Criminal Jurisdiction in International Law

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Even almost a century after the seminal 1927 Permanent Court of International Justice (PCIJ) judgment in the LOTUS Case, international law still does not provide clear rules for determining jurisdiction in case of overlapping, contesting claims of jurisdiction by two or more sovereign states. Recent judgments of the International Tribunal of the Law of the Sea (ITLOS) now provide a growing body of precedents under the 1982 UN Convention on the Law of the Sea, (considered to be the Constitution of the Oceans), that contain glimmers of potential rules, a skeletal framework of guiding principles to determine jurisdiction in disputes involving two or more sovereign states.

The maritime incident involving two Italian marines on board the tanker MT ENRICA LEXIE[1], shooting Indian fishermen mistaking them to be pirates off the coast of Kerala, has once again catapulted the thorny issue of criminal jurisdiction in international law for judicial scrutiny. It may be pertinent to first review the various theories of jurisdiction that have evolved over the years[2], then peruse the growing body of judgments by the *International Tribunal of the Law of the Sea* (**ITLOS**)[3] to gain insight as to what constitutes criminal jurisdiction in international law. Specifically, what factors enable the jurisdiction to be decided in favour of a particular sovereign State when two or more contesting States claim the right to hold trial according to its national laws.

Criminal jurisprudence in international law, to a great extent, has been shaped and moulded by its various theories of jurisdiction. Although international law particularly focuses upon questions of criminal offences, essentially leaving civil matters to municipal law and national enforcement, in the actual implementation of punitive action for criminal offences international law has proven to be ambivalent and lacking muscle. This may largely be to ensure that the practice or implementation of international law is in no way contrary to the tenets of sovereignty of even the smallest of nations. Also, without doubt to preserve if not enhance, without disturbing or disrupting, the carefully crafted goodwill amongst the comity of nations.[4] Several principles over the years have emerged in international law that provide the touchstone for ascertaining and establishing jurisdiction, particularly for crimes committed at sea.

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1 Cf. Footnotes 30 to 33 herein.

2 Source: https://www.britannica.com/topic/international-law/Jurisdiction.

3 Legality of Law Enforcement Activities at Sea (ITLOS Cases No. 2, 19, 24 and 25).

4 "States are in principle not allowed to assert jurisdiction over affairs which are in the domain of other States typically acts that take place extra-territorially as such would violate the sacrosanct principles of non-intervention and the sovereign equality of States." Cedric Ryngaert, Professor of International Law, Utrecht University in "The Concept of Jurisdiction in International Law (second edition 'Jurisdiction in International Law' 2015).

Theories of Jurisdiction

According to the **territorial principle**, States have exclusive authority to deal with crimes committed within their territories. This principle has been somewhat circumvented to permit officials from one State to act within another State in certain circumstances.[5] The presence of US troops in war-torn countries like Taliban-dominated Afghanistan or in the ISIS traumatized regions of West Asia like Jordan, Syria, etc. would be good examples of such circumvention of the territorial principle.

In the case of the **nationality principle**[6], a country is entitled to exercise criminal jurisdiction over its citizens accused of criminal offenses committed in another State. Although this principle has been adopted mainly by civil-law systems, its adoption by common-law regimes increased in the late 20th century, evident in the legislation by Britain of the *War Crimes Act in 1991* and the *Sex Offenders Act in 1997*.

States, based upon the **passive personality** principle, may claim jurisdiction to try a foreign national for offenses, committed outside its territory, that adversely affect its own citizens. This principle has been often used by the United States to pursue, prosecute terrorists, even to arrest such criminals as seen in the kidnapping of the de facto President of Panama, Manuel Noriega. Noriega was subsequently convicted by an American court for cocaine trafficking, racketeering and money laundering.[7]

A number of Conventions, it is worth noting, have embodied the *passive personality principle*, such as the Convention Against the Taking of Hostages (1979), the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons (1973), and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)[8].

