

Article

CRIMES COMMITTED AT SEA AND CRIMINAL JURISDICTION: CURRENT ISSUES OF INTERNATIONAL LAW OF THE SEA AWAITING THE ‘*ENRICA LEXIE*’ DECISION

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ABSTRACT

This article takes the developments from the *Enrica Lexie* Case, currently pending between Italy and the Republic of India in front of the International Tribunal for the Law of the Sea (ITLOS) and the International Arbitral Tribunal, in order to analyse some current problems related to the international law of the sea. The controversy has fomented an intense debate not only in Italy and India but also in the whole International Community. Moreover, it has caused a dangerous diplomatic crescendo between the two involved countries. Thus, the case provides the occasion for important reflections on a major and very debated topic of international law, i.e. the issue of state jurisdiction for crimes committed at sea. This article will therefore analyse the controversies arising from the *Enrica Lexie* incident, the opposing positions maintained by the two States and some problematic aspects concerning the interpretation of the United Nations Convention for the Law of the Sea and other related sources of the law of the sea.

Keywords: International Law; Law of the Sea; Diplomacy; Criminal Law; *Enrica Lexie*.

Introduction

The *Enrica Lexie Case* is an ongoing international dispute concerning the killing of two Indian fishermen that were on board the Indian fishing boat *St. Antony*, allegedly committed by two Italian navy marines that were on board the Italian oil tanker *Enrica Lexie*. This incident occurred in the waters alongside the coasts of the Indian State of Kerala on 15 February 2012. Following the accusation of murder, the two Italian marines, Massimiliano Latorre and Salvatore Girone, were arrested by the Indian authorities and put into custody. The case gave rise to dangerous diplomatic tensions between Italy and India,¹ since Italy claimed exclusive jurisdiction for the trial of the two officers, but India refused to release them and insisted on prosecuting the crime before its courts. Several issues appear to be at

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¹ Gardiner Harris, 'Dispute Over Italian Marines Prompts Bickering in Indian Court, but No Resolution', *New York Times*, 3 Feb. 2014.

stake in this case from the international law standpoint. First of all, the rules of both customary and conventional international law governing state jurisdiction over the seas; second, the interpretation of several provisions of the United Nations Convention on the Law of the Sea (UNCLOS); finally, the applicability of the special provisions of the law of the sea for the fight against maritime terrorism, piracy and other similar crimes.

This article analyses the rules of international law regulating state jurisdiction over the seas and applies them to the concrete *Enrica Lexie* case, with the aim of demonstrating how the interpretation of the relevant provisions is not as straightforward as it might *prima facie* seem to be. The first section of this paper provides a summary of the facts of the *Enrica Lexie* incident and the legal controversies that have arisen from the case. The second section analyses the evolution of the law of the sea, the rules of state jurisdiction over the seas and some previous debated cases. Section three deals with the relevant provisions of UNCLOS, while chapter four analyses the special provisions of international law concerning state jurisdiction for the case of maritime terrorism, piracy or other specific crimes. Finally, the fifth chapter assesses the different views held by Italy and India on the *Enrica Lexis* incident, and emphasizes how some important issues regarding State jurisdiction over the seas remain highly debated and controversial despite the ratification of UNCLOS.

I. The *Enrica Lexie* Incident

The *M/V Enrica Lexie* is an Italian privately owned oil tanker. At the time of the incident, it was sailing from Singapore to Djibouti and had on board an Italian Vessel Protection Department (VPD)², since the International Maritime Organization (IMO) had declared the waters alongside Kerala a high-risk area for piracy.³ After the report of an armed attack and the killing of two fishermen that were on board the Indian fishing boat *St. Antony*, the *Enrica Lexie* was intercepted by the Indian Coast Guard at 36 nautical miles from the coast of Kerala and compelled to dock at the Kochi Port. There, two members of the VPD, Massimiliano Latorre and Salvatore Girone, were brought into custody and charged with homicide, receiving a First Information Report (F.I.R.) on 19 February 2012.⁴

On 22 February, Italy filed a petition to the High Court of Kerala⁵ for the quashing of the F.I.R. and all subsequent acts. At the same time, Italy asserted exclusive jurisdiction over the *Enrica Lexie* and started a criminal process against Latorre and Girone, who were charged with murder⁶ before the Tribunal of Rome.⁷ Nevertheless, the Kerala High Court dismissed the Italian petition⁸ by stating that Indian Courts were also entitled to exercise jurisdiction over the case, and started proceedings

² Vessel Protection Detachment are privately hired military forces employed to protect non-military ships against possible piracy attacks. In Italy, they were authorized under art. 5 of *Decreto Legge 12 Luglio 2011, n. 11*. On this topic see, *inter alia*, G. M. FARNELLI, 'Vessel Protection Detachments and Maritime Security: An Evaluation of Four Years of Italian Practice', *Maritime Safety and Security Law Journal*, 1, 2015, pp.16 et ss.; J. J. PITNEY JR., J.-C. LEVIN, *Private Anti-Piracy Navies: How Warships for Hire are Changing Maritime Security*, Lexington Books, 2013; A. PETRING, 'The Use of Force and Firearms by Private Maritime Security Companies Against Suspected Pirates', *International and Comparative Law Quarterly*, 62, 2013, pp. 667 et ss.

³ International Maritime Organization, 'Reports on Acts of Piracy and Armed Robbery Against Ships', January 2012.

⁴ Circle Inspector of Police, Neendakara, Kollam District, Kerala, F. I. R. No. 2 of 2012.

⁵ *Massimiliano Latorre & others v. Union of India*, Written Petition (civil) No.4542 of 2012.

⁶ Art. 575 of the Italian Penal Code. Under this provision, the punishment is imprisonment of at least 21 years.

⁷ Tribunal of Rome, Criminal Proceedings No.9463/2012.

⁸ Kerala High Court, WP(C)No. 4542 of 2012.

against the two marines for murder,⁹ attempt of murder¹⁰ and mischief.¹¹ Consequently, Italy filed a second written petition, this time addressed to the Supreme Court of India, ‘challenging the jurisdiction of the State of Kerala and the Circle Inspector of Police, Kollam District, Kerala, to register the F.I.R. and to conduct investigation on the basis thereof or to arrest the petitioner[s]’. With this second writ, Italy prayed ‘for quashing of F.I.R.’ since the same was ‘without jurisdiction, contrary to law and null and void.’¹²

On 18 January, the Supreme Court of India ruled that the High Court of Kerala was not entitled to prosecute the case, but that ‘it is the Union of India which has jurisdiction to proceed with the investigation and trial of the Petitioner[s]’, and established that India had to ‘set up a Special Court to try this case’¹³. In April 2013, the Indian National Investigation Agency, the agency empowered to combat terrorism related crimes in India, was entrusted with the prosecution of the case. The agency decided to try the two Italian marines on the basis of the Indian SUA Act, by which India has implemented the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention). By invoking this law, Indian authorities qualified the incident as an act of maritime terrorism.¹⁴ This episode generated new diplomatic tensions since Italy strongly disagreed with equating the *Enrica Lexie* incident to an act of terrorism perpetrated by the Italian marines. Moreover, by applying this provision, Latorre and Girone could have faced death penalty.¹⁵ Eventually, India’s central government ordered the ad hoc tribunal to downgrade the charge from maritime terrorism under the SUA Act to murder.¹⁶

On 26 June 2015, after several deferments of the trial by Indian Courts, Italy decided to submit the dispute to the International Tribunal for the Law of the Sea (ITLOS), pursuant to Annex VII of the UNCLOS, and asked the ITLOS to issue provisional measures stating that ‘India shall refrain from taking or enforcing any judicial or administrative measures against Sergeant Massimiliano Latorre and Sergeant Salvatore Girone in connection with the Enrica Lexie Incident, and from exercising any other form of jurisdiction over the Enrica Lexie Incident [...] throughout the duration of the proceedings before the Annex VII Tribunal’.¹⁷ On 24 August 2015, ITLOS issued its provisional measures and ordered that ‘Italy and India shall both suspend all court proceedings and refrain from initiating new ones which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal or might jeopardise or prejudice the carrying out of any decision which the arbitral tribunal may render.’¹⁸

I.1 The Legal Controversy

According to Italy, the incident was characterised by a series of violations of international law by the Indian authorities. Namely, Italy contends that i) Indian authorities ‘acting by ruse and by coercion’¹⁹ intercepted the *Enrica Lexie* in international waters and caused it to change its course and put into

⁹ Section 302 of the Indian Penal Code

¹⁰ Section 307 of the Indian Penal Code

¹¹ Section 427 of the Indian Penal Code

¹² Writ Petition (civil) No. 135 of 2012, filed under Article 32 of Indian Constitution, para. 101.

