit of immunity from foreign jurisdiction, the doctrine refers to them as "senior members of central governments". In this respect, see, for instance, FOX and WEBB, *The Law of State Immunity*, 3rd ed., Oxford, 2015; in relation to immunity of State officials, see also AKANDE and SHAH, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts", EJIL, 2010, p. 815 ff.

[52] See KOLODKIN, Second Report to the ILC on the Immunity of State Officials from Foreign Criminal Jurisdiction, UN Doc. A/CN4/631 (2010); ESCOBAR HERNÁNDEZ, Third Report to the ILC on the Immunity of State Officials from Foreign Criminal Jurisdiction, UN Doc. A/CN4/673 (2014).

from foreign criminal jurisdiction is, as said, somewhat dated and in many cases controversial. Most of contemporary international law scholars disagree about its scope of application and content.[53]

Moreover, as authoritatively affirmed in this respect: "[…] what States say at international level, [and] the statements of representatives of governments within the relevant international organs […] are not conclusive".[54] What should rather be considered conclusive are practice and domestic case law since they represent the actual context in which State authorities demonstrate their real will to enforce international law, and, with respect to immunity, practice and domestic case law are not uniform and consistent.[55] If we cannot expect an international tribunal to

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[53] In favour of immunity in the present case see RONZITTI, "The *Enrica Lexie* Incident", *cit*. *supra* note 1. On the different theories, see PISILLO MAZZESCHI, "Organi degli Stati stranieri (immunità giurisdizionale degli)", in *Enciclopedia del Diritto – Annali*, Milano, 2014, Vol. VII, p. 735 ff.; ID., "The Functional Immunity of State Officials from Foreign Jurisdiction: A Critique of the Traditional Theories", Questions of International Law, Zoom out 17 (2015), p. 3 ff.

[54] CONFORTI, "A Few Remarks on the Functional Immunity of the Organs of Foreign States", Questions of International Law, Zoom out 17 (2015), p. 69 ff. This, in our view, is also true with regard to States' responses in the ILC's work on State officials' immunity, which, on the contrary, RONZITTI (in this Focus) considers relevant.

[55] See, in the sense of the denial of functional immunity in an "automatic" manner, in addition to the judgment of the Kerala High Court in the case that concerns us (*Latorre and Others v. Union of India and Others*, 29 May 2012), for example: the judgment of the Supreme Court of Burma in the *Kovtunenko* case, 1 March 1960, ILR, Vol. 31, p. 259 ff.; the decision of the Belgian Court of Cassation in the *Sharon and Yaron* case (12 February 2003); the decision of the English High Court in the *Khurts Bat v. Investigating Judge of the Federal Court of Germany* case (Queen's Bench Division, 29 July 2011, paras. 70-100); the judgment of the Italian *Corte di Cassazione* of 24 February 2014 in the *Abu Omar* case, in which the Court states: "in this situation to consider the existence of a customary norm appears incorrect because there is no consolidated case law, there are no continuous and concordant official declarations of the States and there is no univocal doctrinal interpretation" (on this decision, and for other examples, see also NIGRO, in this Focus). It must be underlined that, on the point, the *Corte di Cassazione (Sez. I penale)* had adopted a completely opposite view in its decision in the *Lozano* case, 24 July 2008, No. 31171, IYIL, 2008, p. 346 ff., with a comment by SERRA; RDI, 2008, p. 1223 ff., in which the Court, confirming the lack of Italian jurisdiction in the well-known *Lozano/Calipari* case, (affirmed by the *Corte di Assise di Roma*, 3 January 2008, No. 21, IYIL, 2007, p. 287 ff., with a comment by SERRA) substantially moved from the assumption according to which the customary principle of immunity of the State for acts *jure imperii* implies as a "natural corollary" the immunity of its individual bodies for the same type of acts, otherwise the useful effect of the first principle would be depleted. Therefore, any act carried out by an individual-organ in the exercise of official functions delegated to it by the State, and as such explicating a sovereign activity, would be exempt from criminal judgment insofar as attributable to the State itself, unless the act in question constitutes an international crime. On the logical limits of the parallelism between the immunity of the individual-organ and the immunity of the State, see the considerations made by DE SENA and DE VITTOR, "Immunità degli Stati dalla giurisdizione e violazione di diritti dell'uomo: la sentenza della Cassazione italiana nel caso *Ferrini*", Giur. It., 2005, p. 255 ff. It should also not be forgotten that there are much more radical theses which even cast doubts on the general character of the immunity of States and the – consequent – exceptional character of the exercise of jurisdiction (in this sense, BIANCHI, "L'immunité des Etats et les violations graves des droits de l'homme: la fonction de l'interprète dans la détermination du droit international", RGDIP, 2004, p. 69