Similarly, the **protective principle**, reflected in the hostages and aircraft-hijacking Conventions and the Convention on the Safety of United Nations and Associated Personnel (1994), may be invoked by a State in cases where a foreigner has committed an act abroad deemed prejudicial to that State's interests, as distinct from harming the interests of its nationals.[9]

A recent example of extra-territorial State-action, reflecting both the **protective** as well as the **prescriptive** principles, would be the surgical killing of Osama bin Laden, the founder of Al Qaeda, the terrorist network of Islamic extremists. Osama bin Laden was the mastermind of the 9/11, 2001

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[5] *Channel Tunnel* arrangements between the United Kingdom and France and *the 1994 Peace Treaty* between Israel and Jordan are illustrative examples of exception to the rules governing the territorial principle. Source:https://www.britannica.com/topic/international-law/Jurisdiction

[6] Source:https://www.britannica.com/topic/international-law/Jurisdiction.

[7] Adolf Eichmann was kidnapped in Argentina by Israeli secret agents for 'crimes against the Jewish people and crimes against humanity'. The Israeli action exemplifies the passive personality, protective as well as the prescriptive principles of jurisdiction in international law.

[8] Source:https://www.britannica.com/topic/international-law/Jurisdiction.

[9] At times, States have exercised their law enforcement jurisdiction abroad, without the consent of the territorial State, by arresting persons outside their territory. Adolf Eichmann was kidnapped in Argentina by Israeli secret agents, without the consent of the territorial State, and charged with 'crimes against the Jewish people' and 'crimes against humanity' under the *Nazis and Nazi Collaborators (Punishment) Law of August 1, 1950.* Not surprisingly, such actions have usually met with considerable protestations by other States.

most lethal terrorist attacks ever on U.S. soil, which left nearly 3,000 people dead. It is a significant instance of a State's unilateral action to eliminate the global menace of terror, a well-recognized crime against humanity. Soon after the 2001 attacks, President George W. Bush had declared Osama bin Laden would be captured dead or alive. Subsequently, on May 02, 2011 Navy SEALs descended on the Abbottabad compound, located behind high security walls in a posh residential neighborhood, close to an elite military academy north of Pakistan's capital, Islamabad. It was later determined that Al Qaeda intended to assassinate President Barack Obama and carry out a series of terror attacks against America, including one on the anniversary of September 11. *Operation Neptune Spear* was executed by the United States purportedly without informing the Pakistani government.

The **universality principle**, on the other hand, enjoins and imposes an obligation for exercise of jurisdiction in cases where the alleged crime may be prosecuted by all States[10] (e.g., war crimes, crimes against the Peace, terrorism, crimes against humanity, slavery, drug trafficking and piracy). The **universality principle** thus underscores the nature (gravity, inhumanity) of the Crime rather than a direct nexus with the State invoking the **universality principle**. In practice universal jurisdiction is only exercised when the alleged perpetrator is, usually by use of force, compelled to be present in the asserting State's territory.[11]

Operation Alondra Rainbow

Operation Alondra Rainbow is a sterling example of a State fulfilling its international obligations to curb piracy by capturing and prosecuting the pirates. It began as a routine interception at sea but within a few hours acquired serious international implications. It was in November 1999 that the Indian Coast Guard first received a tip-off that a vessel had been spotted off the Sri Lankan coast resembling the Japanese ship ALONDRA RAINBOW which had gone missing. Curiously, the name this vessel displayed was MEGA RAMA. Due to surveillance by aircrafts of the Indian Coast Guard, a vivid detailed description with photographs of MEGA RAMA, were flashed for verification to the International Piracy Centres worldwide.

When the vessel entered Indian territorial waters, it was pursued by the Indian Coast Guard interceptor boats. MEGA RAMA however managed to evade interception and slipped away into the mid-Arabian Sea. Confirmation was soon received from the International Piracy Centers and various shipping agencies that the physical characteristics of the vessel matched that of the pirated Japanese ship *Alondra Rainbow*. The Indian Navy, which had been closely monitoring the Coast Guard action, upgraded its operational response to deploy a task force. The vessel was intercepted under ***Article 105*** of the 1982 UNCLOS.[12]

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[10] Articles 105 to 111 of the 1982 UN Convention on the Law of the Sea **(1982 UNCLOS)**

[11] ALONDRA RAINBOW case, the first ever piracy trial was held in Mumbai, India. In October 1999 the Japanese owned & manned bulk carrier ALONDRA RAINBOW, plying under the Panamanian flag, was hijacked in Indonesian waters. Having set the Japanese master and crew members adrift mid-ocean to the perils of the sea, the pirates changed the ship's name to MEGA RAMA. The pirates then set sail westwards for the open waters of the Indian Ocean with $14 million worth of cargo on board. The Singapore Piracy Reporting Centre raised an alarm and the pirated vessel was sighted in Indian waters off Kochi. After a dramatic high seas chase involving first the Indian Coast Guard and then the Indian Navy, the vessel was captured and the pirates brought ashore to the Yellow Gate marine police station in Mumbai. However, six years later, the pirates were set free by the Mumbai high court due to technical lacunae in the prosecution's case.

