

Exclusive Jurisdiction Revisited: The Diverging Conceptualisation and Application of Article 92 of UNCLOS in The *Enrica Lexie* Incident Award

■ Arron N. Honniball*

Abstract

The Arbitral Tribunal concerning the *Enrica Lexie* incident recognised ‘jurisdiction’ as a broadly used term in international law, largely undefined in the case law of courts and tribunals. The United Nations Convention on the Law of the Sea (UNCLOS) includes frequent references to State jurisdiction, whereby its context may provide a clear definition (e.g., Article 73 on enforcement jurisdiction) or leave jurisdiction less defined (e.g., Article 92 on exclusive flag State jurisdiction). The undefined jurisdiction in Article 92 of UNCLOS has stimulated differing interpretations upon whether this includes prescriptive and enforcement jurisdiction, or purely enforcement jurisdiction. This article analyses the 2020 *Enrica Lexie Incident Award*, demonstrating that the Tribunal followed a broad interpretation of Article 92 of UNCLOS within its conceptual restatement of exclusive flag State jurisdiction (i.e., exclusive

* Senior Research Fellow, Max Planck Foundation for International Peace and the Rule of Law, Honniball@mpfpr.de.

prescriptive and enforcement jurisdiction), but actually applied the narrow interpretation of Article 92 of UNCLOS to resolve the *Enrica Lexie* incident dispute (i.e., purely enforcement jurisdiction). Respectively, a different Tribunal's majority and minority in the 2019 *M/V Norstar Judgment* had advanced each conflicting interpretation of jurisdiction concerning Article 92 of UNCLOS. In the interests of legal clarity and legal certainty this article proposes that international courts and tribunals explicitly return to a narrow interpretation of Article 92 of UNCLOS whenever the next opportunity arises. Article 92 undoubtedly affirms extraterritorial flag State enforcement. Nonetheless, if it were to also reserve extraterritorial prescriptive jurisdiction, it would also operate as a limitation to the otherwise applicable general law of State jurisdiction. 'Jurisdiction' should therefore be conservatively interpreted to the extent that State practice supports. State practice concerning the high seas continues to demonstrate the exercise of customary prescriptive jurisdiction over the conduct of foreign-flagged vessels or persons therein, highlighting the lack of any limitation to non-flag State prescriptive jurisdiction in Article 92 of UNCLOS.

Keywords: High Seas, Enforcement Jurisdiction, Prescriptive Jurisdiction, Flag State, Article 92(1), Treaty Interpretation

1. Introduction¹

On 21 May 2020 the Arbitral Tribunal in respect of *the ‘Enrica Lexie’ Incident (Italy v India)* furnished its Award (*Award*),² an award rich in the interpretation and application of numerous substantive and procedural provisions of the United Nations Convention on the Law of the Sea (UNCLOS) and related customary international law.³ To date, attention has often focused on the Tribunal’s findings of incidental jurisdiction under Article 288(1) of UNCLOS in respect of the immunity of the Italian marines for acts committed during the incident of 15 Feb-

1. The views expressed in this article are those of the author, and do not necessarily reflect the views of the Foundation, any other staff, or that of any other institution. This article is based upon research first presented in blog posts, namely, Arron N Honniball, ‘The “Enrica Lexie” Incident Award and Exclusive Flag State Jurisdiction’ (*Centre for International Law Blog*, 10 August 2020) <<https://cil.nus.edu.sg/the-enrica-lexie-incident-award-and-exclusive-flag-state-jurisdiction-by-arron-n-honniball/>> ; and Arron N Honniball, ‘Freedom of Navigation Following the M/V “Norstar” Case’ (*The NCLOS Blog*, 4 June 2019) <<https://site.uit.no/nclos/2019/06/04/freedom-of-navigation-following-the-m-v-norstar-case/>>. For a concurring analysis, see James G Devaney and Christian J Tams, ‘In Re Arbitration Between the Italian Republic and the Republic of India Concerning the “Enrica Lexie” Incident’ (2021) 115 *American Journal of International Law* 513, 516-517.

2. *The ‘Enrica Lexie’ Incident (Italy v India), Award* [2020] Arbitral Tribunal (UNCLOS, Annex VII) PCA Case No. 2015-28, followed by a Joint Dissenting Opinion, a Dissenting Opinion and a Concurring and Dissenting Opinion. For broader discussions of the Award see: Robin Churchill, ‘Dispute Settlement in the Law of the Sea: Survey for 2020’ (2021) 36(4) *The International Journal of Marine and Coastal Law* 539; Massimo Lando and Nilüfer Oral, ‘Jurisdictional Challenges and Institutional Novelty – Procedural Developments in Law of the Sea Dispute Settlement in 2020’ (2021) 20(1) *The Law & Practice of International Courts and Tribunals* 191, 211-218; Natalino Ronzitti, ‘Il caso della Enrica Lexie e la sentenza arbitrale nella controversia Italia-India’ (2020) 103(4) *Rivista di diritto internazionale* 937. Italian literature is accessed through translation software – all misunderstandings or misquotes are the fault of the author.

3. United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

ruary 2012.⁴ While it is agreeable that the Parties' dispute would likely not have been resolved by ruling on jurisdiction without addressing the question of immunity,⁵ controversy begets attention, and one may find both supportive and critical literature concerning the Tribunal's incidental jurisdiction.⁶

However, the Tribunal likewise broke new ground for international courts and tribunals by providing the first explicit interpretation of exclusive flag State jurisdiction under Article 92(1) of UNCLOS, a provision whose scope has long been subject to differences of interpretation in literature and not infrequently included in the claims of States in dispute settlement proceedings.⁷ Surprisingly, as far as this author

4. *Enrica Lexie Award* (n 2) para 1094(B)(2)-(3) "India is precluded from exercising its jurisdiction over the Marines". Commentaries: Deepak Raju, 'The Enrica Lexie Award – Some Thoughts on "Incidental" Jurisdiction (2 Parts)' (*Opinio Juris*, 22 July 2020) <<http://opiniojuris.org/2020/07/22/the-enrica-lexie-award-some-thoughts-on-incidental-jurisdiction-part-i/>>; Valentin J Schatz, 'Incidental Jurisdiction in the Award in "The 'Enrica Lexie' Incident (Italy v. India)" (2 Parts)' (*Völkerrechtsblog*, 23 July 2020) <<https://voelkerrechtsblog.org/incidental-jurisdiction-in-the-award-in-the-enrica-lexie-incident-italy-v-india-part-i/>>; Aurel Sari, 'Tanker, Jailer, Soldier, Sailor: Functional Immunity and the Enrica Lexie Award (2 Parts)' (Just Security, 4 September 2020) <<https://www.justsecurity.org/72284/part-1-tanker-jailer-soldier-sailor-functional-immunity-and-the-enrica-lexie-award/>>; Eleni Methymaki and Christian J Tams, 'Immunities and Compromissory Clauses: Making Sense of Enrica Lexie (2 Parts)' (*EJIL: Talk!*, 27 August 2020) <<https://www.ejiltalk.org/immunities-and-compromissory-clauses-making-sense-of-enrica-lexie-part-i/>>.

5. *Enrica Lexie Award* (n 2) paras 806-808. Attila M Tanzi, 'Adjudication at the Service of Diplomacy: The Enrica Lexie Case' (2021) 12(3) *Journal of International Dispute Settlement* 448, 457-459. [ties-and-compromissory-clauses-making-sense-of-enrica-lexie-part-i/](https://www.jdis.org/issue/view/issueid/123/articleid/448)>.

