

Concurring and Dissenting Opinion

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1. As the Dispositif indicates, I am in substantial agreement with nearly all aspects of the Award of the Arbitral Tribunal, with the notable exception of its findings concerning the immunity of the Marines, on which I must respectfully dissent. I shall elaborate on my reasons for dissent below. In order to put my views into perspective, I will briefly identify the salient facts of the case and recall in brief the principal arguments presented by the Parties before the Indian courts and the present Arbitral Tribunal.

I. FACTUAL BACKGROUND TO THE PROSECUTION OF THE ITALIAN MARINES IN INDIA

2. The present case concerns an incident of firing that occurred on 15 February 2012 between 16:00-16:30 IST in the maritime area off the coast of India (Kerala state) at a distance of 20.5 nautical miles. It is admitted that the firing was done by two marines of the Italian Navy, Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone, positioned on the “Enrica Lexie”, an oil tanker flying the Italian flag, to protect the vessel from what they believed to be an impending piracy or armed robbery attack from a small Indian boat, the “St. Antony”, which they perceived to be on a steady collision course. At the time, the “Enrica Lexie” was transiting through a maritime area that was within the range of a “High Risk Area” for piracy designated by the International Maritime Organization. On the particular day of the incident, the seas were calm, and a lot of fishing activity was undertaken, with no reports or warnings about any piracy/armed attacks.
3. Witness statements were recorded in India, Italy, and at the hearing held by the Arbitral Tribunal in July 2019. According to the statements made by Captain Vitelli, who recorded the events in the log book of the “Enrica Lexie”, Captain Noviello, whose role was essentially to assist Captain Vitelli and Sergeant Girone, one of the Marines involved in the firing incident, first observed a small boat at a distance of 2.8 nautical miles coming towards the “Enrica Lexie”. The “St. Antony” did not change its course, despite physical warnings given to it when it was at distance of 800 metres. This resulted in the firing of “warnings shots”, first at a distance of 500 metres, later at 300 metres, and finally at 100 metres to avert collision and/or a pirate attack. The Indian boat, in the event, managed to move away after coming as close as 80 to 100 metres without incident, allowing the “Enrica Lexie” to resume its normal course.
4. While all necessary precautions were taken on board the “Enrica Lexie” as required in such cases, the button on the VDR was not pressed,¹ and, in the event, no data was preserved, even though it was a “reportable” incident.² The statements on the record do not provide a clear account of the

¹ The VDR was always on and hence in use, but it was necessary for the recording button to be pressed once in 12 hours only to save the data during the period to prevent it from over-writing. In reply to a question from Mr. Bundy, counsel for India, as to why the VDR was not pressed, Captain Vitelli explained that they “did not have any information regarding the fact that something happened [...] somebody had died or somebody had been injured”, and in such situations they “were not required, according to the regulation, to do that”. *See* Hearing Transcript, 15 July 2019, 62:15-19.

² In response to a question asked by the President of the Arbitral Tribunal on 15 July 2019 during examination of witnesses at the hearings held by it, Captain Noviello stated that “[t]he procedures to be adhered to in the event of a piracy attack are the procedures that Captain Vitelli complied with. And from my point of view, he has complied with all the procedures; with the exception of the voyage data recorder, which has a memory of about twelve hours. We didn't absolutely think about saving the communications back then, we didn't really think about saving the communications taking place on the bridge. It was a

number of persons whom those on board the “Enrica Lexie” saw on the “St. Antony”; whether they were armed; and whether the boat was engaged in manoeuvres typical of a pirate attack and had any equipment or implements commonly used in such an attack. It was also noted that the vessel could not communicate with the boat as the latter was not responding to attempts to engage in radio communication. Under the circumstances, the statements made by various members of the crew and the Captain of the “Enrica Lexie” concerning the perceived threat of piracy and action taken in response, including warnings given and their target, as well as the claim that the small fishing boat was on a collision course remain unverified and unverifiable, leaving much to conjecture and circumstantial evidence on this score.

5. On India’s case, the “St. Antony” was a small fishing boat with eleven men on board, which was passing by, after a night-long fishing session, from one area to another fishing area as part of an eight-day fishing expedition. According to Captain Fredy,³ the man in charge of the fishing boat, all those on board the “St. Antony” were asleep in the afternoon at the time of the incident, when he was suddenly awoken by the sound of firing of shots, only to see that Jelastine, who was at the helm of the boat, was bleeding and motionless. Soon thereafter he saw Pinku, at the bow, also succumbing to death due to a bullet wound. Captain Fredy said that he took control of the boat and managed to move it away when it was at a distance of 100 to 200 metres from the “Enrica Lexie” to avoid any further damage to his men and the boat. He also stated that bullets fell “like torrential rain” for nearly “two minutes”, without any “provocation”, sounding “no alarm”,

very hasty point in time, we didn't give it a thought; that was our mistake, and we unfortunately have to accept this”. See Hearing Transcript, 15 July 2019, 137:1-12.

³ See First Information Statement of Mr. Fredy, dated 15 February 2012 (**Annex IN-2**) (in this statement, Captain Fredy recorded, before the Kerala Police, that the firing came from the ship which passed them on their right side, heading north-west. The ship was 200 metres away and painted black atop and red at the bottom. He noted that “the bullets came in falling like torrential rain” for nearly “two minutes”, adding that “he abruptly helmed the boat away”. He later informed the owner of the boat, Mr. Prabhu, and appraised him of the situation adding that the firing came from the ship and killed two men without any “provocation”, sounding “no alarm”, making “no mike announcement” or “a warning shot fired”). See also India’s Written Observations, para. 2.10 (a summary account of the incident from the perspective of the Indian investigating authorities noted that “[o]n 15 February 2012 at about 4.30 p.m. Indian Standard Time, an Indian fishing boat, the St. Antony, engaged in fishing activity in India’s Exclusive Economic Zone at a distance of about 20.5 nautical miles off the Indian coast at Kollam, Kerala (at a position 09 degree 17.2 Minutes North Latitude and 76 Degree 01.8 minutes East Longitude), faced a volley of bullets fired from sophisticated automatic firearms from two uniformed persons on board an oil tanker ship, which was about 200 meters from the boat operating in clear weather. Two fishermen on St. Antony were fatally hit by the bullets fired from *the Enrica Lexie*, and the lives of nine other fishermen on the boat were endangered due to the firing. Valentine Jelastine, who was at the helm of the boat, received a bullet to his head; Ajeesh Pink, who was at the bow, received bullet hit on his chest. Both died on the spot. In addition to the casualties, the incident caused serious damage to the boat endangering the safe navigation of the fishing vessel”). For an account of the events as seen from St. Antony, see the summary as noted by the Arbitral Tribunal, see Award, paras 105-117. During the testimony given before the Arbitral Tribunal on 15 July 2019, Captain Fredy “distanced himself from the affidavit of 27 April 2012” he gave to the Italian authorities, Hearing Transcript, 15 July 2019, 165:20-166:2, referring to Affidavit of Fredy J., 27 April 2012 (**Annex IT-168**), See also Award, para. 116.

making “no mike announcement” or “a warning shot fired”. He reported the death of two of his men as a result of the incident, which was promptly conveyed to the local police authorities at Neendakara. According to Captain Fredy, the incident occurred at about 31 nautical miles north-west from Neendakara. He reached Neendakara at about 11 p.m. with the remaining men on the boat, including the two dead.

6. The Indian MRCC Mumbai, and two Indian Coast Guard vessels, the “Lakshmibai” and “Samar”, were duly alerted and swung into action to trace the vessel involved in the incident. Once they identified the “Enrica Lexie” as the vessel involved in the incident, they requested it change its course and directed it to enter Indian territorial waters. The Captain of the “Enrica Lexie” confirmed that he asked for written instructions to change the course of the vessel and received such instructions by e-mail from the MRCC Mumbai. India and Italy disagree as to whether the written message was received before or after the “Enrica Lexie” had already decided to change its course. Once it was in Indian territorial waters, investigations were conducted by the police authorities of Kerala. Following the same, the relevant authorities decided to arrest the two Marines, detain the “Enrica Lexie”, and proceed to take necessary action in accordance with Indian law against the two Marines.

II. ITALIAN OBJECTIONS TO PROSECUTION OF THE MARINES IN INDIA

7. Italy opposed India’s exercise of jurisdiction, first by filing a writ petition before the High Court of Kerala and later before the Supreme Court of India.
8. Italy opposed the exercise of jurisdiction by India before the Kerala High Court and the Supreme Court of India on several grounds. In brief they could be summarised as follows:
 - (i) The incident was the result of warning shots fired by the Marines at an approaching boat to prevent or avert an attempted pirate attack on the “Enrica Lexie”.
 - (ii) As this incident took place in a maritime area beyond the 12 nautical mile territorial waters of India (and not being an incident attracting the provisions and the authority of India with respect to the contiguous zone, which extends up to 24 nautical miles), Italy contended that it is, at best, an incident of navigation in terms of Article 97, paragraph 1, of the Convention. As such, Italy argued that (a) it has exclusive jurisdiction to institute penal or disciplinary proceedings against the master or any other person in the service of the ship before its judicial or administrative authorities; and (b) in pursuance of Article 97, paragraph 3, of the Convention, no State other than Italy could order arrest or detention of the Italian vessel “even as measure of investigation”.

- (iii) Accordingly, Italy submitted that any exercise of jurisdiction by India over the incident, on the basis of the 1976 Indian Maritime Zones Act (and the Gazette Notification of 27 August 1981 issued thereunder) and/or other domestic Indian laws (the 1860 Indian Penal Code, the 1973 Criminal Procedure Code and the SUA) is contrary to India’s obligations as a State party to the Convention.
 - (v) The “Enrica Lexie” was called to Indian territorial waters under a false premise and the arrest of the Marines amounted to abduction.
 - (vi) Italy also submitted, “alternatively” and “without prejudice” to the submissions already made, that India cannot exercise its jurisdiction to prosecute the Marines as they are Italian officials, being part of the Naval judicial police, and were engaged in the discharge of their official functions at the time of the incident. Thus, Italy asserted that the Marines were entitled to immunity under general international law.⁴
9. Before the present Arbitral Tribunal, Italy elaborated on certain of the grounds, noted above, as follows:
- (i) Italy also contended that by “directing and inducing the Enrica Lexie to change course and proceed into India’s territorial sea through a ruse, as well as by interdicting the Enrica Lexie and escorting her to Kochi, India violated Italy’s freedom of navigation, in breach of UNCLOS Article 87(1) (a), and Italy’s exclusive jurisdiction over the Enrica Lexie, in breach of Article 92 of UNCLOS”.⁵
 - (ii) In addition, by “directing and inducing the Enrica Lexie to change course and proceed into India’s territorial sea through a ruse, India abused its right to seek Italy’s cooperation in the repression of piracy, in breach of Article 300 read in conjunction with Article 100 of UNCLOS”.⁶

⁴ See Notification and Statement of Claim, paras 16-19, n. 22. See also Writ Petition No. 4542 of 2012, 22 February 2012 (**Annex IT-15**), para. 11, (“without prejudice”) and, pp 14-15; Writ Petition No. 135 of 2012, 19 April 2012 paras 26-27, 45 (**Annex IT-16**); Judgment of the High Court of Kerala, 29 May 2012, paras 46-48 (**Annex IT-17**); Special Leave Petition 20370 of 2012, 11 July 2012, pp 126-127 (**Annex IT-18**) (noting that “the Learned Single Judge misdirected himself in giving factual conclusions relating to the alleged incident when the same was beyond the scope of the writ petition no. 4542 of 2012, which challenged *only* the jurisdiction of the Respondents to initiate the criminal proceedings and prosecution and *alternatively* raised the issue sovereign immunity and functional immunity of Petitioners 1 and 2 from prosecution in India for the alleged incident”), *Republic of Italy & Ors v. Union of India & Ors*, Supreme Court of India, Judgment of 18 January 2013, Judgment of Kabir CJ, pp 36-40 (**Annex IT-19**) [emphasis added].