[12] This empowers any State to seize a ship or aircraft captured by pirates.

What clearly emerges from the aforesaid perusal of the various principles of jurisdiction, is that in the law of jurisdiction primary focus has been predominantly devoted to 'prescriptive' or 'legislative' jurisdiction. Such jurisdiction refers to the power of a State to make its laws applicable to the perpetrators of certain offences, and/or the property owned by them located abroad, by legislation. Under this principle espoused by the Permanent Court of International Justice *(***PCIJ***)* in the seminal ***1927 Lotus Case***,[13] States are in principle free to exercise prescriptive jurisdiction, unless a prohibitive rule to the contrary exists in international law or could be so identified. This caveat was expounded by the PCIJ that by exercise of jurisdiction in any given case, the State does not "overstep the limits which international law places upon its jurisdiction." The words set between quotation marks are taken from the famous decision of the PCIJ in the Case of the ***S.S. LOTUS (France v. Turkey)***. The PCIJ held that "[T]he first and foremost restriction imposed by international law upon a State is that --- failing the existence of a permissive rule to the contrary ---it may not exercise its power in any form in the territory of another State."[14]

Case of the S.S. LOTUS (France v. Turkey) 1927

It may at this point be worth examining the facts of the LOTUS case. The case arose out of a collision on the high seas between the French mail steamer LOTUS and the Turkish collier BOZ-KOURT*,* in which the latter sank and several Turkish citizens lost their lives. The arrest and conviction of the French first officer in Turkey, which was strongly contested by France, raised the question of the jurisdiction of the Turkish authorities to arrest the French national. The French Government had argued that under international law the fact that the victims were nationals of the forum (Turkey) would be insufficient to justify its exercise of jurisdiction over a foreigner for his extra-territorial acts in the high seas.

The PCIJ stated that that the offence of collision produced its effects on the Turkish vessel,[15] demise of Turkish nationals, and consequently in a place assimilated to Turkish territory in which the application of Turkish criminal law cannot be challenged.[16] Thus, by the process of assimilation the PCIJ did broaden the concept of territoriality.[17] The final judgment however, it may be noted, was based on the rules of navigation as the offence arose out of collision between the two vessels in the high seas, for which reason the jurisdiction of the Flag State was upheld.

It may be categorically stated that the rules of the enforcement of jurisdiction are far stricter than the rules of prescriptive jurisdiction[18]. As the PCIJ held in the LOTUS CASE, *supra*,[19] States are not

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[13] PCIJ, SS Lotus, PCIJ Reports, Series A, No. 10, 18-19 (1927).

[14] Ibid: PCIJ, SS LOTUS, PCIJ Reports, Series A, No. 10, 18-19 (1927).

[15] Ships and aircraft enjoy the nationality of the State whose flag they fly, in which they are registered and are thus subject to its jurisdiction.

[16] Ibid: PCIJ, SS LOTUS, PCIJ Reports, Series A, No. 10, (1927).

[17] Arthur Lenhofft in "International Law and Rules On International Jurisdiction", Cornell Law Quarterly (vol. 50 issue I Fall 1964 pp.5-23).

[18] The rules of enforcement jurisdiction are stricter than the rules of prescriptive jurisdiction. As the Court held in the LOTUS case, States are not entitled to enforce their laws outside their territory, "except by virtue of a permissive rule derived from international custom or from a convention," stated by Prof Cedric Ryngaert in "The Concept of Jurisdiction in International Law": Utrecht University ---- (second ed. 'Jurisdiction in International Law' 2015).

[19] It is a well-established rule of international law, that the law of the flag ordinarily governs the internal affairs of the ship. From the standpoint of international law, the foreign character of vessels, regardless of ownership, is determined by the fact of their registration in a foreign State.

entitled to enforce their laws outside their territory, "except by virtue of a permissive rule derived from international custom or from a convention," even when they have jurisdiction to prescribe and apply their laws extra-territorially as propounded in their national laws.