¹³ Ibid.

¹⁴ The Sunday Guardian, ‘Italian Marines Booked under the Suppression Act’, 6 Apr 2013.

¹⁵ The Economic Times, ‘Home Ministry Okes Italian Marines’ Prosecution under Act that Attracts Death Penalty’, 20 Jan 2014.

¹⁶ BBC News, ‘Italian Marines Row: India Drops Anti-Piracy Charge’, 24 Feb 2014.

¹⁷ ITLOS, Press Release, ‘Request for Provisional Measures Submitted to the Tribunal by the Italian Republic Against the Republic of India’, 22 July 2015.

¹⁸ ITLOS, The ‘Enrica Lexie’ Incident (Italy v. India), Request for the Prescription of Provisional Measures.

¹⁹ Ibid.

port in Kochi; ii) Indian armed personnel ‘boarded the vessel, undertook a coerced investigation of the ship and interrogations of its crew’, and iii) sergeants Latorre and Girone were arrested and have been subject to the custody of the Indian courts ever since. Moreover, Italy claims that the only courts empowered with the right of prosecuting Latorre and Girone are Italian courts, by invoking the exclusive flag state jurisdiction. Italy, thus, maintains that Indian authorities lack both enforcement and prescriptive jurisdiction over the matter.

On the other hand, India claims that the case falls within its prescriptive and enforcement jurisdiction, and argues that ‘as the victims were Indian nationals and they were killed on board an Indian fishing vessel [...] early assertion of jurisdiction by Italy does not preclude India from exercising jurisdiction over the killing of its nationals who were fishing in India’s exclusive economic zone’.

The case is relevant and has received a widespread media coverage and doctrinal attention, since it illustrates ‘the complexity that arise in managing jurisdictional conflicts and deciphering the relationship between international and domestic law’.²⁰ Using the *Enrica Lexie* incident as a case-study, the purpose of this article is precisely to underline how, despite the ratification of UNCLOS, the provisions of international law concerning state jurisdiction over the seas are not easy to interpret and apply, and can thus give rise to complex legal controversies between States.

II. State Jurisdiction over the Seas

The Oxford dictionary defines jurisdiction as ‘the official power to make legal decisions and judgments’.²¹ As Professor Ryngaert has underlined, from the national law standpoint ‘jurisdiction is an aspect of a State’s sovereignty, as the right to prescribe and enforce laws is an essential component of statehood’²². On the other hand, from the international law standpoint, ‘the laws of jurisdiction delimit the competences between States, and thus serve as the basic ‘traffic rules’ of the international legal order’.²³ In dealing with State jurisdiction, it is necessary to distinguish between i) prescriptive (or legislative) jurisdiction, i.e. the right of a State to make and prescribe laws; and ii) enforcement jurisdiction, i.e. the power of a State to enforce or to punish noncompliance with the laws, whether through the courts or by use of executive action.

The power of a State to exercise prescriptive and enforcement jurisdiction primarily derives from its sovereignty over a specific territory, as recognised by international law.²⁴ This is the so-called territoriality principle, by which a State has the jurisdiction over all the events taking place within its boundaries, regardless of the nationality of the persons that committed the crime.²⁵ Conversely, a State is in principle not allowed to assert jurisdiction over affairs that take place within the territories of other States. Hence, ‘a State’s jurisdictional assertions that pertain to acts carried out *in its territory* are in principle lawful, while assertions that pertain to acts done *outside its territory* are suspect, and even

²⁰ D. IRELAND-PIPER, ‘The Enrica Lexie and St Antony: a Voyage into Jurisdictional Conflict’, *QUT Law Review*, 14, II, 2014, pp. 74 et ss.

²¹ Oxford Dictionary, at: <http://oxforddictionaries.com>

²² C. RYNGAERT, ‘The Concept of Jurisdiction in International Law’, p. 1, at: <https://unijuris.sites.uu.nl/wp-content/uploads/sites/9/2014/12/The-Concept-of-Jurisdiction-in-International-Law.pdf>. For a comprehensive analysis of jurisdiction in international law, see C. RYNGAERT, *Jurisdiction in International Law*, Oxford University Press, 2015.

²³ *Idem*, p. 2.

²⁴ A. LENHOFF, ‘International Law and Rules on International Jurisdiction’, *Cornell Law Review*, 50, I, 1964, pp. 5 et ss.

²⁵ See H. L. BUXBAUM, ‘Territory, Territoriality, and the Resolution of Jurisdictional Conflict’, *American Journal of Comparative Law*, 57, 2009, pp. 631 et ss.; R. T. FORD, ‘Law’s Territory (A History of Jurisdiction)’, *Michigan Law Review*, 97, 1999, pp. 843 et ss.

presumptively unlawful.²⁶ In this regard, different variations of the territoriality principle are applied, and namely subjective territorial jurisdiction and objective territorial jurisdiction. Under the subjective territorial principle, a State is recognised jurisdiction over crimes that have physically taken place within its territorial border. On the contrary, under the objective territorial principle, a State can exercise jurisdiction over acts that have been committed abroad, but that have caused effects within its borders.

Indeed, ‘one of the main functions of a State is to maintain order within its own territory, so it is not surprising that the territorial principle is the most frequently invoked ground for criminal jurisdiction.’²⁷ However, extraterritorial jurisdiction is also recognised under conventional and customary international law, on the basis of different principles: the nationality principle, the protective principle, and the universality principle.²⁸ First, the nationality principle permits a State to exercise jurisdiction over its nationals, even when a crime was committed abroad. This principle is two-folded, entailing that a State may prosecute both i) its own nationals for crimes committed abroad (active personality principle) and ii) foreigners that have committed crimes against its nationals abroad (passive personality principle).²⁹ Second, the protective principle authorises States to exercise jurisdiction when offences that are committed abroad threaten certain national interest of the State.³⁰ Finally, the most far-reaching ground for extraterritorial jurisdiction is the so-called universality principle, which refers to the power of a State to claim its own jurisdiction over crimes that have no direct nexus with its territory or its citizens.³¹ The universality principle is the most controversial one and finds its application only in relation to some specific international crimes such as *jus cogens* norms.³²

Extraterritorial jurisdiction is particularly problematic since it involves conflicting claims of jurisdiction by different States. As it has been correctly stated, ‘the close relation between Westphalian sovereignty and criminal jurisdiction means that one nation’s attempt to exercise jurisdiction over persons or matters that also fall within the jurisdiction of another nation could be regarded as a usurpation of the second nation’s sovereignty’. This ‘could threaten the stability of the international legal order’,³³ leading to diplomatic tensions and armed conflicts between States. For this reason, generally, a State’s enforcement jurisdiction is much narrower than the prescriptive jurisdiction. In fact, as a general principle, ‘enforcement can only happen through territorial measures, e.g., by arresting a person who is voluntarily present on the territory, or by seizing property of the defendant

²⁶ C. RYNGAERT, ‘The Concept of Jurisdiction in International Law’, op. cit., p. 2.

²⁷ M. AKERHUST, ‘Jurisdiction in International Law’, *British Yearbook of International Law*, 46, 1973, p. 154.