⁵ Hearing Transcript, 18 July 2019, 240:11-18.

⁶ Hearing Transcript, 18 July 2019, 240:19-24.

III. LACK OF CONCLUSIVE EVIDENCE CONCERNING THE CASE OF PIRACY

10. The investigations conducted by India⁷ and Italy⁸ separately did not reveal any conclusive evidence concerning the circumstances under which firing by the Marines was called for. Having regard to the statements of those on board the “Enrica Lexie”, Italy was unable to produce credible evidence to substantiate its case that the Marines were responding to a possible threat of piracy/armed robbery.
11. On the other hand, statements made by Captain Fredy were neither consistent nor helpful in establishing facts of the incident from his side. As most of these facts, allegations, or claims made by the Parties deal with the cause of death of the two Indian fishermen, which is of concern only to the national court of proper jurisdiction, subject to applicable rules of evidence, it is not necessary for this Opinion to dwell upon them.⁹
12. Insofar as the reasons for the “Enrica Lexie”’s change of course, following the request from the MRCC, Mumbai, are concerned, however, the oral testimony given by the Tribunal Witnesses at the Hearing provided considerable clarification, as is set out in detail in Part III, Section C of the Award.

IV. LEGAL PROCEEDINGS BEFORE THE KERALA HIGH COURT AND THE INDIAN SUPREME COURT

13. It may be recalled that the Kerala Police filed a charge sheet on 18 May 2012 under Sections 302, 307, and 427, read with Section 34 of the Indian Penal Code and Section 3 of the SUA.¹⁰ While the Kerala High Court upheld India’s jurisdiction over the Marines and rejected the Italian plea of immunity, the Supreme Court in its order of 18 January 2013 did not deal with the matter of immunity, instead, it upheld India’s jurisdiction and directed the Union of India to establish a Special Court to dispose of the case as expeditiously as possible. It also directed the prospective Special Court to examine Italy’s objections to its jurisdiction, paying special attention to the provisions of the Convention concerning piracy. Immediately after this judgment, India took steps to establish the Special Court, which was constituted on 15 April 2013. The NIA was put in charge of conducting the necessary investigations. However, upon a petition filed by the Marines before

⁷ For the investigations conducted by India, see Award, paras 155-169.

⁸ For the investigations conducted by Italy, see Award, paras 194-203.

⁹ For factual background to the case, see Award, Part III.

¹⁰ For a mention of these charges and the two grounds on which the Kerala High Court rejected the objections raised by Italy against the exercise of jurisdiction by India, see *Republic of Italy & Ors v. Union of India & Ors*, Supreme Court of India, Judgment of 18 January 2013, Judgment of Kabir CJ, para. 9 (**Annex IT-19**).

the Supreme Court in January 2014, the NIA was blocked from filing charges before the Special Court. Italy also requested India to amend the charge sheet against the Marines by dropping any reference to the SUA, which India agreed to do.¹¹

14. Italy questioned the validity of the Gazette Notification of 1981 issued under the 1976 Indian Maritime Zones Act, which extended Indian laws, in particular its criminal laws, to the exclusive economic zone.¹² India, on the other hand, defended its right to issue the notification given its sovereign rights and exclusive jurisdiction over the living and non-living resources and the need to protect the oil platforms in its continental shelf, asserting that in enforcing Indian laws, due account would be taken of the facts of each case.¹³ The Supreme Court was in the event not persuaded to order the termination of the criminal proceedings against the Marines. Ultimately, India asserted its jurisdiction over the incident and the Marines on the basis of passive personality or objective territoriality principles of international law.¹⁴ Italy, on the other hand, opposed Indian jurisdiction on this score, claiming that it amounted to an exercise of extra-territorial jurisdiction in contravention of Indian law.¹⁵

V. THE PROCEEDINGS BEFORE THE ARBITRAL TRIBUNAL

15. Given the priority it attached to the immunity of the Marines from the jurisdiction of India, and after failing to obtain relief on this score from the Indian judicial process with which it was engaged for over three years, Italy decided in June 2015 to submit the dispute to arbitration under Annex VII of the Convention, invoking Article 286; Article 287, paragraphs 1 and 5; and Article 288, paragraph 1. According to Italy, the Arbitral Tribunal so constituted has jurisdiction, among other matters, to adjudge and declare (i) that “India violated and continues to violate Italy’s

¹¹ See India’s Written Observations on Italy’s Request for the Prescription of Provisional Measures, paras 3.41-3.42.

¹² Italy’s Reply, paras 6.3-6.17.

¹³ See India’s Counter-Memorial, paras 4.19 -4.24 *see also* India’s Counter-Memorial, paras 4.2-4.18, in its submissions, India defends the 1981 Notification under the 1976 Maritime Zones Act and questions the right of Italy to raise the matter before the Arbitral Tribunal as a new dispute, asserting that the Arbitral Tribunal lacks the jurisdiction). *See also* Written Submissions submitted on behalf of the Union of India by the Additional Solicitor General, 12 September 2012 (**Annex II-275**), in which it was noted that the Notification could and should be read harmoniously with India’s rights and obligations under the Convention in respect of the exclusive economic zone.

¹⁴ See India’s Counter-Memorial, paras 3.6-3.18, 4.15-4.24; Table I, ‘Principle of Passive Criminal Jurisdiction’, pp 55-63, Table II, ‘Domestic Criminal Legislation Conferring Jurisdiction over Crimes Committed on Board National Ships’, pp 64-76.

¹⁵ In this regard, it is noted that Italy relied on two expert opinions of Justice Deepak Verma to submit that India cannot exercise extra-territorial jurisdiction over foreigners when the act complained of took place outside Indian territorial jurisdiction. *See* Justice Deepak Verma, First Expert Report: The “Enrica Lexie” Incident, dated 24 August 2016; Justice Deepak Verma, Second Expert Report: The “Enrica Lexie” Incident, dated 25 July 2017. *See also* Italy’s Memorial, para. 6.4; Italy’s Reply, para. 5.11.

exclusive right to institute penal and disciplinary proceedings against the Marines, in breach of Article 97(1) of UNCLOS”;¹⁶ (ii) by “ordering the detention of the *Enrica Lexie* between February and May 2012, and investigating those on board, India violated the prohibition against the arrest or detention of a ship by a State other than the flag State in breach of Article 97(3) of UNCLOS”;¹⁷ and (iii) by “asserting and continuing to exercise its criminal jurisdiction” over the Marines, “India is in violation of its obligation to respect the immunity of the Marines as Italian State officials exercising official functions in breach of Articles 2(3), 56(2), 58(2) and 100 of UNCLOS”.¹⁸

16. India, on the other hand, requested the Arbitral Tribunal, in its final submissions, among others, “to adjudge and declare that it has no jurisdiction with respect to the case submitted to it by Italy”. It is India’s argument that it is exercising its jurisdiction in respect of the death of two of its fishermen who were “legitimately exercising their right to fish in India’s exclusive economic zone”.¹⁹ India also takes the view that the prosecution of the Italian Marines is based on the passive personality and objective territoriality principles, well recognized in State practice, rather than on any provisions of the Convention, and that it had started exercising such jurisdiction against the Marines only after they were found in the territory of India.

A. EXISTENCE OF A DISPUTE WITHIN THE MEANING OF ARTICLE 288, PARAGRAPH 1, OF UNCLOS CONCERNING ITALY’S CLAIM OF EXCLUSIVE JURISDICTION

17. The Award deals extensively with the arguments of the Parties on the basis of evidence placed on the record as well as gathered at the time of oral hearings in July 2019.²⁰ The Parties disagreed as to the relevance and interpretation or application of a number of Articles of the Convention. It has been the consistent view of India that the dispute between the Parties is one that is related to the exercise of jurisdiction by India based on its law and the same does not fall within the scope of the Convention. It is important to note, however, that India, in its Counter-Memorial, not only defended its authority to prosecute the Italian Marines under Indian law but also justified its actions in directing the “*Enrica Lexie*” to move towards the port of Kochi, noting that in so doing, it acted in conformity with the Convention and did not violate Articles 87.²¹ India went further

¹⁶ Italy’s Memorial, p. 188.

¹⁷ Hearing Transcript, 18 July 2019, 241:4-8.

¹⁸ Hearing Transcript, 18 July 2019, 241:9-15.

¹⁹ *See* Award, para. 230.

²⁰ For an overview of the facts and evidence, *see* Award, Part III.

²¹ *See* Counter-Memorial of India, Chapter 6.

and made counter-claims alleging that Italy breached its obligations and violated India's rights under the Convention.²²

18. On the existence of dispute within the meaning of Article 288, paragraph 1, of the Convention, the Arbitral Tribunal held that there is a dispute "which is appropriately characterized as a disagreement as to which State is entitled to exercise its jurisdiction over the incident of 15 February 2012 involving the 'Enrica Lexie' and the 'St. Antony' which raises questions under several provisions of the Convention, including Articles 56, 58, 59, 87, 92, 97, 100 and 300 on the interpretation or application of which the Parties have different views".²³ However, with respect to the claim of Italy on the immunity of the Marines, the Arbitral Tribunal noted that "the dispute may raise, but is not limited to, the question of immunity of the Marines".²⁴
19. The Arbitral Tribunal, after an extensive examination of the relevant articles of the Convention, decided that both India and Italy, in their capacity as flag States, and in accordance with Article 92 of the Convention, are entitled to exercise jurisdiction concurrently over the incident. It based this conclusion on the fact that the Marines on board the "Enrica Lexie" fired shots that killed two fishermen on the Indian boat "St. Antony". In the process, it rejected the Italian argument that India used "ruse and force" to direct the "Enrica Lexie" to change its onward course to enter its territorial sea, and that India is entitled to investigate the death of two of its fishermen and seek cooperation in that respect from the Italian captain and others on the "Enrica Lexie". The Arbitral Tribunal held that such actions do not amount to interference with Italy's right to exercise its freedom of navigation under Article 87, paragraph 1. The Arbitral Tribunal also rejected the Italian claim that it enjoyed exclusive jurisdiction over the firing incident under Article 97, paragraphs 1 and 3, as, on the facts of the case, it did not involve collision, and the incident could not be properly treated as an incident of navigation.
20. I agree with these findings of the Arbitral Tribunal.
21. With respect to Italy's claim that the 1976 Maritime Zones Act and the 1981 Notification issued thereunder are not compatible with the provisions of the Convention, the Arbitral Tribunal found²⁵ that: (1) it is established that no enforcement action was taken by the Indian authorities against the "Enrica Lexie" or the Marines in the Indian exclusive economic or contiguous zones; (2) India has not reiterated the argument before the Arbitral Tribunal that its conduct was based on the 1976

²² India's Counter-Memorial, Chapter 8.

²³ Award, para. 243.

²⁴ Award, para. 243.

²⁵ See Award, paras 356-60.

Maritime Zones Act and 1981 Notification, even if the pleadings of the Union of India before the Indian courts during the initial course of the internal proceedings relied on them to justify its conduct; and (3) India instead relied on the territoriality and passive personality principles under international law as justification for its conduct. For its claim that the Indian legislation is incompatible, Italy referred, from among the Articles of the Convention, to only Article 87, paragraph 1, subparagraph (a), concerning freedom of navigation on the high seas in support of its submission that India is thereby in breach of the Convention.