Based upon the law of **prescriptive jurisdiction**, States may exercise jurisdiction on an extra-territorial basis, especially in criminal matters.[20] Irrefutably, enforcement of prescriptive jurisdiction can only occur by arresting the accused person, who then has to be present in its territory; or by seizing property of the defendant located within its territory and/or abroad. Often, consent by other States and their co-operation will be required to bring about the presence in its territory of the accused person by means of extradition. Alternatively or in addition, to have a domestic court order enforced against assets of the accused person located abroad ("*global Mareva Injunction*"). Such consent or co-operation is not always forthcoming from other sovereign States, which explains why States have at times unilaterally resorted to extra-territorial enforcement measures, patently in violation of international law. [21]

Functional jurisdiction is a method by which the dilemma of establishing criminal jurisdiction in favour of one contesting State may be resolved. It is a term that is mostly used in the context of the law of the sea. In essence, it refers to the coastal State's diminishing jurisdiction over activities in their maritime zones (the territorial sea, the contiguous zone, the exclusive economic zone, and the continental shelf). The device of functional jurisdiction, to a limited extent, may refer to any State's jurisdiction over certain criminal activities ("universal crimes") on the high seas, such as piracy, acts of terrorism, trade in enriched uranium, materials used for nuclear weapons, drug-trafficking, or the trade in slaves. Such functional jurisdiction is naturally geared towards protecting coastal States own legitimate interests first.[22] Although exceptionally rather than the rule, functional jurisdiction is also amenable towards protecting common concerns of the comity of nations. This is exemplified by the guiding principle of common heritage of mankind, which accords preservation of the marine environment with cast-iron legal sanctity, making it to be an international obligation for nation States under the 1982 UNCLOS. The looming dangers of Climate Change galvanized the UN General Assembly in September 2015 to adopt *the 2030 holistic Agenda for Sustainable Development* that includes 17 Sustainable Development Goals (**SDGs**).

Functional jurisdiction involves both a prescriptive and an enforcement component, which do not necessarily coincide. For example, the coastal State may adopt laws and regulations relating to "innocent passage" through its territorial sea in respect of a considerable number of activities impinging upon its maritime domain, but it may only enforce those laws (whether criminal or civil) in certain limited circumstances, depending upon its strategic priorities and national interest.

Finally, there is **jurisdictional immunity** which applies to diplomats, including diplomatic missions and archives, under the Vienna Convention on Diplomatic Relations,1961 and the Vienna Convention on Consular Relations, 1963. Immunity generally is from criminal prosecution, not for civil liabilities arising from contractual obligations, debts, traffic violations, etc. Immunity from local

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[20] *Supra,* footnotes7 & 9. Adolf Eichmann was kidnapped in Argentina by Israeli secret agents, without the consent of the territorial State, and charged with" crimes against the Jewish people" and" crimes against humanity" under the Nazis and Nazi Collaborators (Punishment) Law of August 1, 1950.

[21] Israeli kidnapping of Eichmann, the US kidnapping of Noriega, and the killing of Osama bin Laden in Abbottabad, Pakistan by the US Navy Seals, *supra.*

[22] Prof Cedric Ryngaert in "The Concept of Jurisdiction in International Law": Utrecht University ----, *supra.*

jurisdiction and local laws may also apply to International Organizations in accordance with the General Convention on the Privileges and Immunities of the United Nations, 1946 and agreements signed with the State in which they operate. Judges of International Courts and visiting armed forces personnel may also enjoy certain immunities from local jurisdiction and that State's national laws.

Whether the prohibition of extra-territorial law enforcement applies to cyberwarfare, deliberate disabling of another State's critical infrastructure, security, digital systems, etc.?

In recent years, with the steady increase in global communication, especially the explosion of the Internet, the ubiquitous nature of social media, omnipresence of the electronic and social media platforms allow and facilitate spatially remote individuals to connect and communicate even spread, propagate dangerous ideologies. Ever advancing cutting-edge technology has increased manifold the ever-present threat, which is real and hydra-headed, from cyber crime, malware, the shadowy world of the dark web, etc.; capable of disabling and vitiating a nation's vital assets including computer networks, security establishments, critical services and infrastructure. It is, however, not yet fully settled whether the prohibition of extra-territorial enforcement also applies to technological remote searches on computer networks located abroad.