6. Yoshifumi Tanaka, 'Between the Law of the Sea and Sovereign Immunity: Reflections on the Jurisdiction of the Annex VII Arbitral Tribunal in the Enrica Lexie Incident Case' (2021) 20(2) *The Law & Practice of International Courts and Tribunals* 367; Loris Marotti, 'A Satisfactory Answer? The Enrica Lexie Award and the Jurisdiction Over Incidental Questions' (2021) 30(1) *The Italian Yearbook of International Law Online* 191. On the interest balancing therein, Devaney and Tams (n 1) 517-519.

7. To remain concise, the jurisprudence and literature previously analysed cannot be repeated here, but nonetheless remains the foundation upon which this paper stands. See the many contributions of diverse authors concerning Article 92 of UNCLOS cited in: Arron N Honniball, 'The Exclusive Jurisdiction of Flag States: A Limitation on Pro-Active Port States?' (2016) 31 *The International Journal of Marine and Coastal Law* 499.

is aware, this new ground has garnered comparatively less attention. Furthermore, while informative analysis prior to the *Award* explored the interpretation and application of Article 92(1) of UNCLOS to the facts of the incident,⁸ this understandably could not foresee the systemic manner in which the Tribunal would interpret and apply Article 92(1) of UNCLOS across the various submissions and interrelated provisions of UNCLOS. It is within this context that this paper seeks to tease out the Tribunal's interpretation and application of Article 92(1) of UNCLOS across the Parties' submissions, demonstrating the extent to which, if at all, the Tribunal has contributed to the clarification and consolidation of the 'exclusive flag State jurisdiction' concept, or further muddled the water.

In short, this paper focuses on the Tribunal's interpretation and application of Article 92(1) of UNCLOS, demonstrating that the Tribunal's statement on conceptualising exclusive flag State jurisdiction adopts a broad *interpretation* to include exclusive flag State prescriptive and enforcement jurisdiction. That interpretation follows the 2019 precedent of the *M/V "Norstar" Case (Panama v Italy) Judgment (M/V Norstar Judgment)*,⁹ suggesting that exclusive flag State jurisdiction encapsulates both enforcement jurisdiction and prescriptive jurisdiction.¹⁰ Nonetheless, on *application* of Article 92(1) of UNCLOS to Italy's submission, or when Article 92(1) is indirectly raised, the Tribunal's reasoning limits exclusive flag State jurisdiction to enforcement jurisdiction. Thus, for States, courts, tribunals, or commentators considering the impact of exclusive

8. Persuasively concluding that Article 92 only refers to prescriptive jurisdiction and thus not at dispute: Paolo Busco and Filippo Fontanelli, 'Questioni di giurisdizione e immunità nella vicenda dell'Enrica Lexie, alla luce del diritto internazionale' (2013) 3 Diritto Penale Contemporaneo 399, 411-414. Note as this work predates the submission of counterclaims by India, one cannot presume the author's conclusions extend to Italy's actions re the *St Anthony*

9. *M/V 'Norstar' (Panama v Italy), Judgment* [2019] ITLOS 25, ITLOS Reports 2018-2019 10.

10. *ibid* 225.

flag State jurisdiction on disputes, domestic laws, proposed legislative amendments, or ongoing multilateral negotiations, the question arises whether this broad interpretation of Article 92 of UNCLOS in the *Enrica Lexie Award* and the *M/V Norstar Judgment* should be followed. By revisiting Article 92 of UNCLOS in light of the customary laws of treaty interpretation and contemporary State practice, this article reasserts that Article 92 of UNCLOS is limited to governing exclusive flag State enforcement jurisdiction. There is currently little benefit or support — but plenty of danger — in extending Article 92 of UNCLOS to questions of prescriptive jurisdiction on the high seas.

Part 2 sets the scene, briefly summarising the facts of the *Enrica Lexie* incident and introducing Article 92 of UNCLOS. Parts 3 and 4 respectively address the interpretation and application of exclusive flag State jurisdiction in the *Award*. Part 5 builds on this doctrinal discussion to address the practical considerations of the diverging interpretation and application of exclusive flag State jurisdiction, both internally within the *Award* and externally in respect of State practice concerning high seas prescriptive jurisdiction. Part 6 concludes with a look ahead to resolving ambiguities in the interpretation and application of Article 92 of UNCLOS.

2. The *Enrica Lexie* Incident and Exclusive Flag Stat Jurisdiction

On 26 June 2015 Italy commenced arbitral proceedings against India concerning the *Enrica Lexie* incident, the case coming before an Arbitral Tribunal established under Annex VII of UNCLOS.¹¹ Bucking a

11. *M/V 'Norstar' (Panama v Italy), Judgment* [2019] ITLOS 25, ITLOS Reports 2018–2019 10.

recent trend, the proceedings¹² on the merits were not transferred to ITLOS following the conclusion of the interrelated ITLOS provisional measures proceedings, nor following the procedural matters consultation of the Parties by the President of the Tribunal.¹³ Paragraphs 77–216 of the *Award* provide a detailed account of the facts of the incident and subsequent State responses, as understood by the Parties and the Tribunal.

For the purposes of analysing the Tribunal's broader doctrinal contributions on jurisdiction at sea, the facts may be briefly summarised. In short, two Italian navy marines, serving as a vessel protection detachment aboard the Italian-flagged *Enrica Lexie*, fired upon the Indian-registered *St Antony* within India's Exclusive Economic Zone (EEZ), killing two fishers and causing damage to *St Antony* and other crew members. Both India and Italy claimed prescriptive jurisdiction over the incident. India also exercised enforcement jurisdiction over both the *Enrica Lexie* and the Italian marines once they entered India's territorial sea.¹⁴ Italy requested exclusive enforcement jurisdiction and expressed a commitment to resume its criminal investigation into the incident.¹⁵

The concept of exclusive flag State jurisdiction is found in Article 92(1) of UNCLOS, which states: 'Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in inter-

12. "Enrica Lexie" (*Italy v India*), *Provisional Measures, Order of 24 August 2015* [2015] ITLOS 24, ITLOS Reports 2015 182. See also, *The 'Enrica Lexie' Incident (Italy v India), Order - Request for the Prescription of Provisional Measures* [2016] Arbitral Tribunal (UNCLOS, Annex VII) PCA Case No. 2015-28.

13. E.g., as occurred: *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/ Myanmar), Judgment* [2012] ITLOS 16, ITLOS Reports 2012 4 [1–2]; *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives), Preliminary Objections, Judgment* [2021] ITLOS 28 [1–2].

14. *Enrica Lexie Award* (n 2) para 356.

15. *ibid* 75, 889.

national treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas'.¹⁶

In so far as it remains compatible with Part V of UNCLOS, exclusive flag State jurisdiction also applies in the EEZ.¹⁷

This textually ambiguous provision, for which the drafting history of UNCLOS does not provide authoritative supplementary guidance as to the scope of 'jurisdiction' referred to, called for careful interpretation and application on at least three counts.¹⁸ First, there existed the dispute upon Article 92(1) of UNCLOS, which essentially revolved around whether India's acts in connection with the *Enrica Lexie* while the *Enrica Lexie* was within India's EEZ amounted to an act of unauthorised enforcement jurisdiction. Second, Article 92(1) of UNCLOS is raised as part of the applicable law in the context of interpreting and applying other closely associated articles of UNCLOS which had formed the basis of further submissions by the Parties.¹⁹ Finally, concerning third States, the reasoning and findings of international courts and tribunals often carry great weight in guiding practice and national interpretation.