22. In addition, the Arbitral Tribunal noted that in its examination of the submission of Italy that India breached its right to freedom of navigation, in Part V, Section B.1(b), of the Award, it found that it is not based on the alleged extension of the Indian legislation to the exclusive economic zone. Accordingly, the Arbitral Tribunal concludes that, even if questions may arise as to the compatibility of that legislation with the Convention, it sees no need to address that issue in the context of the present dispute.²⁶
23. I voted in favour of the operative paragraph A.6 of the Dispositif, not only for the reasons thus noted by the Award, concluding that there is no need to deal with the issue in the present context of the dispute as defined under paragraph A.1 of the Dispositif, but also because the Arbitral Tribunal is not competent, in my opinion, to deal with the matter in the first instance. It is well-established that India did not invoke the same as a justification for its conduct in the exclusive economic or contiguous zones or for framing the charges under its national criminal law for the purpose of prosecution before its courts. It is thus not only a matter which is moot, but also one that does not arise under any of the provisions considered by the Arbitral Tribunal in deciding on the dispute, as material for its jurisdiction, that is, which State has jurisdiction over the incident in accordance with the provisions of the Convention.

B. JURISDICTION WITH RESPECT TO IMMUNITY OF THE ITALIAN MARINES

24. Turning then to the other issue, the immunity of the Marines, more important from the perspective of Italy, the Arbitral Tribunal examined the question whether the matter of immunity of State officials could be treated as a dispute within the meaning of Article 288, paragraph 1, of the Convention. On the basis of its examination of all the articles relied upon by Italy to argue that the Arbitral Tribunal has such jurisdiction, the Arbitral Tribunal came to the conclusion that the “Convention may not provide a basis for entertaining an independent immunity claim under general international law”.²⁷ This is a significant finding that should have put an end to the case

²⁶ Award, paras 360-61.

²⁷ Award, para. 809.

before the Arbitral Tribunal, leaving the dispute on the issue of immunity of the Marines to the Special Court of India.

25. The Arbitral Tribunal, however, rejecting the objections of India by a majority vote, found that (i) it “is one aspect out of several, albeit an important one, that requires examination in resolving the Parties’ dispute”;²⁸ and (ii) to resolve the dispute “satisfactorily” and “conclusively”, it is incumbent upon it to examine the “issue of immunity of the Marines” which “is an incidental question that necessarily presents itself in the application of the Convention in respect of the dispute before it”.²⁹ The Arbitral Tribunal thus founded its jurisdiction over Italy’s claim on the immunity of the Marines on the ground that it is an issue that is incidental to the more general dispute over which it has jurisdiction, that is, which State is entitled to exercise its jurisdiction over the incident.
26. On the merits of the Italian claim concerning the immunity of the Marines, the Arbitral Tribunal, by a majority vote, decided that “the Marines were, as members of Italy’s armed forces, fulfilling a State function”³⁰ when they were deployed on “Enrica Lexie” as part of a VPD pursuant to a mandate from the Italian State, as provided in the Italian law on VPDs to ensure “the protection of the ships flying the Italian flag in transit in international maritime spaces at risk of piracy”.³¹ In this connection, it took the view that the fact that “the Marines were stationed on a merchant vessel, and not a warship” did “not alter [...] the character of their mission as part of the VPD, undertaking acts in an official capacity attributable to the Italian State”.³²
27. I respectfully disagree with these conclusions of the Arbitral Tribunal both on the issue of jurisdiction over, and on the merits of, the Italian claim concerning the immunity of the Marines. I am of the view that the Arbitral Tribunal erred in treating the issue of immunity as an incidental matter to the dispute between Italy and India concerning the “jurisdiction over the incident”. I am also of the view that its conclusion that the Italian Marines are entitled to immunity from Indian jurisdiction does not have a basis in general (customary) international law. I entirely disagree with its finding that the Marines are entitled to immunity from Indian jurisdiction, even when they were on a commercial (cargo) vessel, under private ownership, whereas immunity under general

²⁸ Award, para. 806.

²⁹ Award, para. 811.

³⁰ Award, para. 859.

³¹ Award, para. 859, *citing* Law Decree No. 107 of 12 July 2011, of the Italian Republic, Article 5, paragraph 1 (**Annex IT-91**).

³² Award, para. 859.

international law is reserved in respect of a ship “used only on government non-commercial service”.³³

28. I will first deal with my point that the issue/dispute concerning the immunity of the Marines is not and cannot be treated as an issue incidental to the dispute between Italy and India concerning the jurisdiction over the incident.

1. Lack of Jurisdiction of the Arbitral Tribunal over the Immunity of the Marines: A Dispute Not Within the Scope of Article 288, paragraph 1, of the Convention.

29. India submitted that the subject of immunity of State officials from foreign criminal jurisdiction is not a subject covered by any of the provisions of the Convention and hence not within the competence of the Arbitral Tribunal to deal with under Article 288, paragraph 1. Italy, on the other hand, submitted that Article 2, paragraph 3; Article 56, paragraph 2; Article 58, paragraph 2; Article 95; Article 96; and, as a subsidiary argument, Article 297, paragraph 1, subparagraphs (a) and (b), provide a basis for the Arbitral Tribunal to assume jurisdiction over the issue of immunity. The Arbitral Tribunal held in this regard that it could exercise its jurisdiction over the issue of immunity, not as an issue covered by the Convention, but as an incidental issue necessary to discharge its mandate fully and completely. In so deciding, for reasons noted below, I consider that the Arbitral Tribunal erred and exceeded its competence.
30. The Arbitral Tribunal’s decision to assume jurisdiction over the issue of immunity, although it found that it is not as an issue covered by the Convention, but on the ground that it is an issue incidental to the dispute and necessary to discharge its mandate fully and completely is fundamentally wrong and based on untenable propositions. It is not unusual for a tribunal to face more than “one aspect out of several, albeit an important one, that requires examination in resolving the Parties’ dispute”.³⁴ As was observed by the ICJ in the case between Bolivia and Chile, “in the past, applications that are submitted to the Court often present a particular dispute that arises in the context of a broader disagreement between parties”.³⁵ In that connection, the Court observed that “while it may be assumed that sovereign access to the Pacific Ocean is, in the

³³ UNCLOS, Article 96.

³⁴ Award, para. 806.

³⁵ *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objections, Judgment of 24 September 2015, I.C.J. Reports 2015, p. 592, para. 32, referring to *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2011 (I), pp 85-86, para. 32; *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988, pp 91-92, para. 54; *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, I.C.J. Reports 1980, pp 19-20, paras 36-37.

end, Bolivia's goal, a distinction must be drawn between that goal and the related but distinct dispute presented by the Application, namely, whether Chile has an obligation to negotiate Bolivia's sovereign access to the sea and, if such an obligation exists, whether Chile has breached it".³⁶ In any case, the problem whether it constituted as an incidental issue did not arise in that case because "[t]he Application", as the Court noted, "does not ask the Court to adjudge and declare that Bolivia has a right to sovereign access".³⁷

31. Courts or tribunals faced with such a situation have undertaken first to isolate the real issue of the case and the object of the claim on the basis of an objective examination of the application or notification, the memorials and counter-memorials, and the arguments placed before it. The Arbitral Tribunal, following this well-established practice,³⁸ noted that the real issue of the case

³⁶ *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objections, Judgment of 24 September 2015, I.C.J. Reports 2015, p. 592, para. 32. We may also note in this connection that there are differing views on the issue whether a general reference to the obligation to respect the principle of 'sovereign equality' of States in a treaty obliges the Court to deal with a dispute concerning sovereign immunity of State officials, for example, as is the case in Article 4, paragraph 1, of the United Nations Convention against Transnational Organized Crime of 15 November 2000 (hereinafter the "Palermo Convention"). The International Court of Justice held that "[a]s the Court has previously observed, the rules of State immunity derive from the principle of sovereign equality of States (*Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, I.C.J. Reports 2012 (I), pp. 123-124, para. 57). However, Article 4 does not refer to the customary international rules, including State immunity, that derive from sovereign equality but to the principle of sovereign equality itself. Article 4 refers only to general principles of international law. In its ordinary meaning, Article 4(1) does not impose, through its reference to sovereign equality, an obligation on States parties to act in a manner consistent with the many rules of international law which protect sovereignty in general, as well as all the qualifications to those rules". See *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, I.C.J. Reports 2018, p. 292 at p. 321, para. 93.

Dissenting from the view of the majority, in a joint dissenting opinion Vice-President Xue, Judges Sebutinde and Robinson and Judge *ad hoc* Kateka observed on the other hand that "[f]rom the time the principle of sovereign equality of States was included in the 1988 Drugs Convention to the time of its inclusion in the 1997 International Convention for the Suppression of Terrorist Bombings, the 1999 International Convention for the Suppression of the Financing of Terrorism, the 2000 Palermo Convention and the 2003 Corruption Convention, that principle has functioned as a conventional troubleshooter to keep in check the conduct of States in the exercise of their jurisdiction, whether territorial or extraterritorial. It serves as a standard against which the conduct of States is to be measured in the discharge of their treaty obligations". See *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment (Joint Dissenting Opinion of Vice-President Xue, Judges Sebutinde and Robinson and Judge *ad hoc* Kateka), I.C.J. Reports 2018, p. 340 at 355, para. 48. "Now we see clearly the function of the reference to the principle of sovereign equality of States: it is a compendious way of saying that acts, such as a breach of foreign State immunity, are a breach of the principle of sovereign equality of States as laid down in Article 4(1)". See *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment (Joint Dissenting Opinion of Vice-President Xue, Judges Sebutinde and Robinson and Judge *ad hoc* Kateka), I.C.J. Reports 2018, p. 340 at 355, para. 49.

³⁷ *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objections, Judgment of 24 September 2015, I.C.J. Reports 2015, p. 592, para. 32.

³⁸ It may be recalled that the arbitral tribunal in the *Chagos Marine Protected Area Arbitration* case, noted that: "[u]ltimately, it is for the Tribunal itself while giving particular attention to the formulation of the dispute chosen by the Applicant, to determine on an objective basis the dispute dividing the parties, by examining the position of both parties" (*Fisheries Jurisdiction (Spain v. Canada)*, *Jurisdiction of the Court*, Judgment, I.C.J. Reports 1998, p. 432 at p. 448, para. 30), and in the process "to isolate the real

and the object of claim is a dispute between the Parties concerning the interpretation or application of the Convention and that it is about which State is entitled to exercise jurisdiction over the incident of 15 February 2012 involving the “Enrica Lexie” and the “St. Antony”. The Arbitral Tribunal, despite its finding that none of the articles relied upon by Italy to claim that India is in violation of its obligation to respect the immunity of the Marines are “pertinent and applicable in the present case”, found fit to exercise jurisdiction over the dispute concerning immunity of the Marines on the ground that it is an important matter arising out of several issues raised by the dispute, deserving a full and complete answer as “*an incidental question* that necessarily presents itself in the application of the Convention in respect of the dispute before it”.³⁹

32. In the process, the Arbitral Tribunal relied upon the oft-cited dictum from the *Certain German Interests in Upper Silesia* case to conclude that it is entitled to assume jurisdiction over the dispute between the Parties concerning the immunity of the Marines. In so doing, the Arbitral Tribunal failed to see that the facts and issues involved in that case were different and not comparable to the facts and claims of the present case to offer necessary guidance and justification to treat the issue of immunity of the Marines as an ‘incidental issue’ to the dispute concerning the jurisdiction over the incident.
33. It may be observed that, in the case concerning *Certain German Interests*, the Permanent Court of International Justice made a distinction between rights held by Germany in its own right as a sovereign as opposed to its interests as a holder of private property. Germany sought the jurisdiction of the Permanent Court in respect of a dispute with Poland, in accordance with Article 23 of the 1922 Geneva Convention concluded between Germany and Poland for the protection of private property interests over large industrial estates of German Upper Silesia. The issues involved in the case were related to differences of opinion between the German and Polish Governments respecting the construction and application of the provisions of Articles 6 to 22.
34. We may recall in this connection that, following the First World War, Poland acquired sovereignty over Upper Silesia as a successor to Germany. Poland opposed the jurisdiction of the Permanent Court on the ground that, under Article 256 of the Treaty of Versailles, as a State succeeding Germany, it was entitled to enact a measure of “liquidation” concerning property, rights, and interests which Germany had enjoyed prior to the creation of Poland. Poland claimed that any dispute between the two parties in this regard was subject to settlement by recourse to

issue in the case and to identify the object of the claim (*Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 457 at p. 466, para. 30)”, PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 208.