Remote searches carried out by a State with respect to information held on websites, computers or servers located outside its territory are not contested in case where the information is publicly accessible or in the public domain (see **Article 32** Cybercrime Convention, 2001); or when the territorial State allows such searches or the information-holder gives its consent. Some States, however, carry out remote searches on foreign servers without relying on legal assistance and redress, or without seeking the consent of the territorial State where the foreign servers are located. Such action appears to be in conflict with the LOTUS-prescribed prohibition on extra-territorial law enforcement, but arguably would be declared to be in defense of national interest and security.[23]

No clearly defined rule of international law has yet evolved to resolve conflicts arising from overlapping jurisdictional claims

What maybe concluded, from the above analysis of the theories of jurisdiction in international law, is that there is a patent presumption against extra-territoriality. A multitude of States may potentially claim jurisdiction on the basis of the real or perceived trans-boundary effects of the commission of just one single offense, as in the case of manslaughter at sea, accidental or mysterious death on board a vessel, or an oil-spill spreading towards the Coast of several States. Inevitably, this may give rise to international friction between contesting States claiming exclusive jurisdiction.

Unfortunately, to date, no clearly defined rule of international law has yet emerged that could resolve conflicts arising from overlapping, *prima facie*, lawful jurisdictional claims.[24] There is no rule giving priority to the "*most interested*" or "*affected*" State. Although it may appear logical to give the territorial State first preference and unhindered right of way for exercising jurisdiction, given the historic roots

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[23] The above-mentioned principles of jurisdiction are, to a large extent, founded on the premise of a link with the asserting State, notably nationality which ties jurisdiction to the nationality of the accused or perpetrator and/or the victim of the crime. In the case of the protective or security principle it is normally invoked and applied in the context of territorial sovereignty, preservation of the marine environment and the Resources therein, or political independence as a nation State.

[24] Prof Cedric Ryngaert in "The Concept of Jurisdiction in International Law": Utrecht University ---- (second ed. 'Jurisdiction in International Law' 2015).

and the strong territorial anchoring of the law of jurisdiction[25]bolstered by the thumb-rule of the place of occurrence of the Crime giving rise to the cause of action.

The ENRICA LEXIE case presented just such a dilemma of resolving overlapping, lawful jurisdictional claims based on territoriality and nationality. Some other recent judgments of the International Tribunal of the Law of the Sea (**the Tribunal**)[26] may be perused to glean a set of rules for establishing jurisdiction between contesting States for the trial of persons committing criminal offences on the seas. Such a perusal would also throw light on the factors that govern and weigh in favour of a particular contesting sovereign State.

Briefly, let us first consider the facts of M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea). At the time of the incident, the M/V SAIGA served as a bunkering vessel supplying fuel oil to fishing vessels and other vessels operating off the coast of Guinea. M/V SAIGA, on crossing the maritime boundary between Guinea and Guinea Bissau, entered the exclusive economic zone of the Guinean island of Alcatraz, when she was arrested by Guinean Customs patrol boats. The vessel was brought into Conakry, Guinea where the vessel and its crew were detained. No bond or other financial security was requested by Guinean authorities for the release of the vessel and its crew nor was it offered by Saint Vincent and the Grenadines.

Thereafter, Saint Vincent and the Grenadines approached the International Tribunal for the Law of the Sea (the Tribunal) under ***Article 292*** of the 1982 UNCLOS and submitted that the Tribunal should direct that the vessel, her cargo, and crew be released immediately. The Applicant was prepared to provide any security reasonably imposed by the Tribunal. Guinea requested the Tribunal to dismiss the Applicant's action.

The Tribunal, after considering the question of its jurisdiction under ***Article 292*** of the 1982 UNCLOS to entertain the Application, was of the view that ***Article 73*** did not apply as no bond or any other security had been offered or bail posted. The Tribunal held that according to **Article 292**, the posting of a bond or security was a mandatory requirement. It noted that Guinea had not notified Saint Vincent and the Grenadines of the arrest and detention of M/V SAIGA as required by ***Article 73, paragraph 4***. In the circumstances, it did not seem reasonable to the Tribunal to hold Saint Vincent and the Grenadines responsible for the fact that a bond had not been posted. Thus, the averments made by Saint Vincent and the Grenadines were well founded. Consequently, Guinea had to promptly release the M/V SAIGA, her crew, and cargo.