16. UNCLOS Article 92.

17. *ibid* Article 58(2).

18. Both a contextual interpretation of Article 92(1) of UNCLOS and an examination of the drafting history were previously published and not repeated here, Honniball, 'The Exclusive Jurisdiction of Flag States' (n 7) 519–528. Further supplementary means of interpretation exist, but notwithstanding the additional difficulty of attributing individual statements to the UNCLOS drafters' collective intention, these appear insufficiently conclusive to confirm a particular meaning of 'jurisdiction', nor remove the ambiguity therein. Vienna Convention on the Law of Treaties, signed 23 May 1969, 1155 UNTS 331 (entered into force 21 January 1980) Article 32 (VCLT).

19. UNCLOS Article 293(1).

3. Conceptualisation of Exclusive Flag State Jurisdiction

Exclusive flag State jurisdiction is first raised by the Tribunal in respect of Italy's Submission 2(a), but only in so far as establishing that both Italy's and India's flag State jurisdiction would extend to the incident (see 4.2). The Tribunal's main analysis of Article 92 is found in response to Italy's Submission 2(b) that '[b]y interdicting the *Enrica Lexie* and escorting her to Kochi, India violated Italy's exclusive jurisdiction over the *Enrica Lexie*, in breach of UNCLOS Article 92'.²⁰

It is worth noting that Italy's submission on Article 92(1) of UNCLOS adopted the prevailing restrictive interpretation and application of 'exclusive flag State jurisdiction' which predated the *M/V Norstar Judgment*, i.e., only referring to exclusive at-sea enforcement jurisdiction.²¹ Italy argued that 'India breached Article 92 of the Convention by *directing, interdicting, and escorting* the "*Enrica Lexie*" while it was in India's exclusive economic zone'.²² These are all at-sea enforcement measures. Furthermore, it is evident that Italy promotes a zonal approach to interpretation whereby exclusive flag State jurisdiction protects a vessel from unauthorised enforcement in the EEZ/high seas while a vessel is navigating in the EEZ/high seas.²³ Likewise, India responded that it did not take any enforcement measures until the *Enrica Lexie* was boarded in its territorial sea.²⁴

20. *Enrica Lexie Award* (n 2) paras 68, 75, 521.

21. *Owners, Officers and Men of the Wanderer (GrBr).v United States, Decision* (1921) VI RIAA 68, 71–75; *The Arctic Sunrise Arbitration (Netherlands v Russia), Award on the Merits* [2014] PCA 2014-02 (Arbitral Tribunal (UNCLOS, Annex VII)) [233–333, 401(C)].

22. *Enrica Lexie Award* (n 2) para 510 (emphasis added).

23. *ibid* 896, 907.

24. *ibid* 514–517.

Nonetheless, in response, the Tribunal's analysis did not limit Article 92(1) of UNCLOS to exclusive enforcement jurisdiction. Instead, the Tribunal adopted an expansive interpretation of exclusive flag State jurisdiction so as to also include exclusive prescriptive jurisdiction:

(a) *The concept of exclusive jurisdiction of the flag State*

524. The principle of exclusive flag State jurisdiction has been recognised as an 'essential adjunct to the principle of the freedom of the seas' or a 'corollary of the open and free status of the high seas'.

525. The concept of 'jurisdiction', derived from the Latin *juris dicere* (literally: 'to speak the law'), while broadly used in international law, remains largely undefined in the case law of international courts and tribunals.

526. One may distinguish between prescriptive jurisdiction, adjudicative jurisdiction, and enforcement jurisdiction. Prescriptive jurisdiction is the authority of a State to make laws in relation to persons, property, or conduct; adjudicative jurisdiction is the authority of a State to apply law to persons or things; and enforcement jurisdiction is the authority of a State to exercise its power to compel compliance with law. Under international law, *the exercise of jurisdiction by a State entails an element of prescribing laws, rules, or regulations over conduct, or applying or enforcing such laws, rules, or regulations over persons or property.*

527. *It follows from the above analysis that the principle of exclusive flag State jurisdiction under the Convention is violated when a State other than the flag State seeks to prescribe laws, rules, or regulations over a ship of the flag State, or applies or enforces such laws, rules, or regulations in respect of such a ship.* The Arbitral Tribunal also recalls in this respect the observation of ITLOS in *M/V 'Norstar'* that the principle of exclusive flag State jurisdiction 'prohibits not only the exercise of enforcement jurisdiction on the high seas by States other than the flag State but also the extension of their prescriptive jurisdiction to lawful activities conducted by foreign ships on the high seas'.²⁵

25. *Enrica Lexie Award* (n 2) (emphasis added; notes omitted).

Unfortunately, this section of the *Award* provides little clarification or reasoning for the Tribunal's interpretation of Article 92(1) of UNCLOS. The *Award* therefore does not respond to the numerous dissenting opinions of the previous ITLOS *Enrica Lexie Provisional Measures Order*, opinions which suggested UNCLOS (including Article 92) was silent on extraterritorial prescriptive jurisdiction concerning crimes (e.g., murder) at sea.²⁶ Such reasoning would have also been welcome because the Tribunal has purposively sought, through obiter dictum, to contribute to a broadening interpretation of Article 92(1) of UNCLOS. This is because any question of exclusive flag State prescriptive jurisdiction was not vital to resolving the Parties' dispute on Article 92, i.e., whether India's conduct amounted to an exercise of unauthorised enforcement jurisdiction in the EEZ.

The analysis in Paragraphs 524–526 of the *Award* does not examine Article 92(1) of UNCLOS itself. It is difficult to conclude how 'it follows' from a general introduction to the concept of jurisdiction in international law that jurisdiction in Article 92(1) of UNCLOS must refer to prescriptive and enforcement jurisdiction.²⁷ As the Tribunal highlights, 'jurisdiction' is often not explicitly defined and, depending on the circumstances and context of each use, can refer to prescription jurisdiction, enforcement jurisdiction, or both. Tellingly, one of the general authorities on jurisdiction cited by the *Award*²⁸ was also cited in

26. "Enrica Lexie" (*Italy v India*), *Provisional Measures, Order of 24 August 2015, Dissenting Opinion of Judge Lucky* [2015] ITLOS 24, ITLOS Reports 2015 268 [36, 60]; "Enrica Lexie" (*Italy v India*), *Provisional Measures, Order of 24 August 2015, Dissenting Opinion of Vice-President Bouguetaia* [2015] ITLOS 24, ITLOS Reports 2015 232 [15]; "Enrica Lexie" (*Italy v India*), *Provisional Measures, Order of 24 August 2015, Dissenting Opinion of Judge Ndiaye* [2015] ITLOS 24, ITLOS Reports 2015 246 [23].

27. "Enrica Lexie Award" (n 2) para 527.