³⁹ Award, para. 811 [emphasis added].

the German-Polish Mixed Arbitration Tribunal constituted in pursuance of the Treaty of Versailles.

35. The Permanent Court rejected Poland's objection to its jurisdiction on the ground that there was a dispute between the two States concerning "the sphere of application of Articles 6 to 22" of the Geneva Convention;⁴⁰ and that the "jurisdiction possessed by the Court under Article 23 in regard to differences of opinion between the German and Polish Governments with respect to the construction and application of the provisions of Articles 6 to 22 concerning the rights, property and interests of German nationals is not affected by the fact that the validity of these rights is disputed on the basis of texts other than the Geneva Convention".⁴¹ The Permanent Court noted that it may be indispensable to interpret the Treaty of Versailles in respect of the rights claimed by Poland under Article 256 of the same as part of its examination of the merits of the case but determined that such matters would "constitute merely questions preliminary or incidental to the application of the Geneva Convention".⁴² In this connection, the Permanent Court asserted that "the interpretation of other international agreements is indisputably within the competence of the Court if such interpretation must be regarded as incidental to a decision on a point in regard to which it has jurisdiction".⁴³
36. It is clear from the above that in the case of *Certain German Interests*, it was necessary for the Permanent Court to deal with the rights of Poland under Article 256 of the Treaty of Versailles in order to come to a conclusion on its obligations under the Geneva Convention. Under the circumstances, issues arising under Article 256 of the Treaty of Versailles were treated as "incidental" to the Permanent Court's jurisdiction under Article 23 of the Geneva Convention. There exists no such inseparable or integral link between the issue of immunity and the issue of exclusive jurisdiction claimed by Italy in the present case.
37. Further, while the immunity of the Marines is submitted as one issue out of several, as the Arbitral Tribunal rightly noted, that does not necessarily make it an incidental issue, as immunity of State officials is not linked to any of the subject matters dealt with by the Convention. In fact, it is

⁴⁰ *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Judgment of 25 August 1925, P.C.I.J. Series A, No. 6, p. 16.

⁴¹ *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Judgment of 25 August 1925, P.C.I.J. Series A, No. 6, p. 18.

⁴² *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Judgment of 25 August 1925, P.C.I.J. Series A, No. 6, p. 18.

⁴³ *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Judgment of 25 August 1925, P.C.I.J. Series A, No. 6, p. 18. For a summary of the case, see *Certain German Interests in Upper Silesia*, Judgment of 25 August 1925 (Series A, No. 6) (Jurisdiction), in *Summaries of Judgments, Advisory Opinions and Orders of the Permanent Court of International Justice*, ST/LEG/SER.F/1/Add.4 (United Nations, New York 2012), pp 52-59.

specifically *excluded* from the Convention by virtue of the strictly limited context in which “complete immunity” is recognized. It is notable that whereas Article 95 provides for the right of warships on the high seas “to have complete immunity from the jurisdiction of any State other than the flag State”, Article 96 qualifies the same, limiting it *only* in respect of “ships owned or operated by a State or used *only* on government non-commercial service” (emphasis added). An equally significant conclusion that emerges from Article 27 on the definition of warship, is that the immunity warships enjoy under the Convention comprises immunity only in respect of the officer in command, “duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent and manned by a crew which is under regular armed forces discipline”.

38. Moreover, the issue of immunity of State officials, even if it is an important aspect of the Italian case is a subject that lies outside the scope of the Convention, like issues of “sovereignty or other rights over the continental or insular land territory”.⁴⁴ Inasmuch as issues of sovereignty are excluded from the scope of the Convention under Section 3 of Part V, immunity of State officials, as an attribute of the principle of sovereignty of States under international law, should, likewise, be deemed to have been excluded.
39. An examination on an “objective basis”⁴⁵ of the various submissions made by Italy before the Arbitral Tribunal makes it quite clear that the issue of immunity of the Marines is submitted to the Arbitral Tribunal, not as an incidental issue, but as a core issue deserving of treatment as an independent dispute. It is clear that the “object of [Italy’s] claim”⁴⁶ is to preclude India from exercising its jurisdiction over the Marines, and for this purpose, from the very outset of the dispute, Italy advanced the claim of immunity independently of its other claim that Italy, as the flag State, enjoyed exclusive jurisdiction over the incident.⁴⁷ In effect, it is evident that Italy brought before the Arbitral Tribunal two different disputes: one, as the Arbitral Tribunal noted,

⁴⁴ See Article 298(1)(a) where it is noted that where “any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over the continental or insular land territory” is excluded from the scope of the dispute settlement of the UNCLOS even in the case of those States which have not excluded disputes concerning “sea boundary delimitations, or those involving historic bays or titles” by an express declaration to be made at the time of signing, ratification, or accession to the Convention or at any as provided under Article 298.

⁴⁵ Award, para. 231, referring to PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People’s Republic of China)*, Award on Jurisdiction and Admissibility of 29 October 2015, para. 150.

⁴⁶ Award, para. 231, citing *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 457 at p. 466, para. 30.

⁴⁷ See the Statement of Sir Daniel Bethlehem, the Italian Counsel at the hearings held by the Arbitral Tribunal on 8 July 2019, Hearing Transcript, 8 July 2019, 45:22-46:4, 46:20-23, cited in Award, para. 225.

as to “which State may exercise jurisdiction over the incident [of 15 February 2012]”⁴⁸ and the other concerning the issue of immunity of the Marines, opposable only to the jurisdiction being exercised by India.

40. The fact that the issue of immunity is an independent dispute is also further supported by the fact that the Arbitral Tribunal’s determination that both India and Italy enjoyed concurrent jurisdiction over the incident is based on Article 92 dealing with the exclusive jurisdiction of the flag State. In arriving at this conclusion it did not have to interpret or apply any of the articles cited by Italy in defence of its claim that India violated its obligations under the Convention by not respecting the immunity of its Marines. It is self-evident that the issue of immunity would not even have arisen if there was a collision between the “Enrica Lexie” and the “St. Antony” and the Tribunal concluded that Italy alone had exclusive jurisdiction over the incident under paragraphs (1) and (3) of Article 97.
41. The Arbitral Tribunal, on the other hand, to reach the conclusion it did on the dispute concerning immunity, as will be shown below, had to examine the matter under general international law and did not find any of the articles of the Convention, on which Italy relied for this purpose, as applicable.

2. Identification of an “Incidental Matter” to a Dispute within the Scope of Article 288, paragraph 1, of UNCLOS

42. It is generally agreed that the Convention does provide a basis for treating some issues as incidental to a dispute under Article 288, paragraph 1. But what can be treated as an incidental issue or not is strictly governed by two important features of the Convention. First, the Convention is framed as a constitution of the oceans; and in that sense it is not a comprehensive and “self-contained regime”.⁴⁹ Second, the Convention, as an outcome of the negotiations held from 1974

⁴⁸ Award, para. 235.

⁴⁹ Bruno Simma, ‘Self-contained Regimes’ (1985) 16 *Netherlands Yearbook of International Law*, 111. This is a concept that has become current in the context of the development of international law of State responsibility, and Article 55 (*Lex specialis*) of the ILC Draft Articles on State Responsibility, which provides “These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or the implementation of international responsibility of a State are governed by special rules of international law”. See James Crawford, ‘Symposium: The ILC’s State Responsibility Articles: The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect’ (2002) 96 *AJIL* 874, in which Professor (now Judge) Crawford, former ILC Special Rapporteur on State responsibility, noted that the Articles on State Responsibility “presume that international law is a unified body of law”. “But”, he added, “this ‘unification’ can be understood only in a limited sense”. Noting further that “the degree of unification or conflict in international system is both political and (in relation to existing regimes) a question of interpretation”, he took the view that “there cannot be, at the international level, any truly self-contained regime, hermetically sealed against bad weather”, without denying however that as a general matter, “if states to wish to create such a regime

to 1982, not counting the discussions held in the United Nations Seabed Committee during 1968 to 1974 and later during 1990-1994 leading to the conclusion of the 1994 supplementary Agreement by way of implementation of Part XI of the Convention, is treated as a package deal. The provisions of Part XV on settlement of disputes are part of that package deal. After all, as observed by a commentator, with the exception of the ICJ, nearly all of the tribunals in the international arena, including ITLOS and arbitral tribunals envisaged under Annex VII of the Convention, are “treaty bodies” or “specialized bodies”, and, as such, it is a well-established principle in international law that, in order to ascertain their jurisdiction, international courts and tribunals are required to determine whether or not the subject-matter of the dispute falls within the provisions of the treaty under which they are established. This requirement must be assessed as an element of jurisdiction *ratione materiae* under the heading of what is usually called today the “platform test”.⁵⁰

43. The Convention, regarded as the “Constitution for the Oceans”,⁵¹ does allow for the interpretation and application of its provisions considering principles of international law that govern the subject matters covered by those provisions. Matters concerning the conservation of fisheries, marine environment and bio-diversity, pollution due to oil spills, efficient management of resources in

(still governed by international law), there seems to be nothing to stop them”. As an example of a self-contained regime, it is often argued that the European Union is one such regime. Crawford avers that it may be so in “good weather”, pp 879-880. But see for example, Trevor C. Hartley, ‘International Law and the Law of the European Union—A Reassessment’, (2001) 72 *British Yearbook of International Law* 1, cited by Crawford at n. 22, p. 880.

⁵⁰ Mathias Forteau, ‘Regulating the Competition between International Courts and Tribunals: The Role of *Ratione Materiae* Jurisdiction under Part XV of UNCLOS’ (2016) 15 *The Law and Practice of International Tribunals* 190, 191-192, referring to the observations of the ICJ in the case of *Oil Platforms (Islamic Republic of Iran v. the United States of America)*, Preliminary Objections, Judgment of 12 December 1996, I.C.J. Reports, 1996, p. 803, at pp 809-810, para. 16. The relevant passage in the judgment reads: “It is not contested that several of the conditions laid down by this text have been met in the present case: a dispute has arisen between Iran and the United States; it has not been possible to adjust that dispute by diplomacy and the two States have not agreed ‘to settlement by some other pacific means’ as contemplated by Article XXI. On the other hand, the Parties differ on the question whether the dispute between the two States with respect to the lawfulness of the actions carried out by the United States against the Iranian oil platforms is a dispute ‘as to the interpretation or application’ of the Treaty of 1955. In order to answer that question, the Court cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the violations of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain, pursuant to Article XXI, paragraph 2”.