make express reference to all the domestic case law on the issue, we can expect a ruling supported by profound and significant grounds. Legal exception to general rules should always be adequately substantiated. This consideration appears even more important with reference to the subject of immunities, which affects the power of the State to exercise its jurisdiction, and therefore the fundamental right of the individual to take legal action. It is no coincidence that the development of guarantees for the protection of human rights has been accompanied by a progressive reduction in the scope of immunity. Moreover, jurisdiction in criminal matters is one of the most significant attributes of State sovereignty, almost the "hard core" of sovereignty, as evidenced, for example, by the modalities relating to the progressive construction of the European Union. In fact, criminal jurisdiction is one of the subjects which has not yet been transferred from the States to the institutions of the Union. Any hypothesis of renunciation or cession by the State in this matter, therefore, must be evaluated carefully, must be ascertained without any possibility of doubt, and above all must be interpreted restrictively. Since functional immunity entails an exception to the normal exercise of jurisdiction by the State of the forum (as well as a restriction of the right of access to a judge), the existence of the customary principle must be demonstrated rigorously and on the basis of a broad, consolidated and uniform international practice, as well as on a well demonstrated *opinio juris*.[56]

The mere attribution to the State of the act carried out by the individual as its organ does not, therefore, automatically entail the activation of functional immunity in favour of the latter. Nor can it be said that the customary norm on immunity covers all the acts performed by the individual-organ in the exercise of its functions, given that it is limited, as we know, to acts *jure imperii*. Moreover, even if an autonomous norm on functional immunity is considered to exist, its object is certainly not the indiscriminate protection of any individual-organ, for any conduct on behalf of the State.[57] At most, it aims, in fact, to provide protection from judicial interference to certain functions of the foreign State. In short, functional immunity is enjoyed, as has been said, only by those high-ranking individual-organs that normally entertain the State's relations with other subjects

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ff., or which view the granting of immunity as a mere international courtesy (cf. the considerations of LAUTERPACHT, "The Problem of Jurisdictional Immunities of Foreign States", BYIL, 1951, p. 227 ff., and, more recently, the position of CAPLAN, "State Immunity, Human Rights, and Jus Cogens: a Critique of the Normative Hierarchy Theory", AJIL, 2003, p. 744 ff.). For more details on the issue of functional immunity see DE SENA, *Diritto internazionale e immunità funzionale degli organi statali*, Milano, 1996; FRULLI, *Immunità e crimini internazionali. L'esercizio della giurisdizione penale e civile nei confronti degli organi statali sospettati di gravi crimini internazionali*, Torino, 2007; VAN ALEBEEK, *The Immunity of States and their Officials in International Criminal Law and International Human Rights Law*, Oxford, 2008; NIGRO, *Le immunità giurisdizionali dello Stato e dei suoi organi e l'evoluzione della sovranità nel diritto internazionale*, Padova, 2018.

[56] This writer highlighted these aspects in particular in relation to the decision of the *Cassazione* in the *Lozano* case, *cit. supra* note 55. See CATALDI and SERRA, "Ordinamento italiano e corpi di spedizione all'estero, fra diritto umanitario, diritto penale e tutela dei diritti umani", DUDI, 2010, p. 141 ff.

[57] In this sense, see already DE SENA, *cit. supra* note 55, p. 52 ff. and p. 241 ff.

of international law, or by individuals exercising specific functions protected by international law only for those acts that are typically performed by the organ they embody. This is the "hard core" of the functional immunity norm. Outside this perimeter, recognition of immunity cannot be presumed, but must always be demonstrated.