28. "Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, Oxford University Press 2015).

a seven-strong Joint Dissenting Opinion to the *M/V Norstar Judgment* reaching an opposing, more restrictive, interpretation of Article 92(1) of UNCLOS as referring solely to enforcement jurisdiction.²⁹

In support of its interpretation of Article 92(1) of UNCLOS, the Tribunal only refers to the *M/V Norstar Judgment*. Unfortunately, the Tribunal, like the ITLOS in its *M/V Norstar Judgment*, advanced its interpretation of Article 92 of UNCLOS without detailed reasoning and without the support of jurisprudence, State practice, or subsequent treaties. At least one of the authorities cited by the *Award* to support its interpretation of Article 92(1) has referred to the *M/V Norstar Judgment* as appearing ‘contrary to actual state practice’.³⁰ Neither of the current leading academic commentaries to UNCLOS adopt an expansive interpretation of Article 92(1) of UNCLOS, instead treating exclusive jurisdiction as one of enforcement.³¹

Tellingly, while the Tribunal refers to the *M/V Norstar Judgment* for its interpretation of Article 92(1) of UNCLOS, the Parties, at least according to the summaries of their arguments as represented in the *Award*, did not. Italy’s objection to India’s exercise of extraterritorial prescriptive jurisdiction only refers to the *M/V Norstar Judgment* to support its sub-

29. *M/V ‘Norstar’ (Panama v Italy), Judgment, Dissenting Opinion of Judges Cot, Pawlak, Yanai, Hoffmann, Kolodkin, Lijnzaad and Judge ad hoc Treves* [2019] ITLOS 25, ITLOS Reports 2018–2019 10.

30. Cedric Ryngaert, *Selfless Intervention: The Exercise of Jurisdiction in the Common Interest* (Oxford University Press 2020) 152. For literature supportive of applying the broad interpretation to the *Enrica Lexie* incident, see Daniele Fabris, ‘Crimes Committed at Sea and Criminal Jurisdiction: Current Issues of International Law of the Sea Awaiting the “Enrica Lexie” Decision’ (2017) 9(2) Amsterdam Law Forum 5, 18.

31. Douglas Guilfoyle, ‘Article 92’ in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck 2017) paras 1, 6–11; Myron Nordquist, Satya Nandan and Shabtai Rosenne, *UN Convention on the Law of the Sea Commentary 1982 Online* (Brill 2013) 126–127. The later predominantly discusses enforcement exceptions, albeit with some uncertainty by raising Article 218 of UNCLOS which concerns prescriptive jurisdiction.

mission that, in lacking a recognised legal basis, India's legislation would violate Article 87 of UNCLOS.³² Article 92(1) was not envisaged as relevant to this part of the dispute. To the contrary, it appears Italy itself was asserting extraterritorial prescriptive jurisdiction concerning the offences of murder and complicity in murder committed on the high seas by its nationals.³³ For the Italian assertion of prescriptive jurisdiction the fact that the offence occurred on an Italian vessel and Indian vessel was immaterial — as was Article 92 of UNCLOS.

On its part, India highlighted the highly controversial nature of the *M/V Norstar Judgment* and attempted to distance the *Enrica Lexie* incident from its findings.³⁴ More generally, India advanced numerous customary law bases of prescriptive jurisdiction that are not found in UNCLOS, nor any other applicable treaty, such as passive personality-based jurisdiction. India also argued that 'while a coastal State does not have sovereignty over its exclusive economic zone, "this does not mean that it has no rights beyond the sovereign rights and the jurisdiction expressly recognized in the Convention"'.³⁵ Both references would seemingly be in direct contrast to both Tribunals' interpretations of Article 92(1) in the *M/V Norstar Judgment* and *Enrica Lexie Award* as including exclusive flag State prescriptive jurisdiction.

4. Application of Exclusive Flag State Jurisdiction

Following the Tribunal's broad interpretation of Article 92 of UNCLOS it remained necessary to settle the Parties' disagreements on the applica-

32. *Enrica Lexie Award* (n 2) paras 309–310.

33. *ibid* 209 referring to Article 110 and 575 of the Italian Penal Code.

34. *ibid* 336–337, 518–519.

35. *ibid* 336–337, 518–519.

tion of UNCLOS to the *Enrica Lexie* incident. This section reviews the Tribunal's finding in so far as each dispute concerns the interpretation and application of Article 92(1) of UNCLOS.

4.1. Applying Article 92

As per Italy's submission, on the facts the Tribunal's analysis of Submission 2(b) only assessed whether any of the alleged conduct of India included an element of *enforcement* jurisdiction which could therefore violate Article 92(1) of UNCLOS.³⁶ The Tribunal's application of Article 92 was thus much more restricted than its doctrinal restatement of Article 92.

The Tribunal also unanimously found that Italy's physical interference in the navigation of the *St Antony*, within the Indian EEZ and without legal basis, violated Articles 87 and 90 of UNCLOS.³⁷ As acts of physical interference attributable to Italy, this could have also raised a violation of Article 92(1) of UNCLOS — but this was not included in India's submissions.³⁸

4.2. Applying Customary Law-Based Prescriptive Jurisdiction

In response to Italy's submission that India's *1976 Maritime Zones Act* and *1981 Notification* were incompatible with UNCLOS, India argued that its exercise of jurisdiction over the incident was not based on that legislation but rather the territoriality principle or passive personality principle.³⁹ The Tribunal accepts that a State may, by virtue of an ex-

36. *ibid* 528–536.

37. *ibid* 1036–1043.

38. Attribution: *ibid* 860–862.

39. *ibid* 352–359.

tended territoriality principle, exercise prescriptive jurisdiction over its flagged vessels as if offences aboard the vessel were committed in its territory.⁴⁰ The Tribunal also accepts that the objective and subjective territoriality principles would apply to vessels so that a flag State's prescriptive jurisdiction may extend beyond the vessel to related acts initiated or concluded extraterritorially. This includes the acts of foreign nationals aboard foreign-flagged vessels on the high seas. '[W]here an offence was commenced on board one vessel and completed on board another vessel, the flag States of both vessels may have concurrent jurisdiction over the offence'.⁴¹ Such customary law prescriptive jurisdiction is entirely valid, but not codified in any relevant international treaties and therefore is not what Article 92(1) of UNCLOS envisages as 'exceptional cases expressly provided for in international treaties or in [UNCLOS]'. This alone already suggests that questions of whether the extended territoriality principle provides lawful prescriptive jurisdiction in any given case are answered without recourse to 'exclusivity' and Article 92 of UNCLOS.

The Tribunal's engagement with objective and subjective territoriality is a welcome addition. One critique of the *M/V Norstar Judgment* was its failure to do so despite the Italian submissions on this matter within that case.⁴² However, the *Award* immediately follows this addition with another ambiguous statement on Article 92(1) of UNCLOS:

Furthermore, in the Arbitral Tribunal's view, India's exercise of jurisdiction over the 'Enrica Lexie' incident is not only compatible with the Convention, but *justified by Article 92, paragraph 1, of the Convention, which provides for the principle of exclusive flag State jurisdiction*. Pursuant to this principle, India, as the flag State, has *exclusive jurisdiction* over the

40. *ibid* 364–365.

41. *ibid* 366, 840.

42. *M/V 'Norstar' Judgment, Joint Dissenting Opinion* (n 29) paras 22–32.

‘St. Antony’ and may assert its jurisdiction in respect of the offence that was allegedly completed on board its vessel in the exclusive economic zone, in the same way as Italy, as the flag State, has *exclusive jurisdiction* over the ‘Enrica Lexie’ and may assert its jurisdiction in respect of the offence that was allegedly commenced on board its vessel.⁴³

Had the Tribunal limited the concept of exclusive flag State jurisdiction to enforcement jurisdiction at-sea, this statement would clarify that the previously recognised concurrent prescriptive jurisdiction of Italy and India over a transboundary/trans-vessel offence does not affect the exclusive enforcement jurisdiction of each State concerning its vessel in the EEZ. There is no express exception to exclusive flag State jurisdiction concerning the crime of murder, so neither State could take non-consensual enforcement measures in the EEZ or high seas against any foreign vessel involved. Both States could, however, exercise prescriptive jurisdiction over the offence and await the foreign vessel’s entry into its territorial enforcement jurisdiction, such as entering its ports. Enforcement could then occur. Instead, the Tribunal’s statement that the exclusive flag State jurisdiction concerns both prescriptive and enforcement jurisdiction results in a series of paragraphs which suggest prescriptive jurisdiction over a vessel can be simultaneously ‘concurrent’ and ‘exclusive’. That suggestion directly conflicts with the ordinary meanings of these diametrically opposite terms.