The second case, THE M/V VIRGINIA G has somewhat similar facts. M/V VIRGINIA G, an oil tanker flying the flag of Panama, was arrested by the authorities of Guinea-Bissau for carrying out re-fueling operations for foreign vessels fishing in Guinea-Bissau's exclusive economic zone. The Tribunal found that "Guinea-Bissau had violated the Convention by confiscating the M/V VIRGINIA G and the gas oil on board" and "by failing to notify Panama, as the flag State, of the detention and arrest of the *M/V Virginia G* and subsequent actions taken against the vessel and its cargo." The Tribunal held Guinea-Bissau "to have exceeded its exclusive economic zone

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[25] *Supra.*

[26] Recent ITLOS cases referred to herein are :- 1. The M/V SAIGA Case No. 2 (Saint Vincent and the Grenadines v. Guinea); 2. The M/V VIRGINIA G Case No. 19 (Panama/Guinea-Bissau); 3. The M/V NORSTAR Case No. 24 (Panama v. Italy); and 4. The ENRICA LEXIE Incident Case No. 25; (Italy v. India).

enforcement entitlements under the Convention by going beyond what was necessary and proportionate" in the circumstances. Guinea-Bissau further violated the Convention by preventing Panama, as the Flag State, from intervening at the outset by failing to notify Panama of the arrest and detention.[27]

The Tribunal's decision in the M/V VIRGINIA G establishes, it is noteworthy, that Reparation would be awarded against coastal States that cause disproportionate damage or losses while exercising their rights and entitlements under the 1982 UNCLOS against foreign vessels operating within their maritime boundaries.

Reparations were also awarded to the Flag State in the M / V NORSTAR case (Panama v. Italy**)** which dates back to 1998, when Italy requested Spain to arrest the Panamanian-flagged ship M / V NORSTAR for supplying diesel to several yachts beyond the Italian, Spanish, and French territorial seas. Italy alleged that the vessel was also liable for smuggling and tax evasion. In this incident there were several coastal States and the Flag State involved, presenting a classic instance of overlapping jurisdictions. To complicate matters, the ship was on the high seas when it supplied diesel to other vessels. On entering the port of Palma de Mallorca, the Spanish authorities arrested the vessel, acting on the Italian request.

Panama, in accordance with ***Article 287*** of the 1982 UNCLOS, invoked action against Italy for wrongful arrest and detention by Italy of M/V NORSTAR*,* an oil tanker that flew its flag. It requested the Tribunal to determine whether Italy, by arresting the M/V NORSTAR, had infringed upon the rights of Panama provided under Article 87. Italy's stand was that the arrest was primarily for probative purposes, for collecting evidence as their investigations had revealed" that the M/V NORSTAR was involved in the business of the illegal sale of the fuel, purchased in Italy in evasion of tax duties, to a clientele of Italian and other EU leisure boats in international waters off the coast of the Italian city of Sanremo."

The Tribunal held that ***Article 87***, which ensures *the right of freedom of the high seas*, which right includes irrefutably freedom of navigation, was applicable in favour of Panama. On the issue of Reparations, that the damages suffered by Panama were a direct consequence of "the arrest and detention by Italy of M/V NORSTAR*,"* the Tribunal ordered a compensation of 285 thousand dollars to Panama for the violation of its irrevocable right of freedom of navigation.[28] Here again the Tribunal held in favour of the Flag State.

In the ENRICA LEXIE legal dispute, the arbitral proceedings were instituted under the 1982 UNCLOS on 26 June 2015, when Italy served on India a Notification under ***Article 287 and Annex VII, Article 1***. The dispute arose from an incident that occurred approximately 20.5 nautical miles off the coast of India involving the ENRICA LEXIE, an oil tanker flying the Italian flag and India's subsequent exercise of criminal jurisdiction over the two accused, Italian marines from the Italian Navy on board the oil tanker.

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[27] On April 14, 2014, the Tribunal delivered its judgment.

[28] On 10th April 2019, having ascertained the jurisdiction of the Tribunal, the Judges found that the activities of the vessel had been carried out on the high seas, which activities were the subject-matter of the wrongful seizure order of the Italian authorities.

The incident concerned the killing of two Indian fishermen fast asleep on board the ST. ANTONY, an Indian fishing vessel, in Indian waters and India's subsequent rightful exercise of jurisdiction for crimes committed against its nationals and their property, the Indian flagged fishing boat. Purportedly, the two Italian marines aboard the ENRICA LEXIE killed the fishermen mistaking them to be pirates.