⁵¹ Ambassador Tommy Koh of Singapore, in his capacity as President of the United Nations Conference on the Law of the Sea at the time of the signing ceremony of the Convention held at Montego Bay, Jamaica, noted that after a long and arduous journey for 14 years, the international community succeeded in adopting a comprehensive “Constitution for the Oceans”, covering some “25 subjects and issues”, thanks to many innovative techniques and methods of negotiations adopted. The Convention was adopted by consensus without putting it to vote, and it does not allow for reservations – thus deviating from the standard procedure usually applicable to multilateral treaty-making. See Remarks by President Tommy T.B. Koh, Third United Nations Conference on the Law of the Sea of 10 December 1982, available at <www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm>.

the exclusive economic zone, marine scientific research, and the balancing of the freedom of navigation and security interests of coastal States, on the one hand, and those of the major maritime powers including those in respect of military uses of the oceans and suppression of piracy, on the other, are examples of subjects in respect of which the international law of the sea is constantly evolving. Principles of international law, adopted by States by way of codification and progressive development, relating to the lawful use and optimum management of the sea where otherwise not incompatible with the provisions of the Convention, as noted in Article 293, are admissible as applicable law in deciding a dispute concerning the interpretation or application of the Convention. In that sense, “the UNCLOS is not a self-contained treaty”.⁵²

44. Nevertheless, there are clear limits on the exercise of jurisdiction by the courts or tribunals, including those constituted under Annex VII of the Convention, elected by States under Article 287, to settle disputes involving the interpretation or application of Convention. These limits are inherent in the scheme of the settlement of disputes under Part XV, which is a part and parcel of the package deal that characterises the nature of the Convention.

3. The Scheme of the Settlement of Disputes under Part XV of the Convention

45. The scheme for the settlement of disputes embodied in Part XV of the Convention is complex and carefully crafted. It is limited in scope to the interpretation or application of the Convention. It is essential for tribunals constituted in accordance with Part XV of the Convention to exercise judicial caution to avoid abuse to which it is open, and to limit their jurisdiction strictly in respect of disputes on subject matters relevant only to the exercise of their mandate, which is the “interpretation or application of the Convention”.⁵³ There are two good reasons for this. For one,

⁵² Mathias Forteau, ‘Regulating the Competition between International Courts and Tribunals: The Role of *Ratione Materiae* Jurisdiction under Part XV of UNCLOS’ (2016) 15 *The Law and Practice of International Tribunals* 190, 195.

⁵³ On the background and history of negotiations on Part XV dispute settlement provisions, see A. O. Adede, ‘Settlement of Disputes arising under the Law of the Sea Convention’ (1975) 69 *AJIL* 798, 798-818; A.O. Adede, ‘Law of the Sea—The Integration of the System of Settlement of Disputes under the Draft Convention as a Whole’ (1978) 72 *AJIL* 84, 84-95.

For an in-depth analysis of the relationship between Article 288 (1) and 297(1) (essentially “a jurisdiction-affirming provision in an article otherwise devoted to limitations on the exercise of compulsory dispute settlement”), see PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, paras 309-318, citing Virginia Commentary, Vol. V, pp 92-94; *Official Records of the Third United Nations Conference on the Law of the Sea, Volume V (Summary Records, Plenary, General Committee, First, Second and Third Committees, as well as Documents of the Conference, Fourth Session)*, Informal Single Negotiating Text, Part IV, Art. 18, UN Doc. A/CONF.62/WP.9/Rev.1, 6 May 1976; *Official Records of the Third United Nations Conference on the Law of the Sea, Volume VI (Summary Records, Plenary, General Committee, First, Second and Third Committees, as well as Documents of the Conference, Fifth Session)*, Revised Single Negotiating Text, Part IV, Art. 17, UN Doc. A/CONF.62/WP.9/Rev.2, 23 November 1976; *Official Records of the Third United Nations Conference on the Law of the Sea, Volume VIII (Informal Composite Negotiating Text,*

compulsory jurisdiction in international law is an exception to the basic principle that the consent of States parties to a dispute is the basis of the jurisdiction of international courts and tribunals. Secondly, it is well-accepted that UNCLOS is the result of a “package deal”⁵⁴ and adopted by States parties to it, by consensus, providing for multiple uses in a given maritime area. In the process, the package deal succeeded in designing a Convention that accommodates interests arising from the exercise of sovereign rights and exclusive jurisdiction by coastal States over the exclusive economic zone, without undermining or subordinating the rights of other States in respect of the freedoms of the high seas guaranteed by the Convention beyond the 12-mile limit of the territorial sea.⁵⁵ By way of balancing the competing and sometimes conflicting interests,

Sixth Session), Informal Composite Negotiating Text, Art. 296, UN Doc. A/CONF.62/WP.10, 15 July 1977; *Official Records of the Third United Nations Conference on the Law of the Sea, Volume VIII (Informal Composite Negotiating Text, Sixth Session)*, Informal Composite Negotiating Text Revision 1, Art. 296, UN Doc. A/CONF.62/WP.10/Rev.1, 28 April 1979; *Official Records of the Third United Nations Conference on the Law of the Sea, Volume VIII (Informal Composite Negotiating Text, Sixth Session)*, Informal Composite Negotiating Text Revision 2, Art. 296, UN Doc. A/CONF.62/WP.10/Rev.2, 11 April 1980; *Official Records of the Third United Nations Conference on the Law of the Sea, Volume VIII (Informal Composite Negotiating Text, Sixth Session)*, Informal Composite Negotiating Text Revision 3, Art. 297, UN Doc. A/CONF.62/WP.10/Rev.3, 22 September 1980.

On the basis of the analysis thus done, the arbitral tribunal in the *Chagos Marine Protected Area Arbitration* concluded that “[w]here a dispute concerns ‘the interpretation or application’ of the Convention, and provided that none of the express exceptions to jurisdiction set out in Article 297(2) and 297(3) are applicable, jurisdiction for the compulsory settlement of the dispute flows from Article 288(1). It is not necessary that the Parties’ dispute also fall within one of the cases specified in Article 297(1)”. PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 317.

On the possibility that decision-makers may differ on the interpretation or even abuse the dispute settlement provisions “to expand the compulsory jurisdiction of Part XV courts and tribunals” in “several ways”, given that the Convention’s dispute settlement scheme is organized under three different Sections in Part XV of the Convention, it is noted that “[f]irst, the procedural preconditions of compulsory jurisdiction in section 1 can be read down; second, the limited scope of compulsory subject-matter jurisdiction under section 2 can be expanded by broadening the meaning of ‘any dispute concerning the interpretation or application of this Convention’; and, third, the limitations and exceptions to compulsory jurisdiction in section 3 can be restricted”. See Stefan Talmon, ‘The Chagos Marine Protected Area Arbitration: Expansion of the Jurisdiction of UNCLOS Part XV Courts and Tribunals’ (2016) 65 *International and Comparative Law Quarterly* 927, 929-30.

For an analysis of the scheme for the settlement of disputes under Part XV of the Convention in the context of the *South China Sea Dispute*, see Sreenivasa Rao Pemmaraju, ‘The South China Sea Arbitration (The Philippines v. China): Assessment of the Award on Jurisdiction and Admissibility’ (2016) 15 *Chinese Journal of International Law* 265, paras 10-22.

⁵⁴ For an authoritative account on the Convention as a product of a “package deal”, see Hugo Caminos and Michael R. Molitor, ‘Progressive Development of International Law and the Package Deal’ (1985) 79 *AJIL* 871, 873 (alluding approvingly to the view of Judge Jennings). The article highlights the view of the United States and other delegations which attach great importance to the provisions of the Convention because they were negotiated as a package offering *quid pro quo* (at p. 875), which was one of the reasons the Convention does not permit reservations except in respect of specific provisions in Part XV to promote settlement of disputes.

⁵⁵ For a first-hand account of the negotiation history concerning the rights and duties of the coastal State and the rights of third States within the exclusive economic zone, see Jorge Castaneda, ‘Negotiations on the Exclusive Economic Zone at the Third United Conference on the Law of the Sea’, in Makarczyk, J. (ed.), *Essays in International Law in Honor of Judge Manfred Lachs*, (Institute of the State and Law of

the Convention makes reference to “external rules” in about 100 of its provisions, which, as noted by a commentator, concern, depending upon the provisions, “other rules of international law”, “generally accepted international regulations” or “standards”, “generally recommended international minimum standards, whether subregional, regional or global”, other treaties, agreements or “applicable international instruments” and “resolutions and recommendations of other international organizations”.⁵⁶

46. Similarly, Article 300 also requires States parties to the Convention to “fulfil in good faith the obligations assumed under this Convention and [to] exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right”. In spite of the references noted thus to “external rules” including the reference to “other rules of international law” in Article 293, it is understood that these references cannot in and of themselves provide a basis for enlarging the jurisdiction *ratione materiae* of the tribunals constituted under Annex VII or of ITLOS to cover disputes under general international law unless the law in question has a bearing on the utilization or management of the oceans.
47. The integrated structure of the “package deal” highlights the fact, as the third paragraph of the Preamble of the Convention stated, that “the problems of ocean space are closely interrelated and need to be considered as a whole”. There is good reason therefore to operate the scheme of compulsory settlement of disputes with every possible judicial caution, keeping in view the “need for uniform interpretation and application of the Convention” to prevent “the disintegration of the

the Polish Academy of Sciences, (Martinus Nijhoff Publishers, Kluwer Academic Publishers Group 1984), pp 605-623, reprinted by the Ministry of External Relations, Government of Mexico (New York, 2002), pp 42-43.

See also Dolliver Nelson, ‘Exclusive Economic Zone’ (2008) Max Planck Encyclopedia of Public International Law, para. 14. (noting, “[t]he UN Convention on the Law of the Sea in particular declares that the EEZ is subject to ‘a specific legal regime’ (Art. 55). In the light of Art. 55 it seems difficult to maintain the thesis that the EEZ is part of the high seas. It is *sui generis*, with the important consequence that it is neither the territorial sea nor the high seas but partakes of the characteristics of both regimes”). In that sense, it could be said that the rights and duties of the coastal States, on the one hand, and that of the other States in the exclusive economic zone, coexist. As Professor and a former Judge of the ITLOS, Tullio Treves noted: “[c]oexistence between activities on the high seas is disciplined by the reciprocal due regard rule of Art. 87 (2) UN Convention on the Law of the Sea. If these activities become activities in the exclusive economic zone their coexistence is disciplined by the due regard rules of Arts 56 (2) and 58 (3). This gives a role to “the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law”. Other States should be aware that this possibility may become a fact”. *See* Tullio Treves, ‘Law of the Sea’ (2011) Max Planck Encyclopedia of Public International Law, para. 38.