²⁸ A. J. COLANGELO, ‘What is Extraterritorial Jurisdiction?’, *Cornell Law Review*, 99, VI, 2014, pp. 1303 et ss.; A. M. SURENA, C. L. BLAKESLEY, A. F. LOWENFELD, L. CACHERIS & S. APRIL, ‘Extraterritorial Application of Criminal Law’, *American Society of International Law: Proceedings of the Annual Meeting*, 85, 1991, pp. 383 et ss.; D. IRELAND-PIPER, ‘Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine’, *Utrecht Law Review*, 9, IV, 2013, pp. 68 et ss.

²⁹ On the passive personality principle see. G. R. WATSON, ‘The Passive Personality Principle’, *Texas International Law Journal*, 28, 1993, pp. 1 et ss.; R. ECHLE, ‘The Passive Personality Principle and the General Principle of Ne Bis in Idem’, *Utrecht Law Review*, 9, 4, 2013, pp. 56 et ss.; J. G. MCCARTHY, ‘The Passive Personality Principle and Its Use in Combating International Terrorism’, *Fordham International Law Journal*, 13, 3, 1989, pp. 298,

³⁰ See I. CAMERON, *Protective Principle of International Criminal Jurisdiction*, Dartmouth Publishing Co., 1994.

³¹ K. C. RANDALL, ‘Universal Jurisdiction under International Law’, *Texas Law Review*, 66, 1988, pp. 785 et ss.; R. O’KEEFE, ‘Universal Jurisdiction, Clarifying the Basic Concept’, *Journal of International Criminal Justice*, 2, 2004, pp. 735 et ss.; S. YEE, ‘Universal Jurisdiction: Concept, Logic, and Reality’, *Chinese Journal of International Law*, 10, 3, 2011, pp. 503 et ss.

³² Y. S. KRAYTMAN, ‘Universal Jurisdiction - Historical Roots and Modern Implications’, *Brussels Journal of International Studies*, 2, 2005, p. 94 et ss.

³³ E. KONTOROVICH, ‘The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation’, *Harvard International Law Journal*, 45, 1, 2004, pp. 188-189.

located in the territory³⁴. Thus, it is generally said that ‘enforcement jurisdiction is, in international law, almost exclusively territorial’³⁵, even where States have extraterritorial prescriptive jurisdiction.

For several years, there has been debate over the particular issue of whether the territorial prescriptive and enforcement jurisdiction of a coastal State could extend to the sea surrounding its mainland or whether the seas had to remain free from any state regulation and coercion.³⁶ As several authors recognised, ‘there was no topic of international law more widely discussed or more controversial than the question of the territorial sea. Several factors including defence, commercial and other activities justified the demand for an extension of State sovereignty outside the limits of its land territory’.³⁷ Today, coastal States extend their territorial claims to the seas near their coasts, so as to be able to exercise their sovereign powers over foreign ships passing alongside their shores.³⁸ As a consequence, a colourful debate began between ‘competing claims to the freedom of the seas and to the exercise of exclusive (sovereign or jurisdictional) rights by States’.³⁹ The following section will provide a brief overview of the development of the rules of international law governing State jurisdiction over the seas.

II.1 The General Principle of the Freedom of the Seas

In 1609, Hugo Grotius published his booklet *Mare Liberum*. In it, he developed the well-known theory of the freedom of the seas, according to which the sea must be free from any authority of States because, by its nature, the sea is not susceptible to occupation.⁴⁰ Despite this freedom, he maintained that coastal States should enjoy a limited right to exercise authority on the adjoining waters that could be controlled from the State’s mainland.⁴¹ In fact, ‘he conceded that his main thesis did not apply to small enclosures of sea, where exclusive fishing rights could be claimed, and that the discussion in his

³⁴ C. RYNGAERT, ‘The Concept of Jurisdiction in International Law’, p. 7.

³⁵ A. MILLS, ‘Rethinking Jurisdiction in International Law’, *British Yearbook of International Law*, Oxford University Press, 2014.

³⁶ For a general analysis of the historical development of the law of the sea, T. TREVES, ‘Historical Development of the Law of the Sea’, in D. R. ROTHWELL, A. G. OUDE ELFERINK, K. N. SCOTT & T. STEPHENS, *The Oxford Handbook of the Law of the Sea*, Oxford University Press, 2015, pp. 1 et ss.; B. B. JIA, ‘The Principle of the Domination of the Land over the Sea: A Historical Perspective of the Adaptability of the Law of the Sea to New Challenges’, *German Yearbook of International Law*, 57, 2004, pp. 2 et ss. L. BRILMAYER & N. KLEIN, ‘Land and Sea: Two Sovereignty Regimes in Search of a Common Denominator’, *New York University Journal of International Law and Politics*, 33, 2001, pp. 703 et ss.

³⁷ R. VARGHESE, ‘Territorial Sea and Contiguous Zone - Concept and Development’, *Cochin University Law Review*, 9, 1985, p. 437.

³⁸ Cf. H. YANG, *Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea*, Springer, 2006; T. W. FULTON, *The Sovereignty of the Sea*, William Blackwood and Sons: 1911; E. K. MARTENS, ‘Evolution of Coastal State Jurisdiction: A Conflict Between Developed and Developing Nations’, *Ecology Law Quarterly*, 5, 3, 1976, pp. 531 et ss.

³⁹ T. TREVES, *op. cit.*, p. 1. Amongst the supporters of the freedom of the sea one should recall, first and foremost, the Dutch jurist Huig de Groot (Hugo Grotius); the Englishman John Selden (who published in 1613 a treatise entitled *Mare Clausum, seu de dominio maris*), and the Scotsman William Wellwood were the most fervid supporters of the opposite theory.

⁴⁰ H. THORNTON, ‘Hugo Grotius and the Freedom of the Seas’, *International Journal of Maritime History*, 16, 2, 2004, pp. 17 et ss.; A. REPPY, ‘The Grotian Doctrine of the Freedom of the Seas Reapprised’, *Fordham Law Review*, 19, 3, 1950. Some authors have contested the fact that Grotius was actually in favour of the free freedom of the sea, *inter alios*, K. ZEMANEK, ‘Was Hugo Grotius Really in Favour of the Freedom of the Seas?’, *Journal of History of International Law*, 1, 1, 1999, pp. 48 et ss.

⁴¹ HUGO GROTIUS, *De Iure Belli ac Pacis*, Lib. II, Cap. III, Section XIII.2.

book dealt with the vast ocean, and not with bays, straits, and the part of the sea that can be seen from the shore.⁴²

In the 18th century, the Dutch jurist Cornelius van Bynkershoek laid down the general principle that a State was entitled to exercise its sovereignty over the waters extending up to three miles from its shore.⁴³ However, the three-mile rule applied only in limited circumstances,⁴⁴ while the general principle that ‘no sea is possessed by anyone’⁴⁵ was recognised in most circumstances. The famous British ‘*Franconia Case*’⁴⁶ of 1876 highlights the absence of a fully agreed upon definition for what constitutes a territorial sea.⁴⁷ This case dealt with a German vessel, the *Franconia*, colliding with the British ship *Strathclyde* within three miles of the British coasts. The collision caused some English passengers to drown. Consequently, the issue was raised as to whether England’s Courts were entitled to prosecute the German captain of the *Franconia*. Despite the customary application of the ‘three-mile rule’, the judgment denied that England had jurisdiction over the matter, admitting that ‘in order to render a foreigner liable to the local law, he must, at the time the offence was committed, have been within British territory if on land, or in a British ship if at sea.’⁴⁸

The fact that the individual responsible for committing the unlawful act was located on board a foreign ship was therefore decisive in adjudicating the *Franconia* case. Similarly, these circumstantial factors were important in the later *Costa Rica Packet* case of 1897.⁴⁹ The case concerned the skipper of an Australian vessel who, upon running his vessel into an Indo-Dutch ship on the high seas, ordered the cargo to be transferred from the Dutch ship to his own. Two years later, when the Australian skipper landed in Indonesia, he was charged with robbery and arrested by the Dutch authorities. Following protests from England, the issue was referred to an arbitrator, who ruled that ‘on the high seas even merchant vessels constitute detached portion of the territory of the State whose flag they bear, and consequently are only justiciable by their respective national authorities for acts committed on the high seas.’⁵⁰

⁴² T. TREVES, *op. cit.*, p. 4. As prof. Treves underlines, Grotius «maintained that fishing was in principle to be as free as navigation, he conceded that there might be a difference between navigation and fishing, because in a sense it could be held that fished may be exhausted. Consequently, while navigation could not in any case be forbidden, this was not completely ruled out for fishing. Moreover, [he] clearly held that occupation of small parts of the seas, such as in bays and straits, was possible for the coastal State though the presence of military fleets and by exercising coercion from the shore in the same way as on land».