The Tribunal felt it was unnecessary to address the validity of the passive personality principle once territoriality was established.⁴⁴ Given today’s heightened awareness of gross human rights abuses at-sea, including modern day slavery and the murder of fishers or observers, a positive

43. *Enrica Lexie Award* (n 2) para 368 (emphasis added).

44. *ibid* 369. Supporting India’s position: Mahin Sobhani, ‘Study on the Criminal Jurisdiction on the Exclusive Economic Zone with Emphasis on Enrica Lexie case’ (2021) 2(1) *The Iranian Review for Law of the Sea and Maritime Policy* 199, 205-206.

affirmation of the continual applicability of this customary jurisdiction at-sea, regardless of Article 92 of UNCLOS, could promote greater safety and human security at sea.⁴⁵ At the time of writing, the major flag States are *not* the major labour supply States of either merchant shipping or fisheries related vessels. India apparently raised significant State practice to support its position. Italy objected to its applicability in this case but, while sceptical, does not appear to outright object to its applicability at-sea.⁴⁶ Other previously sceptical States, such as the USA, exercise prescriptive personality-based jurisdiction and explicitly include murder of a US national aboard a foreign vessel as one such example.⁴⁷

4.3. Applying Articles 87 and 90

The *Award* reaffirms the intimate link between exclusive flag State jurisdiction and the freedoms of the high seas.⁴⁸ It also reaffirms that extra-territorial prescriptive jurisdiction over foreign-flagged vessels, without a valid legal basis, would violate Article 87 of UNCLOS⁴⁹ and related provisions such as Article 90.⁵⁰ Article 87 of UNCLOS protects a flag

45. *Contra*, arguing Article 92 of UNCLOS limits passive personality-based jurisdiction: Angela Del Vecchio, 'The Fight Against Piracy and the *Enrica Lexie* Case', in Lilian del Castillo (ed) *Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea: Liber Amicorum Judge Hugo Caminos* (Brill 2015) 404–405.

46. *Enrica Lexie Award* (n 2) paras 323–324, 345.

47. 18 United States Code 2020 § 7(7)–(8), 1111(b).

48. Previously, e.g., *M/V 'Norstar' Judgment* (n 9) paras 216–218, 225.

49. *Enrica Lexie Award* (n 2) paras 468–473.

50. *ibid* 1037–1038. On enforcement, see *The Case of the SS Lotus (France v Turkey)*, *Judgment* [1927] PCIJ 9, PCIJ Series A No 10 25; *M/V 'Saiga' (No 2) (Saint Vincent and The Grenadines v Guinea)*, *Judgment* [1999] ITLOS 2, ITLOS Reports 1999 10 [149–150]; *Arctic Sunrise (Merits)* (n 21) paras 332–333. On prescription, see *M/V "Virginia G" (Panama/ Guinea-Bissau)*, *Judgment* [2014] ITLOS 19, ITLOS Reports 2014 4 [220–222] (implicit); *M/V 'Norstar' Judgment* (n 9) para 224; *M/V 'Norstar' Judgment, Joint Dissenting Opinion* (n 29) paras 14–17.

State's vessels from unlawful exercises of prescriptive jurisdiction by non-flag States on the high seas or within EEZs. As confirmed in the *South China Sea Arbitration*, Article 56 of UNCLOS also protects a coastal State's jurisdiction over those vessels within its exclusive EEZ rights and jurisdiction from being subject to unlawful exercises of prescriptive jurisdiction by non-coastal States within its EEZ.⁵¹

The freedoms of the high seas are an interrelated but distinct principle to that of exclusive flag State jurisdiction. As the latter is a 'component' of high seas freedoms, Article 87 of UNCLOS is implicitly broader on the matter of jurisdiction at sea so as to not be superfluous.⁵² The *Award* nonetheless appears to blur this boundary by reiterating that Article 92(1) of UNCLOS codifies a longstanding customary principle that:

[A]part from certain special cases which are defined by international law – vessels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them.⁵³

This is in direct reference to the *S.S. Lotus Judgment* and is the same sole precedent cited in the *M/V Norstar Judgment* to support its controversial

51. *The South China Sea Arbitration (The Republic of Philippines v The People's Republic of China)*, Award [2016] PCA 2013-19 (Arbitral Tribunal (UNCLOS, Annex VII)) [716] whereby Chinese prescriptive jurisdiction exercised in the EEZ of the Philippines breached Article 56 because it extended beyond the regulation of Chinese vessels to include the regulation of foreign flagged (Filipino) vessels without legal basis. It was thus contrary to the otherwise reserved Filipino jurisdiction for fisheries therein.

52. ILC, 'Draft Articles on the Law of Treaties with Commentaries' (1966) II Yearbook of the International Law Commission 187, 219 as far as *ut res magis valeat quam pereat* is a general rule it is embodied in Article 31(1) of VCLT.

53. *Enrica Lexie Award* (n 2) para 467.

reading of Article 92 of UNCLOS.⁵⁴ However, the Tribunals in both the *Enrica Lexie Award* and the *M/V Norstar Judgment* did not emphasise that the *S.S. Lotus Judgment* was likely discussing at-sea enforcement jurisdiction. On ex-post adjudicative jurisdiction, which presupposes valid extraterritorial prescriptive jurisdiction, the PCIJ stated that ‘it by no means follows that a State can never in its own territory exercise jurisdiction over acts which have occurred on board a foreign ship on the high seas’.⁵⁵ This caveat by the PCIJ was not addressed in the *M/V Norstar Judgment* nor the *Enrica Lexie Judgment*.⁵⁶

What is more, if jurisprudence predating UNCLOS is being considered, the *Muscat Dhows Case* appears informative on the general approach to prescriptive jurisdiction at-sea whenever express treaty provisions do not provide otherwise. The Tribunal’s starting point was that:

54. *SS Lotus* (n 50) 25; *M/V ‘Norstar’ Judgment* (n 9) para 216. Critical reflections, see: Richard Collins, ‘The M/V “Norstar” Case (Panama v. Italy) (ITLOS)’ (2019) 58 International Legal Materials 673; Eduardo Jiménez, ‘La Sentencia Del Tribunal Internacional Del Derecho Del Mar De 10 De Abril De 2019 En El Caso M/V Norstar (Panamá C. Italia)’ in Eduardo Jiménez and others, *Revista Electrónica de Estudios Internacionales*, vol 2019 (2019); Alla Pozdnakova, ‘Oceans as Spaceports: State Jurisdiction and Responsibility for Space Launch Projects at Sea’ (2020) 26 Journal of International Maritime Law 267, 275–277; Chie Kojima, ‘Modern Slavery and the Law of the Sea: Proposal for a Functional Approach’ (2021) 9 The Korean Journal of International and Comparative Law 4, 14–17; Vasco Becker-Weinberg, ‘The Interpretation and Application of the Freedom of Navigation and Flag State Jurisdiction in the M/V “Norstar” and the M/T “San Padre Pio” Cases’ (2021) 9 The Korean Journal of International and Comparative Law 108.