Additionally, the Arbitral Tribunal took a clear-cut stance on a matter that is topical for international relations, not only for relations between Italy and India in the case at stake. In 2008, in the case *Djibouti v. France*, the ICJ was required by the Parties to determine whether questions on immunity should be decided on a case-by-case basis or on the basis of a general rule of international law.[58] The ICJ opted for the first route and left open the issue of clarifying the conditions according to which immunity from foreign jurisdiction can apply. The existence of a customary principle on the functional immunity of military personnel as State organs will therefore continue to be the subject of debate in doctrine, also because we do not believe that in this regard the Tribunal (nor the ILC to whose work the Tribunal referred[59]) has made a significant contribution to the matter with the decision under consideration, having provided no decisive argument or evidence as to the existence of such a principle. The Tribunal affirmed the existence of the customary principle by referring, as mentioned above, to only two judgments[60] one of which is not relevant,[61] while the other is susceptible to criticism because it in turn recalls irrelevant case law.[62] As regards, more specifi-

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[58] Both submissions are available on the ICJ website, see *Certain Questions of Mutual Assistance in Criminal Matters* (*Djibouti v. France*), Judgment of 4 June 2008, ICJ Reports 2008, p. 177 ff.

[59] See Award, *cit. supra* note 12, para. 849, in which the Tribunal recalls the ILC Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction adopted in 2016.

[60] Award, *cit. supra* note 12, paras. 808 and 844, in which the Tribunal recalls, as evidence of the existence of a customary principle, the 29 October 1997 Judgment of the Appeal Chamber of the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v. Tihomir Blaškic*, as well as the ICJ decision in the case *Djibouti v. France*, *cit. supra* note 58.

[61] It should be noted that in *Djibouti v. France*, the ICJ did not rule on Djibouti's request to recognize functional immunity to the Prosecutor of the Republic and the Head of National Security from French criminal jurisdiction, stating that the exception of immunity had not been raised before the French courts. Therefore, the dispute can in no way provide evidence of the existence of the customary principle. On the point see Conforti, "In tema di immunità", *cit. supra* note 50, p. 10.

[62] The International Tribunal for the former Yugoslavia in its 1997 decision in the case *Prosecutor v. Blaškić* excludes the possibility of issuing injunctions for purposes of investigation against State bodies, stating that they enjoy functional immunity under customary international law. However, this assertion is not founded on solid grounds, since the Appeals Chamber cites, in support of its thesis, four cases, among which one (US Supreme Court, *Waters v. Collot*, 2 US 247 (1796)) is very old and above all does not concern immunity from criminal jurisdiction but rather immunity from civil jurisdiction, therefore is not very significant. The other cases cited (*McLeod*, *Eichmann* and *Rainbow Warrior*) tend to disprove, rather than confirm, this thesis. In fact, *McLeod* was tried by the Supreme Court of New York for the burning of the ship *Caroline* (*People v. McLeod*, 6 July 1841, Wendell's Law Reports, 1840-1841, p. 483 ff.) and, similarly, the two secret agents of the French Government were tried before the District Court of Auckland, New Zealand, for having blown up the ship *Rainbow Warrior* (Judgment of 4 November 1985). *Adolf Eichmann* (in ILR, Vol. 36, pp. 277-342) is not

cally, the immunity of military personnel abroad, it should be noted that the rules on jurisdiction over the latter are for the most part the subject of a conventional discipline, since they are set out in Status of Forces Agreements (SOFAs), which are based on the model of the agreement concluded within NATO in London in 1951. The practice of States to resort to conventional forms of protection must be interpreted as evidence of States' lack of conviction regarding the existence of a customary rule on the functional immunity of military personnel abroad, the existence of which would clearly make the conclusion of such agreements superfluous.[63]

Even if we accept that there is a rule of general international law which confers functional immunity on military personnel, there are still a number of questions concerning the applicability of this (alleged) rule of general international law to the marines in the *Enrica Lexie* case. While there is no doubt that the two soldiers were organs of the State,[64] in our opinion, contrary to the Tribunal's finding that the two marines were acting "in the exercise of their official functions",[65]

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relevant for the purpose of recognizing the existence of the customary principle because first of all it was a case of judging international crimes; in this dispute, moreover, the Court rejected the exceptions of lack of jurisdiction and tried and condemned *Eichmann*. Among other things, it should be noted that the arguments used to challenge the jurisdiction of the Court referred not to functional immunity, but to the different doctrine of the "act of State" (*Eichmann*'s actions were carried out in Germany and in execution of decrees of its government, attributable only to the German State, and foreign judges could not judge on such acts because they were carried out by a foreign State on its territory).