(quodadmodum)

⁴³ As dr. James Brown stated in 1945, in its introduction to the translation of van Bynkershoek’s works, ‘in the days of Bynkershoek, a cannon carried approximately three miles; hence, the statement that a nation may occupy and exercise ownership over waters three miles within low water mark. This was the solution proposed by the young publicist; this was the solution accepted by the nations; this is the solution still obtaining, unless modify by express consent’ (J. BROWN, *Carnegie Classics of International Law*, Oxford University Press 1923, No. 11, vol. 1). On the three-miles rule, see also W. L. WYNDHAM, ‘Territorial Waters: The Cannon Shot Rules’, *British Yearbook of International Law*, 22, 1945, pp. 210 et ss.; H. S. K. KENT, ‘The Historical Origins of the Three-Mile Rule’, *The American Journal of International Law*, 48, IV, 1954, pp. 537 et ss.

⁴⁴ Specifically, to regulate fishing and to combat illegal trafficking.

⁴⁵ C. VAN BYNERSHOEK, *op. cit.*, p. 89.

⁴⁶ *The Queen v. Keyn* (The *Franconia*), 1876, 2 L. R. Ex. D. 202.

⁴⁷ *The ‘Franconia’ Judgment*, *The Spectator*, 18 Nov 1876, p. 9.

⁴⁸ *Ibid.*

⁴⁹ *Costa Rica Packet Case*, 1897, Great Britain v. the Netherlands, in J. B. Moore, *International Arbitrations*, vol. 5, p. 4948 et ss.

⁵⁰ *Idem*, p. 4952.

It was only in the late 19th century that the concept of a ‘territorial sea’ on which coastal States can exercise their full sovereignty started to emerge⁵¹, following the enactment of specific national legislation.⁵² As a consequence, the rule developed that a State was entitled to claim its jurisdiction and to enforce its laws over foreign ships for acts committed within its ‘territorial waters’, waters that extended up to a certain range from its shore.

II.2 The *Lotus Doctrine*

In 1927, the *Lotus* case, decided by the Permanent Court of International Justice (PCIJ)⁵³, issued a landmark decision regarding jurisdiction over the seas⁵⁴. The case was similar to the *Franconia* one. It involved a collision between a French steamship, the *SS Lotus*, and a Turkish steamer. As a result, eight Turkish nationals drowned in the seas north of Greece. When the *Lotus* reached the port of Istanbul, the French skipper was arrested and prosecuted for murder by the Turkish authorities. France and Turkey decided to settle the controversy through the PCIJ, asking whether Turkey had violated international law by arresting a French citizen for a crime committed on the high seas while on board a French vessel. France maintained that, for Turkey to be able to claim jurisdiction, it was necessary for Turkey to provide a specific provision within international law that granted them jurisdiction. Turkey, on the other hand, contended that a State can always exercise its sovereign powers unless a specific rule of international law prohibits it from doing so.

In dealing with the issue, the Court made an important distinction between prescriptive and enforcement jurisdiction. The PCIJ clarified that, regarding prescriptive jurisdiction, ‘all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction.’⁵⁵ On the contrary, dealing with enforcement jurisdiction, the Court took the view that:

‘[...] the 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. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.’⁵⁶

⁵¹ D. P. O’CONNELL, ‘The Juridical Nature of the Territorial Sea’, *British Yearbook of International Law*, 45, 1971, pp. 303 et ss.; G. MARTSON, ‘The Evolution of the Concept of Sovereignty over the Bed and Subsoil of the Territorial Sea’, *British Yearbook of International Law*, 48, 1976, pp. 321 et ss.

⁵² See, for instance, the English *Territorial Waters Jurisdiction Act* of 1878, defined as ‘an Act to regulate the law relating to the Trial of Offences committed on the Sea within a certain distance of the Coasts of Her Majesty’s Dominions.’ According to this law, ‘the rightful jurisdiction of Her Majesty [...] extends and has always extended over the open seas adjacent to the coasts of the United Kingdom and of all other parts of Her Majesty’s dominions to such a distance as is necessary for the defence and security of such dominions.’ Hence, it was established that ‘an offence committed by a person, whether he is or is not a subject of Her Majesty, on the open sea within the territorial waters of Her Majesty’s dominions, is an offence within the jurisdiction of the Admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offence may be arrested, tried, and punished accordingly.’

⁵³ *The Lotus Case (Turkey v. France), Judgment, 1927, Series A. - No. 10.*

⁵⁴ See H. HANDEYSIDE, ‘The Lotus Principle in ICJ Jurisprudence: Was the Ship ever Afloat?’, *Michigan Journal of International Law*, 29, I, 2007, pp. 71 et ss.; A. HERTOGEN, ‘Letting Lotus Bloom’, *The European Journal of International Law*, 26, IV, 2015, pp. 901 et ss.

⁵⁵ *The Lotus Case*, para. 47.

⁵⁶ *Idem*, para. 45.

This is known as ‘the first *Lotus* principle’. The PICJ went on to clarify that, from this principle, ‘it does not [...] follow that international law prohibits a state from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law’⁵⁷. This is known as ‘the second *Lotus* principle’. It establishes that a State can always exercise enforcement jurisdiction within its own territory, except when there is a specific prohibition of doing so. Hence, the rules of enforcement jurisdiction are far stricter than the rules of prescriptive jurisdiction. As the Court held, 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, even where they have jurisdiction to prescribe their laws extraterritorially.

Concerning specifically State jurisdiction over the seas, the Court disagreed with France’s opinion that the flag State has exclusive enforcement jurisdiction over crimes committed on board a vessel on the high seas. Despite recognising that ‘it is certainly true that [...] vessels on the high seas are subject to no authority except that of the State whose flag they fly’⁵⁸, the judges maintained 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.’⁵⁹ In fact, they argued, ‘a corollary of the principle of the freedom of the seas is that a ship on the high seas is assimilated to the territory of the State the flag of which it flies, for, just as in its own territory, that State exercises its authority, upon it, and no other State may do so.’⁶⁰ As a consequence,

‘If a guilty act committed on the high seas produces its effects on a vessel flying another flag or in foreign territory, the same principles must be applied as if the territories of two different States were concerned, and the conclusion must therefore be drawn that there is no rule of international law prohibiting the State to which the ship on which the effects of the offence have taken place belongs, from regarding the offence as having been committed in its territory and prosecuting, accordingly, the delinquent.’⁶¹

This latter part of the decision endorsed a third important principle, referred to as the ‘effects doctrine’. According to it, an incident may be deemed to have happened within the territory of a State whenever an element of it, including its effect, has taken place within that State’s boundaries, its territorial waters or on board a vessel flying its flag. In sum, with this decision, the PCIJ recognised that a State is entitled to claim its jurisdiction for acts committed outside its territory ‘if one of the constituent elements of the offence, and more especially its effects, have taken place’ within that State.⁶²

II.3 The Law of the Sea in The Geneva Conventions and in UNCLOS

The *Lotus* decision was central to the law of the sea until the 1980s. In the aftermath of World War II, States felt the need to sign specific international treaties regulating the law of the sea. The 1958 Geneva Convention on the High Seas served as this treaty and established new international norms. Besides confirming that no State may validly subject the high seas to its sovereignty⁶³, the Geneva Convention on the High Seas has also rejected the PICJ’s opinion expressed in the *Lotus* case. In fact,

⁵⁷ *Idem*, para. 46

⁵⁸ *Idem*, para. 64.