55. *SS Lotus* (n 50) 25. On transboundary criminal law, “Customary international law does not prevent States from asserting jurisdiction over acts that took place outside their territory on the basis of the territoriality principle” *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar* [2019] ICC-01/19-27 (ICC Pre-Trial Chamber III) [56–62]. “There is no apparent reason why the threshold for territorial jurisdiction would be different based on whether the location of the conduct/crime is on land or vessel/aircraft” *ibid* 48.

56. *M/V ‘Norstar’ Judgment, Joint Dissenting Opinion* (n 29) paras 19, 36. Busco and Fontanelli (n 8) 408–412.

the legal situation of vessels flying foreign flags and of the owners of such vessels in the territorial waters of an Oriental State is determined by the general principles of jurisdiction, by the capitulations or other treaties and by the practice resulting therefrom.⁵⁷

While in this case a bilateral treaty had limited enforcement jurisdiction within the territorial sea, this expressly had no consequence for the exercise of nationality-based jurisdiction by the Sultan of Muscat over owners, masters, or crew members of such vessels.⁵⁸

4.4. Applying Article 97

It was previously argued that the necessity for, and existence of, Article 97 of UNCLOS was testament to the fact that exclusive flag State jurisdiction under Article 92 of UNCLOS concerns enforcement and not prescriptive jurisdiction.⁵⁹ The *Award's* reasoning on Article 97 of UNCLOS would support this proposition, notwithstanding the *Award's* opposing conceptualisation of exclusive flag State jurisdiction:

57. *Muscat Dhows (France/Great Britain), Award (Official Translation)* [1905] PCA 1904-01 (Arbitral Tribunal (Compromis)) 4.

58. *ibid* 5.

59. Honniball, 'The Exclusive Jurisdiction of Flag States' (n 7) 525–526; Benedetto Conforti, 'In Tema Di Giurisdizione Penale per Fatti Commessi in Acque Internazionali' (*Società Italiana di Diritto Internazionale e di Diritto dell'Unione Europea*) <<http://www.sidi-isil.org/wp-content/uploads/2012/10/Conforti1.pdf>>; Douglas Guilfoyle, 'Shooting Fishermen Mistaken for Pirates: Jurisdiction, Immunity and State Responsibility' (EJIL: Talk!, 2 March 2012) <<https://www.ejiltalk.org/shooting-fishermen-mistaken-for-pirates-jurisdiction-immunity-and-state-responsibility/>>; Duncan B Hollis, 'The Case of Enrica Lexie: Lotus Redux?' (*Opinio Juris*, 17 June 2012) <<http://opiniojuris.org/2012/06/17/the-case-of-enrica-lexie-lotus-redux/>>.

The PCIJ's [*S.S. Lotus*] judgment, which decided that both France and Turkey were entitled to exercise penal jurisdiction over the French officer, was reversed with 'the object of protecting ships and their crews from the risk of penal proceedings before foreign courts in the event of collision on the high seas, since such proceedings may constitute an intolerable interference with international navigation'. Article 35 of the ILC Draft Articles Concerning the Law of the Sea accordingly *reserved* exclusive penal jurisdiction to either the flag State of the ship on which the accused person serves, or the State of which the accused person is a national, with the latter addition made 'in order to enable States to take penal or disciplinary measures against their nationals serving on board foreign vessels who are accused of causing collisions'.

646. *It is thus apparent that an exception to the otherwise prevailing rules on allocating jurisdiction was created specifically for a situation where the master or any other person in the service of a ship are at risk of facing penal proceedings before foreign courts in respect of navigational conduct on the high seas; such risk would typically arise only where some form of damage or harm has occurred as a result of navigation.*⁶⁰

The Tribunal did not address the relationship between its conclusions on Article 97 and Article 92, but it is argued here that its reasoning on the former would not support its reasoning on the latter. Paragraph 646 of the *Award* interprets Article 97 in the context of the general international law on allocating prescriptive jurisdiction and not exclusive flag State prescriptive jurisdiction. This is an implicit application of the restrictive interpretation of Article 92, despite the Tribunal's previous explicit statement supporting an expansive interpretation. As argued by India, Article 97 of UNCLOS (and other intermediate treaties) leave intact

60. *Enrica Lexie Award* (n 2) paras 645–646 (emphasis added).

the position of the *S.S. Lotus Judgment* in respect of criminal prescriptive jurisdiction at-sea beyond those expressly reversed cases of ‘collisions or other incidents of navigation’.⁶¹

4.5. Applying the Immunity of State Officials

When addressing Italy’s submission on the immunity of the marines, the Tribunal’s statement of dual concurrency and exclusivity for flag State jurisdiction is repeated, raising possible further confusion:

Pursuant to Article 58, paragraph 2, and Article 92, *each Party has exclusive jurisdiction over their respective ship* involved in the incident, namely, Italy over the ‘Enrica Lexie’ and India over the ‘St. Antony’. *The Parties therefore have concurrent jurisdiction over the incident.*⁶²

Had exclusivity been limited to enforcement, one could interpret this without internal conflict as referring to exclusive enforcement over the vessel and concurrent prescriptive jurisdiction over the incident (extending to prescriptive jurisdiction over the foreign-flagged vessel involved by way of extended territoriality).

The Tribunal’s discussion of immunity also puts to rest any suggestion that by exercising objective or subjective territorial jurisdiction there is no extraterritorial effect or scope to the laws applicable to a foreign-flagged vessel. India had argued that a territorial tort exception to immunity would preclude the Italian marines from enjoying immunity *ratione ma-*

61. *ibid* 633. On this issue: Giuseppe Cataldi, ‘The Enrica Lexie Award Amid Jurisdictional and Law of the Sea Issues’ (2021) 30(1) The Italian Yearbook of International Law Online 167, 176-179. For another recent case concerning interpretation of Article 97 of UNCLOS; Changwoo Ha, ‘Criminal jurisdiction for ship collision and marine pollution in high seas-Focused on the 2015 judgement on M/V Ernest Hemingway case’ (2020) 4(1) Journal of International Maritime Safety, Environmental Affairs, and Shipping 8.

62. *Enrica Lexie Award* (n 2) para 839 (emphasis added).

teriae. However, in rejecting its application to this incident, the Tribunal recognises that in this case India's law is prescribing standards of conduct concerning foreign nationals aboard foreign vessels in the EEZ:

In the present case, it is undisputed that *the Marines were on board the 'Enrica Lexie'*, and not on Indian territory, *when they committed the acts at issue* [...] to the extent that the "territorial tort" exception is a customary rule of international law, it would in any event not apply in this case because *the Marines were not on Indian territory when they committed the acts at issue*.⁶³

Article 87 (and Article 92 for the Tribunal in *Enrica Lexie*) are *applicable* when a non-flag State exercises extraterritorial prescriptive jurisdiction over foreign vessels in the EEZ or high seas. Nonetheless, a greater standard of appreciation is required to establish a *breach* thereof. The extension and extraterritorial effect of Indian law governing the acts of foreign nationals aboard a foreign vessel were justified — in so far as the applicable Articles of UNCLOS — by the extended territoriality principle.⁶⁴

5. Dangers of Divergence

International judicial decisions are sometimes a compromise among the Tribunal's Members. The text of decisions may thus reflect these differences or use broad and compromissory language that is open to differing interpretations, so as to achieve consensus. Furthermore, given the preference and priority of settling disputes by negotiation or other peaceful means, courts and tribunals are rarely asked to rule on clear-cut legal questions.

⁶³. *ibid* 871–873 (emphasis added).