⁵⁶ For a mention of these and other examples as noted under various articles of the Convention, *see* Mathias Forteau, ‘Regulating the Competition between International Courts and Tribunals: The Role of *Ratione Materiae* Jurisdiction under Part XV of UNCLOS’ (2016) 15 The Law and Practice of International Tribunals 190, 195, n. 12.

delicate compromises so carefully negotiated to offer balanced protection to competing rights and interests”.⁵⁷

48. In a pertinent comment, the arbitral tribunal in the *Chagos Marine Protected Area Arbitration* noted thus:

The negotiation of the Convention involved extensive debate regarding the extent to which disputes concerning its provisions would be subject to compulsory settlement. The distrust with which some participants at the Conference viewed compulsory settlement is evidenced by the inclusion in the final texts of substantial carve outs, in Article 297, for disputes relating to the exercise of sovereign rights and jurisdiction in the exclusive economic zone. It is also apparent in the option, in Article 298(a)(i), for States to exclude the delimitation of maritime boundaries from dispute settlement, subject only to the requirement of compulsory conciliation. Given the inherent sensitivity of States to questions of territorial sovereignty, the question must be asked: if the drafters of the Convention were sufficiently concerned with the sensitivities involved in delimiting maritime boundaries that they included the option to exclude such disputes from compulsory settlement, is it reasonable to expect that the same States accepted that more fundamental issues of territorial sovereignty could be raised as separate claims under Article 288(1)?⁵⁸

49. Answering the question, the arbitral tribunal noted that “had the drafters intended that such claims could be presented as disputes ‘concerning the interpretation or application of the Convention’, the Convention would have included an opt-out facility for States not wishing their sovereignty claims to be adjudicated, just as one sees in Article 298(1)(a)(i) in relation to maritime delimitation disputes”.⁵⁹
50. In the *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* between Ukraine and the Russian Federation, the arbitral tribunal endorsed this view even more directly when it concluded that the fact that “a sovereignty dispute is not included either in the limitations on, or in the optional exceptions to, the applicability of compulsory dispute settlement

⁵⁷ A.O. Adede, ‘Settlement of Disputes Arising under the Law of the Sea Convention’ (1975) 69 AJIL 798, 817, referring to Louis B. Sohn, ‘Settlement of Disputes Arising out of the Law of the Sea Convention’ (1975) 12 San Diego L. Rev. 495, 516. See also A.O. Adede, ‘Law of the Sea: The Scope of the Third-Party, Compulsory Procedures for Settlement of Disputes’ (1977) 71 AJIL 305, p. 308, for the clarification on the scope of compulsory third party settlement of disputes under the Convention, keeping in view of the negotiating history of relative rights of coastal States in different maritime zones for different purposes and that of the other States. He observed “that the extent to which coastal state activities may be subject to compulsory third-party proceedings would correspond somewhat to the nature and the extent of the coastal state’s competence [...]. There is, comparatively, more scope for third-party settlement proceedings with respect to issues over which the coastal state only exercises ‘jurisdiction’; less scope for third-party settlement procedures on issues over which a coastal state exercises ‘exclusive jurisdiction’; and even less scope for compulsory procedures as issues become those over which a coastal state exercises ‘exclusive rights’ or ‘sovereign rights’.”

⁵⁸ PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 216.

⁵⁹ PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 217.

procedures supports the view that the drafters of the Convention did not consider such a dispute to be ‘a dispute concerning the interpretation or application of the Convention’.”⁶⁰

51. Accordingly, where more than one issue is involved in a dispute strictly regulated by the Convention, it is, as pointed out by Mathias Forteau, “crucial for the purpose of assessing jurisdiction *ratione materiae* under Part XV of the UNCLOS” to determine whether the issues involved are related to each other as subject matters covered by the Convention “or to the contrary must be considered as an obstacle to jurisdiction”.⁶¹ For example, in the *Chagos Marine Protected Area Arbitration*, the arbitral tribunal held that “[w]here the ‘real issue in the case’ and the ‘object of the claim’ do not relate to the interpretation or application of the Convention [...] an incidental connection [...] is insufficient to bring the dispute, as a whole, within the ambit of Article 288(1)”.⁶² In the *South China Sea Arbitration* between the Philippines and China, the arbitral tribunal noted that only when a dispute can “fairly be said to concern the interpretation or application of the Convention”, it is deemed to come within the scope of Article 288(1).⁶³
52. In the *Dispute Concerning Coastal State Rights*, the arbitral tribunal first identified the real issue involved, which it determined to be whether there existed “a sovereignty dispute over Crimea, and if so, whether such dispute is ancillary to the determination of the maritime dispute brought before the Arbitral Tribunal by Ukraine”.⁶⁴ On this score, the arbitral tribunal came to the conclusion that the Parties’ dispute over Crimea

is not a minor issue ancillary to the dispute concerning the interpretation or application of the Convention. On the contrary, the question of sovereignty is a prerequisite to the Arbitral Tribunal’s decision on a number of claims submitted by Ukraine under this Convention. Those claims simply cannot be addressed without deciding which State is sovereign over Crimea and thus the “coastal State” within the meaning of provisions of the Convention invoked by Ukraine.⁶⁵

⁶⁰ PCA Case No.2017-06: *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. The Russian Federation)*, Preliminary Objections, Judgment of 21 February 2020, para.156.

⁶¹ Mathias Forteau, ‘Regulating the Competition between International Courts and Tribunals: The Role of *Ratione Materiae* Jurisdiction under Part XV of UNCLOS’ (2016) 15 *The Law and Practice of International Tribunals* 190, p. 200.

⁶² PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 220.

⁶³ PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People’s Republic of China)*, Award on Jurisdiction and Admissibility of 29 October 2015, para. 150.

⁶⁴ PCA Case No.2017-06: *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. The Russian Federation)*, Preliminary Objections, Judgment of 21 February 2020, para. 161.

⁶⁵ PCA Case No.2017-06: *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. The Russian Federation)*, Preliminary Objections, Judgment of 21 February 2020, para. 195.

53. Accordingly, it concluded that it cannot deal with that issue even if, as Ukraine argued, “the relative weight of the dispute lies with the interpretation or application of the Convention”.⁶⁶
54. Thus, a dispute concerning an “external rule”, like the one related to the immunity of State officials from foreign jurisdiction, cannot be treated as a dispute “concerning the interpretation or application” of the Convention. It is further clear, as the Arbitral Tribunal itself noted, that the question of immunity from jurisdiction, by definition, operates as “an exception to an *otherwise-existing* right to exercise jurisdiction” over the merits of the case.⁶⁷
55. In other words, the issue of immunity is fundamentally a procedural objection to be pleaded as an exception to jurisdiction which is otherwise found to exist in spite of it. Judges Higgins, Kooijmans, and Buergenthal, in their Separate Opinion in the *Arrest Warrant* case put it thus: “Immunity is the common shorthand phrase for immunity from jurisdiction”.⁶⁸ Accordingly, the distinguished judges stressed: “If there is no jurisdiction *en principe*, then the question of an immunity from a jurisdiction which would otherwise exist simply does not arise”.⁶⁹ Moreover, as the ICJ emphasized in the case, “the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction”.⁷⁰
56. On the basis of the above analysis, the question concerning immunities of State officials, by any reckoning, cannot and, in fact, did not have any bearing on the interpretation or application of any of the provisions of the Convention; hence, is not an incidental issue.

⁶⁶ PCA Case No.2017-06: *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. The Russian Federation)*, Preliminary Objections, Judgment of 21 February 2020, para. 196.

⁶⁷ Award, para. 808 [emphasis added].

⁶⁸ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, I.C.J. Reports 2002, p. 63 at p. 64, para. 3 [internal quotations omitted].

⁶⁹ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, I.C.J. Reports 2002, p. 63 at p. 64, para. 3. The Court also noted that “it is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction”. *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, p. 3 at p. 19, para. 46.

⁷⁰ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, p. 3 at pp 25-26, para. 59.

4. Essential Distinction between Competence to Deal with a Dispute and ‘Applicable Law’ to Settle the Dispute on Merits

57. At this stage, it may be opportune to deal with the submission of Italy to which the Arbitral Tribunal refers in support of assuming jurisdiction over the issue of immunity. Italy argued that “[t]here is nothing unusual in an international court or tribunal with jurisdiction over a dispute concerning the interpretation or application of a treaty deciding questions of international law that necessarily arise in the resolution of the dispute”.⁷¹ In the interest of balance, the Arbitral Tribunal also recalled the point made by India when it noted that “ITLOS, as well as Annex VII tribunals, are called to apply, besides the UNCLOS itself ‘other rules of international law not incompatible with [the] Convention’.”⁷² While it is undeniable, as noted above, that the Convention is not a self-contained treaty and is open to constant evolution, subject to the needs of the international community and in light of the developments in the field of science and technology, it can only rely upon such principles of international law that are “not incompatible with the Convention”. The important point to note in this regard is that the Arbitral Tribunal clearly confuses issues of “applicable law” under Article 293, which governs the merits of a matter that otherwise fall under its competence, with issues relating to its competence under Article 288, paragraph 1, which is a preliminary matter.⁷³
58. Equally irrelevant is Italy’s claim that the Arbitral Tribunal is competent to decide the issue of immunity because “it would make no sense whatsoever for the Tribunal to determine that a state has jurisdiction under the Convention without, at the same time, deciding whether the exercise of such jurisdiction would be lawful under international law”.⁷⁴ After all, if the Arbitral Tribunal found that India has a valid but concurrent jurisdiction over the incident under Article 92 of the Convention, it goes without saying that any such exercise would be *ipso facto* lawful and no separate determination would appear to be necessary.

⁷¹ See Award, para. 810, *citing* Italy’s Rejoinder, para. 4.20.

⁷² See Award, para. 810, *citing* Hearing Transcript, 13 July 2019, 34:1-5.

⁷³ On the important distinction between a court or tribunal’s jurisdiction to hear a case and the law to be applied by the tribunal in deciding a case, the Arbitral Tribunal in the *Arctic Sunrise Arbitration* noted, while disallowing a claim based on the provisions on the 1966 International Convention on Civil and Political Rights, that “Article 293 is not [...] a means to obtain a determination that some treaty other than the Convention has been violated, unless that treaty is otherwise a source of jurisdiction, or unless the treaty otherwise directly applies pursuant to the Convention”. PCA Case No. 2014-02: *The Arctic Sunrise Arbitration (Netherlands v. Russia)*, Award on the Merits of 14 August 2015, para. 192. See also Mathias Forteau, ‘Regulating the Competition between International Courts and Tribunals: The Role of *Ratione Materiae* Jurisdiction under Part XV of UNCLOS’ (2016) 15 *The Law and Practice of International Tribunals* 190, 204.

⁷⁴ Award, para. 807, *citing* Hearing Transcript, 9 July 2019, 57:17-23.

59. For the reasons noted above, the Italian submission on immunity of its marines is a separate dispute and not a matter incidental to the dispute over which the Arbitral Tribunal could exercise its jurisdiction.

C. IMMUNITY *RATIONE MATERIAE* UNDER INTERNATIONAL LAW: IMMUNITY OF THE MARINES, IN PARTICULAR

60. In light of the above conclusion that the Arbitral Tribunal lacks competence to deal with the issue of immunity of the Marines, it would not be strictly necessary for me to deal with issues of immunity *ratione materiae* under international law in general and the eligibility of the Marines to claim immunity from the jurisdiction of India. However, as the Arbitral Tribunal considered itself competent to deal with the matter on its merits, I consider that it is necessary for me to indicate my views in this regard.

61. It may be recalled, as a preface to the consideration of the matter of immunity *ratione materiae* on its merits, that the Arbitral Tribunal framed the question before it thus: “whether India, as the flag State of the ‘St. Antony’, on which the effects of the Marines’ alleged offences – the death of Mr. Ajeesh Pinku and Mr. Jelastine Valentine – occurred, has in principle the right to exercise jurisdiction over the Marines or whether such exercise of jurisdiction is precluded because the Marines enjoy immunity under international law”.⁷⁵

62. To answer this question, the Arbitral Tribunal felt obliged to examine immunity *ratione materiae* under customary international law, in the absence of any provision dealing with that issue in the Convention. Based on the decisions of the ICJ, the International Criminal Tribunal for the Former Yugoslavia, the work of the ILC concerning the immunity of State officials from foreign criminal jurisdiction, and Articles 5 and 6, paragraph 1, of the ILC Draft Articles on Immunity of State Officials, the Arbitral Tribunal came to the conclusion that State officials acting as such enjoy immunity *ratione materiae*.⁷⁶

63. On the applicability of that general proposition on immunity *ratione materiae* to the specific case of the Marines in the present case, the Arbitral Tribunal again fell back on the work of the ICJ in *Certain Questions of Mutual Assistance in Criminal Matters* and the guidance provided by the work of the Special Rapporteur Kolodkin to come to the conclusion endorsed by the work of the

⁷⁵ Award, para. 841.

⁷⁶ Award, para. 846 (noting that this conclusion was endorsed by Italy and India did not object).