⁵⁹ *Idem*, para. 65.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Idem*, para. 60.

⁶³ 1958 Geneva Convention on the High Seas, Article 1.

concerning incidents of navigation, it has established a completely different rule. Article 11 of the Convention stated that:

‘In the event of a collision or of any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such persons except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national.’⁶⁴

Simultaneously, the Geneva Convention on the Territorial Sea and Contiguous Zone, also signed in 1958, established that ‘the sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea.’⁶⁵ Therefore, the combination of the two Geneva Conventions of 1958 meant that, on one hand, States have full jurisdiction over a limited area of sea extending alongside their shores while, on the other hand, beyond those territorial waters, jurisdiction can be exercised exclusively by the flag State of the vessel.

Finally, in 1982, several States signed the United Nations Convention on the Law of the Sea (UNCLOS), which is currently the principal source of international law regarding the law of the sea. The UNCLOS is an extraordinary achievement in the field of international law, and has been described as the ‘Constitution for the Oceans.’⁶⁶ Therefore, it is now necessary to turn to this Convention to solve the current issues relating to criminal jurisdiction over the seas.⁶⁷

III. Jurisdiction over the Seas According to UNCLOS

In order to assess whether Italy or India has the right to claim jurisdiction in the case at hand, it is first necessary to analyse the provisions on jurisdiction set forth in UNCLOS. Importantly, both Italy and India ratified the Convention in 1995. With regard to state jurisdiction over the seas, the Convention distinguishes among different areas of the seas, establishing different rules of jurisdiction depending on where the ship is navigating or the alleged crimes are committed.⁶⁸ In particular, UNCLOS distinguishes between i) the territorial sea; ii) the contiguous zone; iii) the exclusive economic area; and iv) the high seas. Moreover, prescriptive and enforcement jurisdiction do not always coincide within these several areas.

III.1. The Territorial Sea and the Contiguous Zone

The territorial sea is an area extending from a State’s internal waters to its seaward side. According to Article 2 of UNCLOS, ‘the sovereignty of a State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.’ Pursuant to Article 3 of UNCLOS, it is now recognised that ‘every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical

⁶⁴ 1958 Geneva Convention on the High Seas, Article 11.

⁶⁵ 1958 Geneva Convention on the Territorial Sea and Contiguous Zone, Article 1.

⁶⁶ T. T. B. KOH, ‘A Constitution for the Oceans’, at: http://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf

⁶⁷ H. RINGBOM, *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea*, BRILL, 2015.

⁶⁸ J. I. CHARNEY, D. A. COLSON, L. M. ALEXANDER & R. W. SMITH, *International Maritime Boundaries*, 5 voll., Martinus Nijhoff Publishers, 2005; S. FIETTA & R. CLEVERLY, *A Practitioner’s Guide to Maritime Boundary Delimitation*, Oxford University Press, 2016.

miles, measured from baselines determined in accordance with this Convention.⁶⁹ Simply stated, the territorial sea is part of the territory of the State in its fullest meaning, and the State has full prescriptive jurisdiction over this area.

Sovereignty over the territorial seas, however, does not mean that the coastal State enjoys an absolute enforcement jurisdiction over vessels and persons crossing these waters. In fact, as Article 2.3 of the UNCLOS specifies, a State's authority over the territorial seas is 'subject to this Convention and other rules of international law.' The most relevant provision restricting state enforcement jurisdiction within the territorial seas is the one set forth in Article 27, establishing a specific limitation for the exercise of a coastal State's jurisdiction over a foreign vessel that is navigating within its territorial waters. According to this provision:

'The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases:

- (a) if the consequences of the crime extend to the coastal State;
- (b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;
- (c) if the assistance of the local authorities has been requested [...]
- (d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.'

Besides claiming their territorial sea up to 12 nautical miles from their shore, coastal States may also proclaim a 'contiguous zone' beyond the territorial waters.⁷⁰ The contiguous zone can be defined pursuant to Article 33.2 of UNCLOS as 'a narrow belt of water lying seaward of the territorial sea [... which] may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.'⁷¹ Within this area, a State may, pursuant to Article 33.1:

'[...] Exercise the control necessary to:

- a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
- b) punish infringement of the above laws and regulations committed within its territory or territorial sea.'

⁶⁹ Most States have generally accepted the 12 nautical miles limit as enshrined in the UNCLOS. At present, 140 States (including Italy and India) claimed a territorial sea up to 12 nautical miles⁶⁹, and only seven States maintained broader claims. On the issue of 'excessive territorial sea claims', see J. A. ROACH, R. W. SMITH, *Excessive Maritime Claims*, 3rd ed., Martinus Nijhoff Publishers, 2012. In 2012, in a famous judgment related to a dispute between Nicaragua and Colombia, the ICJ recognised that the 12 nautical mile limit is a rule of customary international law (ICJ, *Territorial and Maritime Dispute*, (Nicaragua v. Colombia), 19 November 2012, I.C.J. Reports 2012, p. 624).

⁷⁰ L. C. FELL, 'Maritime Contiguous Zones', *Michigan Law Review*, 62, V, 1964, pp. 848 et ss.; C. G. PLATON, 'Contiguous Zones for Fishing Purposes', *Philippine Law Review*, 37, 1962, pp. 774 et ss.

⁷¹ J. E. NOYES, *The Territorial Sea and Contiguous Zone*, in D. R. ROTHWELL, A. G. OUDE ELFERINK, K. N. SCOTT, & T. STEPHENS, *The Oxford Handbook of the Law of the Sea*, p. 107. On the concept of 'contiguous zone', see, *inter alios*, S. ODA, *The Concept of the Contiguous Zone*, in *International and Comparative Law Quarterly*, 11, I, 1962, pp. 131 et ss.; A. V. LOWE, 'The Development of the Concept of the Contiguous Zone', *British Yearbook of International Law*, 52, I, 1982, pp. 109 et ss.

Hence, the UNCLOS recognises the contiguous zone as a maritime area of limited state control where the coastal State does not have full sovereignty, but where its authority over foreign vessels can be exercised in order to prevent or pursue some specific violations that had been committed on the State's territory or within its territorial sea.⁷² According to most authors, by stating that the State 'may exercise the control', Article 33.1 'literally means that the coastal State may exercise only enforcement, not legislative, jurisdiction within its contiguous zone.'⁷³ Hence, it follows that 'relevant laws and regulations of the coastal State are not extended to its contiguous zone; and that infringement of municipal laws of the coastal State within the zone is outside the scope of this provision.'⁷⁴

III.2 The Exclusive Economic Zone (EEZ)

The exclusive economic zone has been a significant innovation made by UNCLOS.⁷⁵ Beyond the previously mentioned 12 and 24 nautical mile limits, the seas are considered international waters, i.e. not belonging to any State. Nevertheless, it was agreed that coastal States could enjoy some exclusive economic rights for exploiting natural resources within a broader area, provided that this broader maritime zone was not under the sovereign control of another coastal State, and provided that the traditional freedoms of the high seas were preserved.⁷⁶ Hence, Part V of the UNCLOS created the so-called Exclusive Economic Zone (EEZ), which is 'an area beyond and adjacent to the territorial sea', and which is subject to a *sui generis* legal regime.⁷⁷

Pursuant to Article 57, the EEZ 'shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured'. Within this zone, the coastal State has, on one hand, sovereign rights to exploit, conserve and manage fisheries and other natural resources, and, on

⁷² I. A. SHEARER, 'Problems of Jurisdiction and Law Enforcement Against Delinquent Vessels', *International and Comparative Law Quarterly*, 35, 1986, pp. 320 et ss.