⁶⁴. *Contra M/V 'Norstar' Judgment* (n 9) para 226 whereby the extension of Italian law to foreign vessels on the high seas was sufficient to both raise Article 87 as applicable and as violated (despite the distinction set out by the Tribunal in para 188).

An inherent danger of internal divergence nonetheless arises. Conflicting reasoning may result in a matter remaining unsettled, possibly resulting in the continuation of the dispute. The 1927 *S.S. Lotus* reasoning on extraterritorial jurisdiction is testament to this, with most literature of jurisdiction beginning with the debate on whether the prohibitive rule or the permissive principles approach to prescriptive jurisdiction is correct. This remains so despite the lack of State practice supporting the unlimited unless prohibited approach.⁶⁵

International judicial decisions may also raise external divergence if the interpretation and application of UNCLOS was to conflict with the legal outcomes or directions of another dispute settlement procedure that is seized of similar facts, or more broadly the interpretation of State Parties as evident in subsequent State practice or agreements regarding the interpretation and application of UNCLOS. Divergencies with State practice and reasoning may also raise more general concerns, such as trust in courts and tribunals, faith in their interpretation, loyal implementation of their judgments by Parties to a dispute, and the fragmentation of international law concerning overlapping fields — here, the law of State jurisdiction and the law of the sea. More broadly, unclear reasoning may prolong or aggravate other disputes relating to exclusive flag State jurisdiction.

In cases of external divergence, it is difficult to give much weight to the *Award's* views on the scope of exclusive flag State jurisdiction and Article 92 of UNCLOS because the Tribunal has not given reasons for its interpretation.⁶⁶ In such cases, explanatory reasoning would be of benefit to the international community and the lasting legacy of the Tribunal's jurisprudence.

65. Ryngaert (n 28) 29–48.

66. A point raised in another context, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v United Arab Emirates), Provisional Measures, Order of 23 July 2018, Joint Declaration of Judges Tomka, Gaja and Gevorgian* [2018] ICJ 172, ICJ Reports 435 [5].

5.1. Internal Consistency

One envisaged avenue to improve internal consistency is that the Tribunal may be using a different definition of ‘exclusive’ than its ordinary understanding. Essentially, exclusive jurisdiction would then be reduced to meaning a flag State has exclusive prescriptive jurisdiction unless another State has jurisdiction; be that prescriptive jurisdiction established in treaty law or customary international law.

However, as Article 92(1) of UNCLOS is limited in application to extraterritorial maritime zones, States already require a recognised jurisdictional nexus in general international law when prescribing laws concerning foreign-flagged vessels or persons aboard. If this was the Tribunal’s understanding of ‘exclusive’, this would mean that on the point of exclusive flag State jurisdiction, Article 92(1) of UNCLOS simply repeats general international law, without any unique contribution beyond enabling compulsory dispute settlement via Part XV of UNCLOS.

Arguably, this could be a dangerous proposition for the law of the sea. It is well recognised that Article 92(1) of UNCLOS does *at least* protect vessels from foreign enforcement jurisdiction on the high seas or in the EEZ, unless ‘exceptional cases expressly provided for’ apply. The Tribunal reasons that, because Article 92(1) does not define which ‘jurisdiction’ it is referring to, it must include both exclusive prescriptive and enforcement jurisdiction. But the logical end of that reasoning is that the same expansive interpretation applies to the scope of exceptions to exclusive ‘jurisdiction’. For example, the Tribunal accepts India’s objective territoriality as one case where prescriptive jurisdiction can be exercised over acts committed aboard an Italian vessel in the EEZ. There is an exception to Italy’s exclusivity. But, following the Tribunal’s expansive interpretation of Article 92 of UNCLOS, on what basis would this exception not also provide an exception for India to exercise extraterritorial enforcement jurisdiction against an Italian vessel in India’s EEZ?

There is nothing in the wording of Article 92(1) of UNCLOS for which a differing test could be established for questions of exclusive prescriptive jurisdiction and questions of exclusive enforcement jurisdiction. If Article 92(1) of UNCLOS is not reserved to only refer to exclusive enforcement jurisdiction, the ability to distinguish these frequent cases of permissible prescription but impermissible enforcement disappears. Many States would balk at such a dilution of their rights of exclusive enforcement jurisdiction.

Alternatively, one might narrowly read the *Enrica Lexie Award* and the *M/V Norstar Judgment* in context so as to apply their discourse on Article 92 of UNCLOS to only governing the relationship between coastal State jurisdiction and flag State jurisdiction. Compared to other cases of overlapping jurisdiction, UNCLOS does set out to a greater degree the division of coastal State jurisdiction and flag State jurisdiction. UNCLOS also includes provisions, such as Article 59, to assist in unattributed cases. A coastal State does not have prescriptive jurisdiction in the EEZ or high seas beyond those entitlements established by, or under, the UNCLOS framework. On this hypothesis, a contextual reading of the *Enrica Lexie Award* and the *M/V Norstar Judgment* would assist in narrowing and clarifying the Tribunals' interpretations and applications of Article 92 of UNCLOS.

The facts of the *M/V Norstar Judgment* might lend themselves to such a contextual reading.⁶⁷ However, this is less persuasive in refining the *Enrica Lexie Award* because of the reframing of India's disputed jurisdiction during this saga from one of a coastal State's penal law in the EEZ and contiguous zone (witnessed in India's domestic proceedings) to one of

67. *M/V 'Norstar' (Panama v Italy), Judgment, Declaration of Judge Kelly* [2019] ITLOS 25, ITLOS Reports 2018–2019 10, 2 which, while welcoming clarification of the exclusive flag State jurisdiction concept, does so in the context of emphasising the flag-coastal balance of UNCLOS. *al Measures, Order of 23 July 2018, Joint Declaration of Judges Tomka, Gaja and Gevorgian* [2018] ICJ 172, ICJ Reports 435 [5].

objective flag State jurisdiction (witnessed in the arbitral proceedings). Within the *Enrica Lexie Award* the Tribunal was therefore discussing the wider role of Article 92 in balancing jurisdiction on the high seas and EEZ as between the flag State and all other jurisdictions recognised in UNCLOS and compatible customary international law (in this case another flag State).⁶⁸ It is in this more general context that the conceptualisation of Article 92 as including exclusive flag State prescriptive jurisdiction is difficult to reconcile with State practice and other sections of the *Award* that recognise concurrent jurisdiction, in particular the discussions on the exceptionalism of Article 97 of UNCLOS in narrowing penal jurisdiction in limited and defined scenarios.

5.2. External Consistency

As argued previously, an interpretation of exclusive flag State jurisdiction in the wider context of UNCLOS and its object and purpose would point towards ‘jurisdiction’ as referring to enforcement jurisdiction. Nonetheless, another decisive element appears to be the interpretation of State Parties as evident in subsequent State practice and agreements which clearly extend customary principles of State jurisdiction to foreign vessels on the high seas and EEZ, without limitation and without the necessity of concurrent treaty-based jurisdiction.⁶⁹

For example, one may consider the extensive State practice on active personality-based prescriptive jurisdiction extending to foreign-flagged vessels,⁷⁰ or the simple lack of any limitation to applying the universality principle to crimes involving foreign-flagged vessels. What is more, mul-

68. See references to customary and general international law in UNCLOS Preamble and Articles 58(2)-(3), 221(1), 293, 297(1)(b) and 311(2).