ILC on State responsibility, that officials, irrespective of their rank in the hierarchy of their government, enjoy immunity if the acts performed are attributable to the State they serve.⁷⁷

64. Finally, the Arbitral Tribunal, accepting all the submissions of Italy, concluded that in the present case, “the Marines were, as members of Italy’s armed forces, fulfilling a State function” when they were deployed on the “Enrica Lexie” as part of a VPD pursuant to the mandate of the Italian State, as provided in the Italian Law on VPDs, to ensure “protection of ships flying the Italian flag in transit in international maritime spaces at risk of piracy”.⁷⁸ Referring to the fact that “the Marines were stationed on a merchant vessel, and not a warship”, the Arbitral Tribunal noted that in its view, this “does not alter their status and the character of their mission as part of the VPD, undertaking acts in an official capacity attributable to the Italian State”.⁷⁹
65. Having concluded that the Marines enjoy immunity under customary international law, the Arbitral Tribunal examined whether the Marines could still be prosecuted by India “as a result of the application of the ‘territorial tort’ exception”.⁸⁰ It may be recalled that this principle was incorporated in Article 12 of the United Nations Convention on Jurisdictional Immunities of States and Their Property.⁸¹ According to this principle, unless otherwise agreed between the States concerned,

a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.⁸²

66. In this regard, the fact that the Marines were on board the “Enrica Lexie”, and not on Indian territory, when they committed the acts at issue, proved decisive for the Arbitral Tribunal to come to the conclusion that neither Article 12 of the United Nations Convention on Jurisdictional Immunities of States and Their Property, nor the “territorial tort” exception, even if it “were

⁷⁷ Award, paras 856-58.

⁷⁸ Award, para. 859, *citing* Law Decree No. 107 of 12 July 2011, of the Italian Republic, Article 5, paragraph 1 (**Annex IT-91**).

⁷⁹ Award, para. 859.

⁸⁰ Award, para. 863.

⁸¹ The United Nations Convention on Jurisdictional Immunities of States and Their Property, done in New York on 2 December 2004. The UNCSI was adopted by the United Nations General Assembly by Resolution A/59/38 of 2 December 2004. It was signed by 28 countries, including China, France, India, Iran, Japan, Mexico, the Russian Federation and the United Kingdom. The Convention is ratified by 22 States, including Italy, and requires 30 States to come into force.

⁸² The United Nations Convention on Jurisdictional Immunities of States and Their Property, done in New York on 2 December 2004, Article 12.

recognised under customary international law”, are applicable in the circumstances of the present case.⁸³

67. On the basis of the above analysis, the Arbitral Tribunal concluded that “the Marines enjoy immunity in relation to the acts that occurred during the incident of 15 February 2012, and that India is precluded from exercising its jurisdiction over the Marines”.⁸⁴
68. Regretfully, I disagree with all the reasons enumerated by the Arbitral Tribunal for its findings, which in the final analysis led it to conclude that India is precluded from exercising its jurisdiction on the ground that the Marines were entitled to immunity. The finding of the Arbitral Tribunal on the immunity *ratione materiae* of State officials, under customary international law, as a general proposition, is not in issue, but its application in a specific case is a matter of substantial debate, particularly in the absence of a uniform State practice.

1. International Law Governing Immunity of Officials from Foreign State Criminal Jurisdiction

69. International law governing immunity of officials from foreign State criminal jurisdiction is constantly evolving.⁸⁵ The work of the ILC on immunity of State officials from foreign criminal jurisdiction is a work in progress.⁸⁶ It is well accepted that while immunity *ratione personae* is accepted only in the case of a limited and select category of high functionaries of State,⁸⁷ the

⁸³ Award, paras 871-72.

⁸⁴ Award, para. 874.

⁸⁵ See Tom Ruys, Nicolas Angelet, and Luca Ferro, ‘Introduction – International Immunities in a State of Flux?’, in Tom Ruys, Nicolas Angelet, and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press, 2019), pp 1-20.

⁸⁶ See Lori F. Damrosch, ‘The Sources of Immunity Law – Between International and Domestic Law’ in *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press, 2019), pp 40-60. The author observed: “The ILC’s valuable work has not so far provided definitive answers to questions that recurrently arise with respect to categories of individuals who personify or act for States in capacities other than as diplomatic or consular agents in the classic sense – for example, a sitting or former head of State, head of government, foreign minister, or other high-level official”, p.52. On the current work of the ILC: “The topic of foreign official immunity in national criminal proceedings”, which is attracting much attention from governments and scholars, she felt, “is one area where finding common ground for new law- making may be elusive”, p. 60.

⁸⁷ For example, for the head of State or government, the minister in charge of foreign affairs, and the ambassadors and other senior category of diplomatic officials accredited to a State as diplomatic agents, immunity *ratione personae* is generally governed by the Vienna Convention on Diplomatic Relations, done at Vienna on 18 April 1961, which is now regarded as reflecting customary international law in respect of immunity of senior functionaries of State. In the *Arrest Warrant* case, the ICJ noted that “in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal”, see *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, p. 3 at pp 20-21, para. 51.

matter of functional immunity, that is, immunity *ratione materiae*, is limited by the nature and scope of the official function involved⁸⁸ and strictly governed by specific multilateral agreements.⁸⁹ In the case of placement of armed forces of one country within the territory of another country, immunity *ratione materiae* is governed by special agreements, frequently referred to as ‘status of forces agreements’.⁹⁰ Even in the case of the Marines, subject of the present Arbitration, Article 2.1 of the Template Agreement, which governs their deployment on Italian vessels, provides that, “[e]mbarkation and disembarkation of Vessel Protection Detachments takes place, based on existing agreements with coastal States in the High Risk Area, in ports listed in the Addendum”.⁹¹

70. Under the circumstances, while as a general proposition it may be possible to assert that under international law, government officials performing government functions enjoy immunity from foreign State jurisdiction, it is equally clear its application to specific cases involving commercial and non-government service is highly contested, with an ever growing number of countries favouring and adopting a restrictive theory of immunity.⁹²

⁸⁸ See Zachary Douglas, ‘State Immunity for the Acts of State Officials’ (2011) 82 BYIL 281, for a very thorough analysis of the concept of State immunity *vis-à-vis* state liability and for the proposition that “[u]nlike the rules of attribution, the law of state immunity is concerned with the function underlying the exercise of public powers because this is essential to the reconciliation of the competing interests of the forum state and the foreign state” [emphasis in original].

⁸⁹ For privileges and immunities of international organizations and their officials, see Niels Blokker, ‘Jurisdictional Immunities of International Organisations – Origins, Fundamentals and Challenges’, in Tom Ruys, Nicolas Angelet, and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press, 2019), pp 185-200. For an analysis of agreements covering different persons, both natural and legal, see Tom Ruys, Nicolas Angelet, and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press, 2019), Part IV on Individual Immunities, pp 411-576.

⁹⁰ For an analysis of agreements in this regard, see Aurel Sari, ‘The Immunities of Visiting Forces’, in Tom Ruys, Nicolas Angelet, and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press, 2019), pp 559-576. The author notes that “[d]espite the proliferation of status of forces agreements, the position of customary international law remains of more than just scholarly interest”. He adds that “[a]s we have seen, international practice has not given rise to a single immunity regime that applies to all visiting forces in a uniform manner. Instead, distinct regimes are applicable to different types of deployment”, p. 573.

⁹¹ Template Agreement between the Ministry of Defence of Italy and the Ship Owner, Article 2.1 (**Annex IT-95(b)**). See also Addendum to the Template Agreement between the Ministry of Defence of Italy and the Ship Owner, Article 3 (**Annex IT-95(c)**), for the list of ports specified for this purpose.

⁹² According to one account, “more recent international law-making and domestic practices reveal a general trend towards the restrictive doctrine on State immunity. The transition from absolute to restrictive immunity has taken many years and much effort. Among the measures adopted, the UN codification marks the most significant achievement. As noted by Judge James Crawford, ‘although not yet in force, the UN Convention has been understood by several courts to reflect an international consensus on State immunity’,” Wenhua Shan and Peng Wang, ‘Divergent Views on State Immunity in the International Community’, in Tom Ruys, Nicolas Angelet, and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press, 2019), pp 63-64.

71. Notable in this connection is the view taken by the ILC in the early stages of its consideration of the topic of ‘Jurisdictional immunities of States and their property’ (which it took up for codification and progressive development in 1978). As part of his initial or preliminary proposal, the then-ILC Special Rapporteur, Mr. Sompong Sucharitkul, provisionally identified certain categories of property which were exempt from attachment for the purpose of execution of a court decree. He referred to “State property used in connections with its sovereign functions, such as diplomatic or consular or governmental representation”, and noted that such property “remains immune from attachment and execution”.⁹³ The ILC, after considering the proposal, observed that “the question of the extent of, or limitations on, the application of the rules of State immunity required an extremely careful and balanced approach”.⁹⁴ Accordingly, the ILC felt that “the exceptions identified in the preliminary report” should be considered as merely “possible limitations, without any assessment or evaluation of their significance in State practice”.⁹⁵
72. It was also agreed that the question of immunity from execution of judgment should be left for later consideration, that is, towards the end of the finalization of the draft articles, as it required the “greatest care”, given “the widening functions of the State, which had enhanced the complexities of the problem of State immunities”.⁹⁶ The ILC took the view that as the State began to engage in activities such as trade and finance – areas which were formerly undertaken only by individuals or entities – controversies had existed in the past concerning the divisibility of the functions of the State, resulting in “[no] generally accepted criterion for identifying the circumstances or areas in which State immunity could be invoked or accorded”.⁹⁷
73. Accordingly, Italian national law, *ipso facto*, without more by way of applicable principles of international law, or an agreement between India and Italy could not be cited as an obstacle for India to exercise its jurisdiction over the Marines. In this context, it is notable that “Italy sought but failed to obtain an agreement with India on the status of VPDs”.⁹⁸

⁹³ Sompong Sucharitkul, Special Rapporteur, ‘Preliminary Report on Jurisdictional Immunities of States and their Property’, A/CN.4/323, *Yearbook of the International Law Commission 1979*, Vol. II (Part 1), p. 243, paras 84-85.

⁹⁴ See ‘Summaries of the Work of the International Law Commission: Jurisdictional immunities of States and their property’, available at <https://legal.un.org/ilc/summaries/4_1.shtml#a5>.

⁹⁵ See ‘Summaries of the Work of the International Law Commission: Jurisdictional immunities of States and their property’, available at <https://legal.un.org/ilc/summaries/4_1.shtml#a5>.

⁹⁶ See ‘Summaries of the Work of the International Law Commission: Jurisdictional immunities of States and their property’, available at <https://legal.un.org/ilc/summaries/4_1.shtml#a5>.

⁹⁷ See ‘Summaries of the Work of the International Law Commission: Jurisdictional immunities of States and their property’, available at <https://legal.un.org/ilc/summaries/4_1.shtml#a5>.

⁹⁸ India’s Counter-Memorial, para. 5.34, n. 371, referring to Exchange of e-mails between India and Italy on VPDs, 6 February 2012 (**Annex IN-26**) (“Ms. Laura Carpini of the Italian Embassy in India submitted a request for diplomatic clearance for a cargo vessel with a team of six Italian Navy military personnel

74. The crux of the matter in the present Arbitration is whether the Marines are entitled to immunity given the terms and conditions of their deployment on a cargo vessel. The findings of the Arbitral Tribunal on that matter are devoid of any basis in customary international law.

2. Employment of the Marines by a Cargo Vessel: Not a “Government Non-commercial Service”

75. It is clear that the Marines were members of VPD of the Italian naval judicial police. The Italian law cited for establishing this point is not in question. Equally clear is the fact that they fired shots (leaving aside for the moment questions of evidence) in pursuance of the function assigned to them, that is, to protect the merchant vessel from what they apprehended to be a possible piracy attack or armed robbery. However, it is equally clear that in the context of the present case, the terms and conditions of the placement of the Marines on the “Enrica Lexie”, as specified in the Memorandum of Understanding between the Ministry of Defence of Italy and the Italian Ship Owners’ Association,⁹⁹ are decisive to determine the eligibility of the Marines for immunity under international law.