⁷³ Y. TANAKA, *The International Law of the Sea*, p. 122

⁷⁴ Ibid. As Sir Gerard Fitzmaurice argued in the aftermath of the 1958 Geneva Convention on Territorial Sea and Contiguous Zone, in the contiguous zone: «It is [...] control, not jurisdiction, that is exercised. The power is primarily that of a policeman, rather than that of the administrator or of the judge. Although the two ensuing subheads (a) and (b) of the paragraph envisage punishment as well as prevention, yet taken as a whole, the power is essentially supervisory and preventive. The basic object is anticipatory. No offence against the laws of the coastal State is actually being committed at the time. The intention is to avoid such an offence being committed subsequently when, by entering the territorial sea, the vessel comes within the jurisdiction of the coastal State; or else to punish such an offence already committed when the vessel was within such jurisdiction»⁷⁴. In other words, «considering that an incoming vessel cannot commit an offence until it crosses the limit of the territorial sea, it would appear that head (b) of Article 33.1 can apply only to an outgoing ship. By contrast, head (a) can apply only to incoming ships because prevention cannot arise with regard to an outgoing ship in the contiguous zone» (G. FITZMAURICE, 'Some Results of the Geneva Conference on the Law of the Sea', *The International and Comparative Law Quarterly*, 8, I, 1959)

⁷⁵ Even though an exclusive fisheries zone was already established in customary international law, as stated by the ICJ in the *Fisheries Jurisdiction Case* (United Kingdom v. Iceland, 1974). On the evolution of this concept, see J. P. QUENEUDEC, 'La zone économique', *Revue Générale de Droit Public*, 1975, pp. 321 et ss.; W. C. EXTAVOUR, *The Exclusive Economic Zone: A Study of the Evolution and Progressive Development of the International Law of the Sea*, Martinus Nijhoff, 1979.

⁷⁶ UNCLOS, Article 58(2). On the EEZ, see, *inter alia*, R. BECKMAN & T. DAVENPORT, *The EEZ Regime: Reflections After 30 Years*, LOSI Conference Papers, 2012.

⁷⁷ On the concept of Exclusive Economic Zone as envisaged by the UNCLOS, see, *inter alios*, B. CONFORTI, *La Zona Economica Esclusiva*, Giuffrè, 1983; D. J. ATTARD, *The Exclusive Economic Zone in International Law*, Clarendon Press, 1987; B. KWIATKOWSKA, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea*, Martinus Nijhoff, 1989; F. ORREGO VICUÑA, *The Exclusive Economic Zone*, Cambridge University Press, 1989; F. RIGALDIES, 'La zone économique exclusive dans la Pratique des Etats', *Canadian Yearbook of International Law*, 35, 1997, pp. 3 et ss.;

the other hand, jurisdiction with regard to i) the establishment and use of artificial islands, installations and structures; ii) marine scientific research; iii) the protection and preservation of the marine environment.⁷⁸ The coastal State has prescriptive jurisdiction in relation to these matters, and can thus pass laws and regulations establishing, *inter alia*, the limits for fishing, the species that might be caught and the conditions for the construction of artificial islands and other installations.⁷⁹

Concerning enforcement jurisdiction, Article 73 states that:

‘the coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention’.

It is important to notice that, since the EEZ can extend up to 200 nautical miles from the coast, EEZ and contiguous zone often overlap. Hence, in the maritime zone between 12 and 24 nautical miles from a State’s baseline, both the rules of the EEZ and those of the contiguous zone are applicable. As it has been correctly stated, after 25 years from the entry into force of the UNCLOS and the creation of the EEZ, this maritime zone ‘continues to provoke a wide range of cases, discussions and international disputes with regard to the related provisions of the Convention, to the conformity of the latter to customary international law, and to the crucial issue of the gradual expansion of the jurisdiction of coastal States over new uses of the sea.’⁸⁰

III.3. The High Seas and the Exclusive Flag State Jurisdiction.

The High Seas, also referred to as ‘international waters, form an area of the world over which no State is allowed to claim its sovereignty.⁸¹ The 1958 Geneva Convention on the High Seas defined the high seas as ‘all parts of the sea not included in the territorial sea or in the internal waters of a State.’⁸² However, with the emergence of the specific regimes of the contiguous zone and the EEZ, the definition of the high seas had to be revised; namely because it was not clear whether these maritime areas should be treated as part of the high seas with a *sui generis* regime, or whether they constituted an extension of the territorial sea.⁸³ While the contiguous zone was recognised as a maritime area on which the coastal State may exercise only a limited enforcement jurisdiction, the EEZ was deemed to be a completely new legal entity, defined as ‘a zone in which the high seas regime applies to the extent it is not displaced by rights specifically allocated to the coastal State.’⁸⁴

Article 86 of UNCLOS now states that the rules on the high seas apply to ‘all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State’ and specifies that these same rules ‘do not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone.’ The paramount rule is the freedom of the high seas as specified by Article 87, which comprise, *inter alia*, freedom of navigation, freedom of fishing, freedom of scientific research, freedom to construct islands and other installation, provided that all these freedoms are exercised under the conditions lay down by UNCLOS and by other rules of international law.

⁷⁸ UNCLOS, Article 56.

⁷⁹ UNCLOS, Articles 60, 61 and 62.

⁸⁰ G. ANDREONE, ‘The Exclusive Economic Zone’, *The Oxford Handbook of the Law of the Sea*, cit., p. 159.

⁸¹ As it has been said, the theory of the freedom of the sea developed already in the 17th century, in particular thanks to Grotius’ theory of *Mare Liberum*.

⁸² 1958 Geneva Convention on the High Seas, Article 1.

⁸³ R. W. SMITH, *Exclusive Economic Zone Claims: An Analysis and Primary Documents*, Martinus Nijhoff, 1986

⁸⁴ D. GUILFOYLE, ‘The High Seas’, *The Oxford Handbook of the Law of the Sea*, cit., p. 205.

The fact that sovereign claims made by States regarding the high seas are invalid according to international law, however, does not mean that the international waters constitute a completely unregulated legal vacuum. In fact, while no State may extend its jurisdiction over the international waters, an authority must exercise control over the vessels and the persons sailing on the high seas, in order to prevent crimes and other illegal activities. States have therefore agreed upon the so-called principle of the exclusive flag State jurisdiction (EFSJ).⁸⁵ This rule, which was recognised as a rule of customary international law well before the entry into force of UNCLOS, is embodied in Article 92 of the Convention. According to this Article, ‘ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas’. Exclusive jurisdiction is meant to cover both prescriptive and enforcement jurisdiction, and the exceptions to this principle are strictly regulated by the Convention or by other source of customary or conventional international law.

There is much debate about the classification of the EFSJ. Some maintain that it is based on the nationality principle, since the vessel has the nationality of the flag State pursuant to Article 91 of UNCLOS. According to others, EFSJ is based on the territoriality principle since the vessel is a ‘floating island’ of the flag State, and is thus part of its territory.⁸⁶ As the ITLOS has established, the UNCLOS ‘considers the ship as a unit’ and therefore ‘the ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the flag State’. It also specified that ‘the nationality of these persons [is] not relevant’.⁸⁷

IV. Special Rules of Jurisdiction for Piracy and Maritime Terrorism

By reading the provisions contained in UNCLOS, it might be argued that States have agreed to limit their jurisdiction over the seas according to the territorial principle. In fact, each State can exercise its jurisdiction either when the crime took place within its territorial waters or when it took place in international waters but on a vessel flying its flag. However, in dealing with specific crimes occurring at sea, e.g. piracy and maritime terrorism, States seem to prefer either the protective principle or the universality principle over the territoriality principle.⁸⁸ In this section, some rules governing state jurisdiction for specific crimes are briefly analysed, in order to assess how general and special rules can overlap and create conflicting jurisdictional claims over the same matter.

IV.1 Piracy under UNCLOS

Article 101 of UNCLOS defines piracy as

‘Any of the following acts:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board

⁸⁵ A. N. HONNIBALL, ‘The Exclusive Flag State Jurisdiction: A Limitation on Pro-Active Port States?’, *The International Journal of Marine and Coastal Law*, 31, III, 2016, pp- 499 et ss.

⁸⁶ This notion was expressed already by judge Nyholm in its dissenting opinion in the *Lotus Case* (para. 217).