[63] The relationship of treaties with custom is one of exception to the rule. States, in order to derogate from a general rule, or in order to fill a gap in the general law, will put in place conventional rules. If the spread of agreements, with repetition of identical rules, is significant, it is believed that this circumstance may be sufficient to prove the existence of a customary rule, at least *in statu nascendi*. The proliferation of bilateral agreements between the sending State and the territorial State on the status of participants in multinational forces (SOFA) is undeniable. But it is precisely the continued, persistent proliferation of these treaties which, in our opinion, further confirms that the rule invoked by the Court does not exist, at least not for the time being. For further details on these aspects, please refer to CATALDI and SERRA, *cit. supra* note 56, p. 153 ff.

[64] According to the definition contained in Art. 4 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, what matters for the attribution of the status of State organ is the qualification of such subject under domestic law, as well as the fact that this subject has the power to represent the State or act on behalf of the latter in all those matters in which the latter exercises sovereign prerogatives. In the case of the two military personnel involved, there is no doubt that they were State organs as they were riflemen of the Italian Navy, and therefore a branch of the armed forces which, pursuant to Art. 110 of the Code of Military Order (Legislative Decree No. 66 of 15 March 2010) "constitutes the operational maritime component of the State's military defence". In addition, Law No. 130 of 2011 assigned to the Chief and members of the Navy embarked in anti-piracy function on commercial ships, respectively the roles of officer and judicial police officer for the repression of piracy offences under Arts. 1135 and 1136 of the Navigation Code. See Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentary, YILC, 2001, Vol. II, Part Two, p. 40. On this point, with reference to the case in question, see BUSCO and FONTANELLI, "Questioni di giurisdizione e immunità nella vicenda dell'Enrica Lexie, alla luce del diritto internazionale", Diritto penale contemporaneo, 2013, p. 40 ff.

[65] Award, *cit. supra* note 12, para. 862.

the presence of the marines on the *Enrica Lexie* was not justified by the need to protect State functions, but by the need to defend that specific commercial vessel from possible pirate attacks.[66] The *Enrica Lexie* was not a military ship authorized to repress piracy under Article 110 UNCLOS, nor was there any international anti-piracy cooperation coordinated by the United Nations or specifically established between Italy and India.[67] It should also be noted that the presence of military personnel on the Italian tanker was at the expense of the shipowner and not on the basis of an international agreement or a resolution of the Security Council,[68] but on the basis of domestic Italian Law No. 130 of 2011[69] and the agreement that the Ministry of Defence and the private confederation of Italian shipowners *Confitarma* concluded on 11 October 2011.[70] The hypothesis would have been quite different if the Italian State (and not individual ship owners) had decided to enlist military personnel on board all ships flying the Italian flag in piracy-prone areas. Only in this case could it be assumed, without any need of further demonstration, that the State was exercising its sovereign functions.[71] Therefore, even if we admit the existence of the customary principle of func-

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[66] In the same sense, see NIGRO, in this Focus. As expressly stated in Art. 5(6-*ter*) of Law No 130 of 2011, the use of military protection units may in no way entail additional costs for the State.

[67] The point is underlined by FOCARELLI, *Trattato di diritto internazionale*, 2015, p. 754 ff.