76. An examination of the terms and conditions of that Memorandum and its annexes reveals that the deployment is:

- (i) based on a contract of services offered by the Government of Italy to the Italian merchant/cargo vessels, subject to payment of a specified daily allowance as consideration; and
- (ii) open to ship owners to accept at their free will, subject only to the condition that they should first seek such service from the Italian authority in charge of the VPDs before seeking the same from private sources.

77. In other words, the deployment of marines is a form of “supply of services” to the owner of the merchant vessel who “intends” to use them¹⁰⁰ upon payment of EUR 467 per day, covering “costs linked to the employment of VPDs, including ancillary costs for personnel, operation and in-area logistic support”.¹⁰¹ The deployment of marines is viewed as an “institutional contribution based

on board on 6 February 2012. The next day, Mr. Srinivas of the Indian Ministry of External Affairs responded to decline the request, and confirmed that the Government of India could not agree to Italy’s proposal for an Agreement on VPDs”).

⁹⁹ Memorandum of Understanding between the Ministry of Defence of Italy and the Italian Ship Owners’ Association (Confitarma), 11 October 2011 (**Annex IT-95(a)**).

¹⁰⁰ Addendum to the Template Agreement between the Ministry of Defence of Italy and the Ship Owner (**Annex IT-95(c)**).

¹⁰¹ Addendum to the Template Agreement between the Ministry of Defence of Italy and the Ship Owner, Article 2 (**Annex IT-95(c)**).

on the principle of burden-sharing with individual signatory Ship owners”.¹⁰² It is also clear that the deployment of Italian marines on Italian merchant/cargo vessels is only intended to “complement”, but not as part and parcel of, “actions conducted at sea by military ships”.¹⁰³ In that sense, it is clear that the VPDs, despite their status as officials of the Italian naval police, are not authorized “to patrol the seas, board, inspect or arrest suspect pirate ships”.¹⁰⁴

78. In as much as the Marines were deployed on a commercial cargo vessel as part of an offer of services to the private Italian ship owners on payment of a fee, it is a quintessentially commercial contract or transaction between the Government of Italy and the Italian ship owners. A commercial transaction, according to Article 2, paragraph 1, subparagraph (c)(i), of the United Nations Convention on Jurisdictional Immunities of States and Their Property means “any contract or transaction for the sale of goods or *supply of services*”.¹⁰⁵ Further, Article 2, paragraph 2, of the same Convention provides that the “nature” of the contract or transaction “primarily” determines its commercial character. However, if the parties to a contract or transaction so agree or if, in the practice of the State of the forum, it is relevant, the “purpose” of the contract or transaction could also be taken into account.¹⁰⁶
79. In addition, it is undisputed that the Marines were operating on a merchant/cargo vessel and not on a ship which is exclusively operated for a “government non-commercial purpose”, an essential criterion to distinguish services offered as part of commercial services from services rendered as part of State’s sovereign functions. It is well accepted in international law that only “government non-commercial service” would qualify for immunity from foreign State jurisdiction. An example of this is warships, as noted above.¹⁰⁷

¹⁰² Memorandum of Understanding between the Ministry of Defence of Italy and the Italian Ship Owners’ Association (Confitarma), 11 October 2011, p. 2 (**Annex IT-95(a)**).

¹⁰³ Memorandum of Understanding between the Ministry of Defence of Italy and the Italian Ship Owners’ Association (Confitarma), 11 October 2011, p. 2 (**Annex IT-95(a)**).

¹⁰⁴ See Oceans Beyond Piracy, ‘Issue Paper: Vessel Protection Detachments’, available at <http://oceansbeyondpiracy.org/sites/default/files/attachments/Vessel_Protection_Detachments_IssuePaper.pdf>, for an interesting background to the deployment of VPDs, in contrast to “Privately Contracted Armed Maritime Security”, which proved “to be a popular and effective model to mitigate piracy off the coast of Somalia”, and was prohibited later by States. The paper also notes that “VPDs are unique in the maritime security paradigm, as they introduce military personnel, equipment, and activities—including military-specific command and control hierarchies—directly into the commercial maritime sector, aboard private vessels. This infuses sovereign state military operations into commercial activities. The most prominent VPD activities are those conducted by Italian and Dutch governments, although other countries such as Estonia, Lithuania, Serbia, Croatia, Finland, and Ukraine also deployed VPDs either on their own flagged vessels or as part of coalition operations”.

¹⁰⁵ See above, note 81, Article 2, paragraph 1, subparagraph (c)(i) [emphasis added].

¹⁰⁶ *Ibid.*, Article 2, paragraph 2.

¹⁰⁷ See UNCLOS, Article 96 and *ibid.*, Article 16, paragraph 2.

80. In view of the above, the conclusion reached by the majority of the Arbitral Tribunal, that the Marines are entitled to immunity from the jurisdiction of India, is not supported by State practice, let alone one that is uniform and consistent. Thus, it is without foundation either in treaty or customary international law. Accordingly, the conclusion reached by the Arbitral Tribunal on the merits of the Italian claim concerning the immunity of the Marines does not fit well, like a square peg in a round hole, with the well-established principle under international law that government officials enjoy immunity from foreign jurisdiction for official acts performed. This is because the service rendered by the Marines was part of an agreement amounting to a commercial contract.

VI. HUMANITARIAN CONSIDERATIONS

81. With the decision of the Arbitral Tribunal, this Arbitration comes to a close, more than eight years after the incident. The case management, whether at the national level in India or later at the international level (before ITLOS and the present Annex VII Arbitral Tribunal), for much of the time, was concerned with writ petitions and provisional orders addressing serious health and humanitarian side effects of the case on the Marines. Ironically, the long delay and the extended legal battle only further aggravated the side effects on all those concerned, including the Marines, giving rise to grave humanitarian concerns. The result is that the families of the two dead Indian fishermen and Captain Fredy, as well as other fishermen, are given no relief from their loss or suffering in the absence of proper reparation.
82. It is a matter of some satisfaction that despite the legal complications, which are beyond diplomatic means, India and Italy kept their diplomatic channels open and engaged at all times. They even concluded an agreement, which India ratified soon after the shooting incident, regarding the transfer of sentenced persons. According to this pact, the execution of the sentence shall be governed by the administering State, which will be free, under its laws, to provide alternative measures. The agreement is inspired by the Convention on the Transfer of Sentenced Persons, done at Strasbourg on 21 March 1983.¹⁰⁸
83. As a result of the Arbitral Tribunal's decision, the Marines, who are now in Italy pending a final decision on this Arbitration, do not have to return to India to face its judicial process, subject only to such legal process as Italian authorities may consider necessary under their law. This answers one side of the humanitarian crisis that plagued this case. In addition, the Arbitral Tribunal

¹⁰⁸ For a mention of the agreement between India and Italy and a comment on this Arbitration, *see* Hari Sankar, 'Jurisdictional and Immunity Issues in the Story of Enrica Lexie: A Case of Shoot & Scoot turns around!', in *EJIL:Talk!*, 25 March 2013, available at <<https://www.ejiltalk.org/jurisdictional-and-immunity-issues-in-the-story-of-enrica-lexie-a-case-of-shoot-scoot-turns-around/>>.

addressed some urgent humanitarian considerations on the Indian side also. It ordered Italy to pay the necessary compensation to India for the damage suffered by India, Captain Fredy, and the Indian fishermen, on account of the physical harm and material damage to their property (including to the “St. Antony”) and mortal harm suffered by the crew members of the “St. Antony”, attributing responsibility to Italy for the death of the two Indian fishermen. I welcome these conclusions, despite my reservations on the subject of immunity of the Marines.

84. In this regard, the Arbitral Tribunal invited the Parties “to consult with each other with a view to reaching agreement on the amount of compensation due to India”.¹⁰⁹ The Arbitral Tribunal noted that it “shall retain jurisdiction, should either Party or both Parties wish to apply for a ruling from the Arbitral Tribunal in respect of the quantification of compensation due to India”, if such an application is submitted within one year from the date of the Award.¹¹⁰

VII. CONCLUSIONS

- i) The Arbitral Tribunal can only have jurisdiction over a dispute concerning the interpretation or application of the Convention. A dispute may involve more than one aspect or issue, but it is for the Arbitral Tribunal to isolate the ‘real issue of the case’.
- ii) An objective examination of the ‘real issue of the case’ and the ‘object of the claim’ revealed two distinct and separate disputes: one, which of the two countries, India or Italy, is entitled to exercise its jurisdiction over the incident of 15 February 2012; the other, concerning the immunity of Marines from foreign criminal jurisdiction, to wit, the Indian jurisdiction.
- iii) Accordingly, the claim concerning immunity is not and cannot be treated as an incidental issue to the other dispute over which the Arbitral Tribunal found jurisdiction.
- iv) To the extent that the issue of immunity of State officials is not covered by any of the provisions of the Convention, the Arbitral Tribunal is not empowered to exercise its jurisdiction to determine its validity in accordance with Article 288, paragraph 1, of the Convention. In addition, the claim of immunity operates as an exception to an otherwise existing jurisdiction.
- v) It may be recalled that the Marines were employed by the owner of an oil tanker for rendering a service in return for a payment of a daily allowance and other incidental costs for such employment. Service rendered under those conditions is anything but a “government non-commercial service”. Under the circumstances, it fails to meet the

¹⁰⁹ Award, para. 1089.

¹¹⁰ Award, para. 1090.

essential condition under international law to qualify for immunity from foreign jurisdiction. In the case of military personnel of one country stationed or visiting another country, a claim of immunity is admissible only if there is an agreement between the sending and receiving State. Italy did not have such an agreement with India to cover the Marines in the present case.¹¹¹

- vi) The Convention does not deal with issues of general international law or other treaty regimes not related to subject matters that fall within its scope. The Convention is admittedly not a self-contained treaty and has several provisions which, by their very nature, are open to further evolution in related fields of international law. Provisions of the Convention that deal with the sovereign rights and duties of coastal States over the exclusive economic zone and the continental shelf, conservation of fisheries, marine pollution, bio-diversity and the environment, and security interests or military uses, may be noted as prime examples of such related fields.
- vii) However, as the Convention is the outcome of a ‘package deal’, “external rules” bearing upon the subject matters specified in the Convention could be raised as incidental issues, subject to such exceptions and limitations noted under Section 3, Part XV, and in particular, Articles 297 and 298, of the Convention.¹¹²
- viii) The regime of compulsory settlement of disputes under Part XV of the Convention is a regime that operates as an exception to the general principle of international law according to which the jurisdiction of an international court or tribunal is based on consent of State parties to the dispute. As an exception to the rule, what is not specified in the Convention’s scheme of compulsory settlement of disputes is deemed to have been excluded from it. Accordingly, the claim of immunity cannot be considered by the Arbitral Tribunal without express consent from India.
- ix) Italy and India have done their best to cooperate with each other in good faith to settle matters arising from the “Enrica Lexie” incident. It is even more important that they work together now to settle expeditiously all the pending humanitarian issues on both sides, including issues of compensation.

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¹¹¹ Template Agreement between the Ministry of Defence of Italy and the Ship Owner, Article 2.1 (**Annex IT-95(b)**), states that “embarkation and disembarkation of Vessel Protection Detachments takes place, based on existing agreements with coastal States in the High Risk Area in ports listed in the Addendum”. *See also* para. 73, n. 98 above for information on the lack of an agreement between Italy and India in this respect.

¹¹² *See above* para. 45, n. 54 and n. 56.