⁸⁷ M/V ‘Saiga’ (No 2) (Saint Vincent and the Grenadines v Guinea), (Judgment) [1999] ITLOS Rep 10, para. 105

⁸⁸ L. AZUBIKE, ‘International Law Regime Against Piracy’, *Annual Survey of International and Comparative Law*, 15, 1, 2009, pp. 43 et ss.

such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).'

International law considers piracy as a universally pursuable and punishable crime.⁸⁹ This principle is confirmed by UNCLOS, which set forth additional rules for the case of piracy.⁹⁰ According to Article 100, 'all States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.' Hence, the Convention expressly states in Article 105 that:

'On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The Courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ship, aircraft or property, subject to the rights of third parties acting in good faith.'

This rule sets forth an exception to the principle of the EFSJ, and allows any State to arrest any person on board a pirate ship, regardless of the flag under which the pirate vessel is flying. However, it is important to highlight that this provision applies to the EEZ and on the high seas and, hence, States are not allowed to pursue pirate ships within the territorial waters of another State.⁹¹ Moreover, the rule set forth in Article 105 applies only to a pirate ship as defined by Article 103. Specifically, a pirate ship is one that is 'intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101' or that 'has been used to commit any such act, as long as it remains under the control of the persons guilty of that act.' Therefore, it is possible to argue that 'UNCLOS makes assault and murder on the high seas universally punishable' as long as the crime is committed by private vessels and for private ends.⁹²

IV.2. Unlawful Acts under the SUA Convention

An additional source of jurisdiction over vessels on the high seas comes from the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, the so-called SUA

⁸⁹ This is due to the fact that «for hundreds of years, international law has treated the pirate as a *hostis humani generis*—an enemy of all mankind. Several factors account for pirates' special jurisdictional treatment. Pirates, by definition, do not discriminate among targets based on nationality and thus endanger the trade of all countries. Their attacks also raise the prices of commodities, so that even nations not directly involved in shipping suffer. Moreover, cargo ships are usually owned by a corporation in one state, fly the flag of a second state, and carry cargo destined for multiple other states. Further, ships often are crewed by people from still other states. Piracy implicates the interests of all of those countries. Equally important, pirates are not endorsed by their home countries. This means that when some other state seeks to prosecute them, his or her own country will likely not protest» (E. KONTOROVICH, *The Piracy Analogy*, *op. cit.*, p. 251.252).

⁹⁰ A. ODEKE, 'An Examination of the Bases for Criminal Jurisdiction over Pirates Under International Law', *Tulane Journal of International Law and Comparative Law*, 22, 2013, pp. 305 et ss.; B. HART DUBNER, 'On the Definition of the Crime of Sea Piracy Revisited: Customary vs. Treaty Law and the Jurisdictional Implications Thereof', *Journal of Maritime Law and Commerce*, 42, 1, 2011, pp. 71 et ss.

⁹¹ This provision, thus, allows pirates to take advantage of the territorial waters of weak or failed states, as the case of Somali pirates have recently shown.

⁹² E. KONTOROVICH, *'A Guantánamo on the Sea'*, *op. cit.*, p. 252.

Convention. This Convention was signed in 1988, following the hijacking of the Italian vessel *Achille Lauro* by a commando of armed members of the Palestinian Liberation Organization.⁹³ The treaty was concluded to fill some gaps in the law of the sea, namely regarding the fight against maritime terrorism, piracy and other threats to safe navigation not fully or adequately covered under UNCLOS.⁹⁴ Under this Convention, State Parties are obliged to establish their jurisdiction over the offences therein enumerated and to enact penalties to the offenders.⁹⁵

The SUA Convention, pursuant to Article 3, applies to any person that

‘Unlawfully and intentionally:

(a) Seizes or exercise control over a ship by force or threat thereof or any other form of intimidation; or

(b) Performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or

[...]

(g) Injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).’

Pursuant to Article 6:

‘each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in Article 3 when the offence is committed:

(a) Against or on board a ship flying the flag of the State at the time the offence is committed; or

(b) In the territory of that State, including its territorial sea; or

(c) By a national of that State.’

Hence, the SUA Convention admits jurisdiction on the basis of the nationality principle, in both its declinations of active personality and passive personality. In this respect, the SUA Convention’s application is narrower when compared to the rules on piracy contained in the UNCLOS, which grants universal jurisdiction.⁹⁶ Instead, the SUA Convention covers a wider range of cases,⁹⁷ since its applicability is not limited to illegal acts ‘committed for private ends by the crew or the passengers of a private ship.’ Rather, the applicability is more broadly extended to ‘a vessel of any type whatsoever’ with the sole exceptions being warships or a ‘ship owned or operated by a State when being used as a naval auxiliary or for customs or police purposes.’⁹⁸

⁹³ M. HALBERSTAM, ‘Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety’, *American Journal of International Law*, 82, 1988, pp. 269 et ss.

⁹⁴ A. W. LIPUT, ‘An Analysis of the Achille Lauro Affair: Towards an Effective and Legal Method of Bringing International Terrorists to Justice’, *Fordham International Law Journal*, 9, 2, 1985, pp. 328 et ss.

⁹⁵ N. RONZITTI, ‘The Enrica Lexie Incident: Law of the Sea and Immunity of State Officials Issues’, at: http://www.sidi-isil.org/wp-content/uploads/2012/05/01_Ronzitti.pdf

⁹⁶ M. BOB KAO, ‘Against a Uniform Definition of Maritime Piracy’, *Maritime Safety and Security Law Journal*, 3, 2016, pp. 1 et ss.

⁹⁷ T. TREVES, ‘Piracy, Law of the Sea, and Use of Force: Developments Off the Coast of Somalia’, *European Journal of International Law*, 20, 20, 2009, pp. 399 et ss.; M. STERIO, ‘Fighting Piracy in Somalia (and Elsewhere): Why More is Needed’, *Fordham International Law Journal*, 33, 2, 2009, pp. 372 et ss.

⁹⁸ SUA Convention, Article 2.

V. Jurisdiction over the *Enrica Lexie* Case

The cardinal question on which the whole *Enrica Lexie* case is centred relates to the prescriptive and enforcement jurisdiction of both India and Italy over the two marines.⁹⁹ Italy claims its extraterritorial jurisdiction based on the EFSJ. India, on the other hand, argues that it has jurisdiction by virtue of the passive personality principle, the protective principle and the effects doctrine. This section utilises the previously analysed rules of international law regulating state jurisdiction over the seas and applies them to the concrete *Enrica Lexie* case, with the aim of demonstrating how the interpretation of the relevant provisions is not as straightforward as it might *prima facie* seem to be.

In fact, even five years after the initial event, the dispute between India and Italy seems far from being settled. There are several aspects regarding jurisdiction that both diplomats and legal scholars debate. As the Indian professor Manimuthu Gandhi observed in the aftermath of the decision of the Indian Supreme Court, if ‘the legal issues relating to the *Enrica Lexie* incident, including extraterritorial jurisdiction, are taken before an international adjudicatory forum, a different decision could emerge given that the subject matter of the dispute involves certain grey areas of international law.’¹⁰⁰

V.1. Exercise of Jurisdiction in the Contiguous Zone and EEZ

The main issue of the *Enrica Lexie* concerns the jurisdiction over the trial of the two Italian marines. To frame the case within the relevant provisions of international law, it is paramount, first and foremost, to assess where the event actually took place since, as it has been explained, the rules on jurisdiction vary depending on the zone of the seas where the crime was committed. In fact, this is perhaps the only element on which the two States seem to agree, since both parties recognise that the incident happened ‘at a distance of about 20.5 nautical miles from the Indian sea coast off the State of Kerala.’¹⁰¹ Hence, the incident occurred outside Indian territorial waters,¹⁰² but within Indian contiguous zone and EEZ.

As a consequence, Italy contended that, within these zones, India has no sovereignty, but only some sovereign rights, limited to those expressly recognised in Articles 33 and 56 of UNCLOS¹⁰³.