[68] As is well known, the Security Council has dealt with the repression of international piracy in particular with reference to events taking place off the coast of Somalia. It is worth remembering especially Resolution No. 1814 of 15 May 2008 with which the Security Council asked States to act in agreement with the Somali government to protect ships and humanitarian aid to Somalia, and Resolution 1851 of 16 December 2008 with which States are authorized to enter Somali territorial waters and adopt "all necessary means to repress acts of piracy and armed robbery" (para. 6). On the international actions against piracy, see GUILFOYLE (ed.), *Modern Piracy: Legal Challenges and Responses*, Cheltenham, 2013; KOUTRAKOS and SKORDAS (eds.), *The Law and Practice of Piracy at Sea: European and International Perspectives*, Oxford, 2014; DEL CHICCA, *La pirateria marittima*, Torino, 2016; BEVILACQUA, *Criminalità e sicurezza in alto mare*, Napoli, 2017.

[69] As already mentioned, this law authorized the presence of armed personnel on board commercial ships. In this regard, please refer to BEVILACQUA, "Counter Piracy Armed Services, The Italian System and the Search for Clarity on the Use of Force at Sea", IYIL, 2012, p. 50 ff.; RICCIUTELLI, "La recente normativa sulle misure di contrasto alla pirateria marittima", The Italian Maritime Journal, 2011, p. 2 ff.; RONZITTI, "Un passo avanti per la tutela delle navi italiane ma troppa cautela nella legge di conversione", Guida al diritto – Il Sole 24 Ore, No. 43, 2011, p. 54 ff.; HARLOW, "Soldiers at Sea: The Legality and Policy Implications of Using Military Security Teams to Combat Piracy", Southern California Interdisciplinary Law Journal, 2012, p. 561 ff.; TONDINI, "Impiego di NMP e guardie giurate in funzione antipirateria", Rivista marittima, 2013, p. 32 ff.

[70] The text of the agreement is available at: <http://www.unife.it/giurisprudenza/giurisprudenza/studiare/diritti-umani-conflitti-armati/materiale-da-archiviare/dudu-2013/salerno/A_101011_Protocollo_Difesa_CONFITARMA_UG.pdf>.

[71] Different opinions have been sustained in doctrine in this regard. See in particular: RONZITTI, "The *Enrica Lexie* Incident", *cit*. *supra* note 1; EBOLI and PIERINI, "Coastal State Jurisdiction Over Vessel Protection Detachments and Immunity Issues: The *Enrica Lexie* Case", Revue de droit militaire et de droit de la guerre, 2012, p. 117 ff.; CARELLA, *Il caso dei "marò" e il diritto internazionale*, Bari, 2013.

tional immunity as relied on by the majority of the judges, it is our opinion that such principle was not automatically applicable to the case at hand, since the two Marines, although exercising the typical functions connected to the security of the ship and its crew, were acting on behalf of private subjects and not on behalf of the Italian State. Therefore, also on this point, the Tribunal should have set out a more thorough and well-argued motivation.[72]

6. Concluding Remarks

The decision commented on here has the undoubted merit of putting an end to a long-standing dispute between the two States, leaving both of them satisfied, all things considered, with the result obtained. Italy has seen the recognition of the principle of functional immunity from criminal jurisdiction of its two soldiers, with the consequence that it does not have to return them to India and can instead prosecute them at home. The Government of New Delhi, for its part, obtained the Tribunal's decision confirming Italy's violation of the freedom of navigation on the high seas, with the consequent obligation to pay compensation for damages.

However, with all due respect to the Tribunal, with a 406-page judgment, dissenting opinions included, it was reasonable to expect more convincing and detailed arguments on the individual points decided. In fact, on the one hand, the Arbitration Tribunal treated as incidental an issue that was perhaps not so incidental, and, on the other hand, it acknowledged the existence and application of the customary rule on the functional immunity of military personnel without giving adequate reasons. In this regard, let us reiterate what has already been said above, namely that the adoption of an expanded notion of incidental jurisdiction lends itself to an unlimited extension of the jurisdiction of international courts and that the recognition of the existence and applicability of functional immunity must be adequately proven, as it involves a derogation from the normal criteria of attribution of jurisdiction as well as a restriction of the fundamental right of access to justice, provided by national and supranational systems of protection of human rights. The need to reach a compromise between the Parties in an equitable spirit has therefore prevailed over a strict application of the law. It remains only to take note of it.

[72] In the same sense, see in particular the Dissenting Opinion of Judge Patrick Robinson (paras. 63-70).