69. VCLT Article 31(3).

70. Simone Vezzani, *Jurisdiction in International Fisheries Law. Evolving Trends and New Challenges* (CEDAM 2020), 182-195.

tilateral treaties predating UNCLOS (e.g., *Convention for the Protection of Submarine Telegraph Cables*)⁷¹ and subsequent to UNCLOS (e.g., *Port State Measures Agreement*),⁷² distinguish prescriptive and enforcement jurisdiction at-sea, presupposing general customary law principles such as nationality-based jurisdiction apply, regardless of flag State and regardless of whether the flag State is a Contracting Party. Contrary State practice, for example, where the exercise of extraterritorial prescriptive jurisdiction is explicitly excluded as a matter of legal obligation, is not known to this author.

Legal uncertainties are detrimental to State Parties and general efforts to protect the maritime community and marine environment. Urbina's damning expose in *The Outlaw Oceans* highlights the often exacerbating lack of political will for international cooperation and enforcement concerning crimes that are committed far from shore.⁷³ Likewise, when addressing entities involved in emerging maritime concerns with a jurisdictional nexus to the State, State responses should not be unnecessarily complicated by expansive interpretations of Article 92 of UNCLOS. It would be very unfortunate if the *M/V Norstar Judgment* and *Enrica Lexie Award* begin to have a chilling effect on the extension of perfectly valid customary law prescriptive jurisdiction to activities involving foreign-flagged vessels.

71. Convention for the Protection of Submarine Telegraph Cables, signed 14 March 1884, TS 380 (entered into force, 1 May 1988) Article 8 (possible exercise of nationality-based jurisdiction).

72. Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, 22 November 2009, 55 ILM 1157 (entered into force 5 June 2016), Preamble, Articles 15(a)(ii) and 18(1)(a) (transmit inspection results to the State of nationality – in the hope that an adequate response occurs).

73. Ian Urbina, *The Outlaw Ocean: Journeys Across the Last Untamed Frontier* (Alfred A. Knopf 2019).

6. Conclusion

The practical legacy of the *Award* in resolving the Parties' dispute is clear.⁷⁴ As required by the *Award*, in 2021 Italy and India reached agreement on the quantification of compensation due to India and this has been duly paid.⁷⁵ In turn, the criminal cases against the Italian marines were discharged and India has therefore ceased to exercise criminal jurisdiction over the Italian marines.⁷⁶ The continuation and eventual conclusion of the Italian criminal investigation into the incident, with the cooperation of India, is the last remaining step to bring the *Enrica Lexie* incident to conclusion.

However, the doctrinal contribution of the *Award* to clarifying the appropriate interpretation and application of Article 92(1) of UNCLOS is less clear, and arguably less positive. The Tribunal's statement on conceptualising exclusive flag State jurisdiction takes the broadest possible interpretation of Article 92(1) to include exclusive flag State prescriptive and enforcement jurisdiction, with little reasoning or support. And yet, when applying Article 92(1) to Italy's submission, or when Article 92(1) is indirectly raised, the Tribunal's reasoning limits exclusive flag State jurisdiction to enforcement jurisdiction, as per the restrictive approach. The latter may be a saving grace for the particular findings of the *Enrica Lexie Award*, but to repeat the same mistakes of the *M/V Norstar Judgment* in its doctrinal restatement of Article 92(1) of UNCLOS is shaping to be an untenable

74. For a contextual reading, whereby Tanzi argues the use of third-party dispute settlement was complementary to wider diplomatic means and the abatement of circumstances making continued a negotiated settlement unfeasible, Attila M Tanzi (n 5), 451-453.

75. *Enrica Lexie Award* (n 2) para 1094(B)(6)(b); *Special Leave Petition (Civil) No. 20370 of 2012 (Massimiliano Latorre and others v. Union of India and others)*, Order of 15 June 2021, Supreme Court of India (2021), para 3, available at <https://main.sci.gov.in/supremecourt/2012/22647/22647_2012_41_43_28070_Order_15-Jun-2021.pdf>.

76. *Enrica Lexie Award* (n 2) para 1094(B)(2); *Special Leave Petition (Civil) No. 20370 of 2012*, Order of 15 June 2021 (n 75) para 7.

trend in current jurisprudence. The trend within other international fora is certainly not to suggest exclusive flag State prescriptive jurisdiction on the high seas but rather promote the exercise of all available jurisdictions.⁷⁷

Neither the facts nor the positions of the Parties required the Tribunal to, without reasoning, support the *M/V Norstar Judgment's* interpretation of Article 92(1). Given the Tribunal's contradictory support of concurrent prescriptive jurisdiction in other sections of the *Award*, either Paragraphs 524–527 should have been deleted, or they should have been significantly expanded to include reasoning, State practice, and application of the rules of treaty interpretation to justify their conclusion. That opportunity was lost.

Equally, when discussing flag State jurisdiction, it would be best to refrain from simultaneously referring to concurrent and exclusive jurisdiction. The Concurring and Dissenting Opinion of Judge Rao provides a good example, simply referring to concurrent flag State jurisdiction under Article 92 of UNCLOS.⁷⁸ Given the internal and external inconsistencies of the *Award's* broadly construed *interpretation* of Article 92 of UNCLOS — and the very real potential this has to mislead those who do not delve into the more fine-tuned *application* of Article 92 of UNCLOS within the *Award* — it has been necessary here to discuss and clarify this aspect of the *Award*.⁷⁹ This remains all the more so given that

77. FAO, *International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing* (FAO 2001) para 9.3.

78. *The 'Enrica Lexie' Incident (Italy v India)*, *Award, Concurring and Dissenting Opinion Dr Sreenivasa Rao Pemmaraju* [2020] Arbitral Tribunal (UNCLOS, Annex VII) PCA Case No. 2015-28 [19].

79. However, see Ringbom's engaging and accessible articulation of jurisdiction at sea, including in the BBNJ negotiations context which may represent a missed opportunity to explicitly realign the existing egocentric jurisdictional framework with the community interests such an instrument is purported to serve: Henrik Ringbom, 'Ships in ABNJ – Broadening Jurisdictional Opportunities for Non-Flag States' in Vito De Lucia, Alex Oude Elferink, and Lan Ngoc Nguyen (eds) *International Law and Marine Areas beyond National Jurisdiction: Reflections on Justice, Space, Knowledge and Power* (Brill 2022).

the undisputed core of the dispute was the question of jurisdiction over the incident vis-à-vis Articles 92 and 97 of UNCLOS.⁸⁰

Regardless of whether one agrees with the Tribunal's interpretation of Article 92 as incorporating exclusive flag State prescriptive and enforcement jurisdiction, or the position affirmed here that it refers to enforcement jurisdiction, it is desirable to persuasively define the scope of 'jurisdiction' in Article 92(1) of UNCLOS. Legal clarity is necessary to either protect flag States from other States exercising prescriptive jurisdiction prohibited by UNCLOS, or to avoid unnecessary uncertainties and possible inhibitions to the rights of non-flag States to regulate persons, property, or conduct at sea whenever they fall within their established jurisdictional entitlements. This author would clearly side with the latter and the need to avoid any chilling effects of the *Enrica Lexie Award's* and the *M/V Norstar Judgment's* general statements on Article 92 of UNCLOS going forward.

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80. By contrast, the Award's interpretation and application of Article 97 of UNCLOS has been subject to detailed analysis: Andrea Cannone 'L'interpretazione della espressione "altri incidenti di navigazione" di cui all'art. 97 della Convenzione sul diritto del mare nella sentenza arbitrale del 21 maggio 2020 relativa alla vicenda della Enrica Lexie (Italia c. India)' (2021) Ordine Internazionale e Diritti Umani 283.

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