On July 2, 2020, the Permanent Court of Arbitration released an extract of its **Award**.[29] The Tribunal found that India had not violated sections of ***Articles 7, 92, 97, and 100*** as Italy contended. However, it ruled that India was precluded from exercising its jurisdiction over the Marines. The Tribunal found that Italy had breached ***Articles 87 and 90*** by interfering with the navigation of the ST. ANTONY, but had not violated ***Articles 56, 58, or 88***. Regarding compensation, the Tribunal held that India was entitled to payment of compensation loss of life of its citizens, physical harm to its fishermen, material damage to property the fishing boat, mental agony and moral harm suffered by the crew members.[30]

[31]On 10 August 2020, the Award was published.[32] The Tribunal reasoned that both claims for jurisdiction had distinct elements of both the nationality and territoriality principles, including flag state claims of both India and Italy --- and ruled that both India and Italy had concurrent jurisdiction. Surprisingly, the Security element applicable to India, the territorial integrity of its contiguous zone and the sanctity of life of the fishermen, its citizens was not considered by the Tribunal at all, a serious lapse and flaw in the Award.

Russia-Ukraine dispute pending before ITLOS: Sovereign immunity of warships and other government vessels, the peacetime right of freedom of navigation by military vessels

Interestingly, a provisional decision of the Tribunal in a yet to be resolved dispute between Russia and Ukraine provides vital clues to the future development of criminal jurisdiction in international law.[33] It was established before the Tribunal that Russian Coast Guard forces, in tandem with a Russian naval corvette and military aircraft, had fired on two Ukrainian warships and a naval auxiliary as they attempted to transit the narrow Kerch Strait, defying the warnings of Russian military authorities. The warships and their crew were captured and detained in Russia, charged with violating Russian criminal law.

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[29] Italy submitted that India had breached the 1982 UNCLOS in several ways, including by interdicting the ENRICA LEXIE, investigating those on board, and" exercise [ing] its criminal jurisdiction over two Italian Marines." India asserted that the Tribunal did not have jurisdiction to decide this case and that Italy had committed several violations of UNCLOS" [b]y firing at the ST. ANTONY and killing two Indian fishermen (asleep) on board (the Indian-flagged fishing vessel within the Indian contiguous zone)."

[30] On 10 August 2020, the Award, with certain redactions made at the request of the Parties, was published on the PCA Case Repository.

[31] From 8 July to 20 July 2019, the hearing was held at the seat of the Permanent Court of Arbitration (PCA) at the Peace Palace, The Hague, the Netherlands. The hearing addressed the jurisdiction of the Arbitral Tribunal as well as the merits of Italy's claims and India's counter-claims.

[32] On 10 August 2020, the Award, with certain redactions made at the request of the Parties, was published on the PCA Case Repository.

[33] On May 25, 2019 by way of an interlocutory Order, the Tribunal prescribed provisional measures in the case brought by Ukraine against Russia, ordering Russia to release three Ukrainian naval vessels and 24 Ukrainian service members seized on November 25, 2018 in an incident in the Kerch Strait.

[34]Ukraine urgently approached the Tribunal requesting emergency relief through provisional measures, for the immediate release of the warships. Under the 1982 UNCLOS, in urgent situations to prevent a real and imminent risk of irreparable harm and prejudice to the rights of one Party, in this case Ukraine, such measures are authorized under ***Article 290***. Earlier, Russia had by declaration in accordance with ***Article 298*** of the Convention exercised its right to exempt military activities from compulsory dispute resolution procedures. The sole issue, therefore, before the Tribunal was *"whether Russia's action constituted military activities."*

It was Ukraine's contention that a dispute does not have to" concern military activities" simply because it involves warships or because warships are present at the relevant time. According to Ukraine, it is not the type of vessel, but rather the type of activity the vessel is engaged in that matters. Concurring, the Tribunal was of the view that, "the distinction between military and law enforcement activities must be based primarily on an objective evaluation of the nature of the activities in question, taking into account the relevant circumstances in each case."

The Tribunal determined that Russia's actions were not military in nature but part of its law enforcement operations. The deciding factor, *inter ali*a, which clinched the issue was the invocation by the Russian Federation of ***Article 30*** of the 1982 UNCLOS" Non-compliance by warships with the laws and regulations of the coastal State," to justify its detention of the vessels.

The Tribunal considered the right of Ukrainian ships to transit the Kerch Strait to be a navigational issue under the regime of "innocent passage." and not *per se* a military activity, as "innocent passage" is a right enjoyed by all ships. (Para 68, Order). Further, the Tribunal noted that Russia had acted to enforce its 2015 navigational regulations and temporary suspension of the right of "innocent passage," which were both law enforcement activities. (Para 71, Order).

The Tribunal concluded, and categorically was of the view, that Russia's use of force against the Ukrainian naval ships was in the context of a law enforcement operation rather than a military operation. (Paras 73-74, Order). The subsequent arrest and detention of the Ukrainian naval ships and criminal proceedings against the Ukrainian sailors strengthened the finding that Russia had conducted a law enforcement action rather than a military operation. (Paras 75-76, Order).

The Tribunal did, however, recognize, vindicate, and uphold two important customary rights: sovereign immunity of warships and other government vessels, and more importantly, the peacetime right of freedom of navigation by military vessels. The Tribunal had no hesitation to declare in no uncertain terms: ***"Under the Convention, passage regimes, such as innocent or transit passage, apply to all ships."*** (*supra,* Para 68, Order).

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[34] According to *Judge Kriangsak Kittichaisaree*, Judge of the *International Tribunal for the Law of the Sea* (**ITLOS**), at a lecture on 11 May to the IMLI Class of 2020-2021 entitled" Legality of Enforcement Activities at Sea (**Cases No. 2, 19, 24 and 25**) {"Four issues shall have to be considered to determine the legality of law enforcement at sea by a sovereign State. These include the compatibility of the national law of the sovereign State with international law; the maritime zone in which law enforcement is being carried out; the context of the activities, the circumstances of the incident which gives rise to the cause of action; and lastly, the rules of engagement."

According to James Kraska, the Tribunal has greatly reduced, diminished and diluted the right of States to opt for military activities exemption from international judicial scrutiny.[35] In a significant deviation from the broader view of military activities reflected in the 2016 Philippines v. China Arbitral Award, the Tribunal held that the confrontation over "innocent passage" was a navigational issue, rather than a military activity.[36] It based its conclusion upon the customary rule that "innocent passage" is a widely-recognized norm of international law and thus a right enjoyed by all ships, including warships.

The Tribunal also determined that Russia's temporary suspension of "innocent passage", declared conveniently to halt the transit of Ukrainian warships, was a law enforcement activity rather than a military operation. These factors led the Tribunal to conclude that Russia's actions were in the context of law enforcement measures rather than qualifying as a military operation.[37]

Clearly, the interlocutory Order by ITLOS unambiguously recognizes and establishes that curtailment or prohibition of "innocent passage," even to military vessels, as violative of international law. Moreover, the invocation by the Russian Federation of ***Article 30*** of the 1982 UNCLOS (*supra*):" Non-compliance by warships with the laws and regulations of the coastal State", to justify its detention of the Ukrainian naval vessels, was considered by ITLOS further proof of law enforcement by Russian authorities. Thus, could not be considered as conduct of "military activities." This conclusion may be seen as indicative of the rationale behind ITLOS judgments to unreservedly recognize, reiterate, and uphold the customary rules and traditional norms of international law, *viz.*, freedom of navigation, "innocent passage," flag state jurisdiction.

What emerges from the above forensic examination of recent ITLOS judgments is that Flag State jurisdiction continues to hold sway and reign supreme; it would be extremely difficult to dislodge in favour of either coastal or territorial jurisdiction. Evidently the well-established rule of international law that the law of the Flag State, which exclusively governs the affairs of the ship and crew, appears to be deeply entrenched, almost unassailable and irrevocable. Exceptional, perhaps even extenuating extraordinary, circumstances would be required to overturn, dislodge, whittle down, circumvent or even bypass this deep-rooted, impervious rule of Flag State supremacy in international law for criminal offences at sea.

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[35] James Kraska, Chairman and Charles H. Stockton Professor of International Maritime Law in the Stockton Center for International Law at the U.S. Naval War College in his blog: "Did ITLOS Just Kill the Military Activities Exemption in Article 298?"

[36] Ibid.

[37] Ibid.