In Italy’s view:

‘The coastal State has no sovereignty in the territorial sense of dominion over Contiguous Zones, but it exercises sovereign rights for the purpose of exploring the Continental Shelf and exploiting its natural resources. It has jurisdiction to enforce its fiscal, revenue and penal laws by intercepting vessels engaged in suspected smuggling or other illegal activities attributable to a violation of the existing laws. The waters which extend beyond the Contiguous Zone are traditionally the domain of high seas or open sea which juristically speaking, enjoy the status of International waters where all States enjoy traditional high

⁹⁹ H. SANKAR, ‘Jurisdictional and Immunity Issues in the story of the *Enrica Lexie*: A Case of Shoot & Scout Turns Around!’, *Blog of the European Journal of International Law*, 25 March 2013.

¹⁰⁰ M. GHANDI, ‘The *Enrica Lexie* Incident: Seeing Beyond the Grey Areas of International Law’, *Indian Journal of International Law*, 53, 1, 2013, p. 1.

¹⁰¹ Supreme Court of India, Writ Petition No. 135 of 2012, *Republic of Italy & others v. Union of India & others*,

¹⁰² According to Article 3 of the Indian Maritime Zones Act of 1976 ‘the limit of the territorial waters is the line every point of which is at a distance of twelve nautical miles from the nearest point of the

¹⁰³ Supreme Court of India, Writ Petition No. 135 of 2012, para. 20

seas freedoms, including freedom of navigation. The coastal States can exercise their right of search, seizure or confiscation of vessels for violation of its customs or fiscal or penal laws in the Contiguous Zone, but it cannot exercise these rights once the vessel in question enters the high seas, since it has no right of hot pursuit, except where the vessel is engaged in piratical acts, which make it liable for arrest and condemnation within the seas.¹⁰⁴

In other words, the Italian theory considers both the contiguous zone and the EEZ as special areas outside Indian territorial waters, over which the coastal States can exercise only those limited sovereign rights that are explicitly granted by UNCLOS. Hence, Italy maintains that UNCLOS has established a 'restrictive approach' of jurisdiction and therefore, except for the cases in which the Convention expressly grants it jurisdictional rights, a State is not entitled to exercise its sovereign authority over the sea. Thus, the Italian Courts are the only ones allowed in prosecuting Latorre and Girone, since i) the *Enrica Lexie* incident falls outside the scope of permissible categories of jurisdiction to which India is entitled within its Contiguous Zone and EEZ under Articles 33 and 57 of the UNCLOS; ii) the alleged incident occurred outside Indian territorial waters and on board a vessel flying the Italian flag.

In opposition to the Italian theory, India bases its thesis first on Section 7.7(a) of its Maritime Zones Act, pursuant to which 'the Central Government may, by notification in the official Gazette, extend, with such restrictions and modifications as it thinks fit, any enactment for the time being in force in India or any part thereof to the exclusive economic zone or any part thereof'. It held that, under the Notification No. SO 67/E dated 27 August enacted by the Indian Ministry of the Home Affairs, the new Article 188A was introduced in the Indian Code of Criminal Procedure, pursuant to which '[the] Indian Penal Code [has] been made applicable to the Exclusive Economic Zone.'

Second, India claims that it has jurisdiction over the case because i) the offence was directed towards Indian nationals (passive personality principle); and ii) the conduct has threatened India's security (protective principle). Furthermore, India adopted the view that the 'Effects Doctrine' is applicable to the case. Therefore, since a part of the crime, i.e. the death of the Indian fishermen, occurred not on board the *Enrica Lexie* but on board an Indian ship, India has concurrent jurisdiction over the case pursuant to the objective territoriality principle.

According to Indian lines of argumentation, the *Lotus Doctrine* is still valid law. Therefore, it is argued that a State is allowed to extend its own jurisdiction through an act of domestic law, as long as this is not specifically forbidden by international law. India based its thesis on Article 59 of UNCLOS, pursuant to which:

'In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.'

Taking into account this provision, which expressly admits that there might be circumstances where UNCLOS does not resolve all questions of jurisdiction, India, recalling the *Lotus* decision, argued that the Convention allows coastal States to claim their jurisdiction even beyond the cases specifically dealt with. Thus, since the only prohibitive prescriptions are those found in Article 92 and 97, 'Italy and India may have concurrent jurisdiction to try the offence, where the collision of ships on the high seas is not involved, in accordance with general principle of law.'¹⁰⁵ Accordingly, 'even if both Italy and India had the power to prosecute the accused, it would be much more convenient and appropriate

¹⁰⁴ *Idem*, para. 31.

¹⁰⁵ M. GANDHI, *op. cit.*, p. 17.

for the trial to be conducted in India, having regard to the location of the incident and the nature of the evidence and witnesses to be used against the accused.¹⁰⁶ Moreover, India argued that, even by rejecting the thesis of the ‘permissive approach’, Indian courts would still be entitled to exercise their jurisdiction within the EEZ in this case since the jurisdiction for the purpose of protecting fishing rights granted by Article 56, would also include legislation for the safety and security of the fishermen.¹⁰⁷

Italy, in turn, contests the application of Article 188A of the Indian Criminal Procedural Code, since, in its view, it constitutes a departure from and a violation of the provisions of the UNCLOS, and namely of Articles 33 and 56.¹⁰⁸ In Italy’s view, ‘Articles 91, 92, 94 and 97 of UNCLOS clearly established that any principle of concurrent jurisdiction that may have been recognised as a principle of public international law stands displaced by the express provisions of UNCLOS.’¹⁰⁹ Therefore, Italy maintains that India, being bound by UNCLOS, is obliged to recognise the primacy of the flag State jurisdiction, unless it is explicitly entitled to exercise sovereign rights.

IV.2 Application of Article 97

Italy alternatively argues that the case falls under Article 97 of UNCLOS. The application of this provision is paramount for Italy, since it states that no other than the flag State can detain the ship, arrest the crew or investigate over an incident of navigation occurred on the high seas. According to Italy, the *Enrica Lexie* incident constitutes an ‘incident of navigation’. Moreover, it maintains that the contiguous zone and the EEZ must be considered as high seas for the application of Article 97. Hence, even if one recognises that the permissive approach established with the *Lotus* decision is still valid law (thus allowing India to extend its criminal jurisdiction over the Contiguous Zone and the EEZ), no penal proceedings may be instituted against the two marines except before the judicial authorities of the flag State or by the marine’s individual national authorities. Italy argued that Article 97, specifically relating to the incident of navigation, has also explicitly overridden the ‘effects doctrine’ of the *Lotus* case; thus, the Article prohibits the extension of criminal jurisdiction in this case.

India, however, responds that Article 97 is not applicable to the *Enrica Lexie* Case for two reasons. First, a case of a murder cannot fall within the definition of ‘collision or any other incident of navigation’.¹¹⁰ In this respect, India argues that the phrase ‘incident of navigation’ should be interpreted as ‘an event or happening, especially one causing trouble, [that] generally occurs unexpected or unanticipated [and] which has a bearing on navigation’ and maintains that ‘by no stretch of imagination it can be said that opening fire, unilaterally, at fishing boat 200 meters away from the ship, containing unarmed fishermen, most of whom were sound asleep, constitute an incidence of navigation. This is a case of firing against fishermen.’¹¹¹ Second, India purports that Article 97 of the UNCLOS applies only to an ‘incident of navigation’ that took place on the high seas *strictu sensu*, and not to those incidents occurring within the Contiguous Zone or the EEZ. This latter assertion is grounded on the fact that Article 86 of UNCLOS states that ‘all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State’.

IV.3. Application of the SUA Convention

¹⁰⁶ Supreme Court of India, Writ Petition No. 135 of 2012, para. 62

¹⁰⁷ *Ibid.*

¹⁰⁸ *Idem*, para. 28.

¹⁰⁹ *Idem*, para. 38.

¹¹⁰ UNCLOS, Article 97.1

¹¹¹ Kerala High Court, WP(C)No. 4542 of 2012, para. 27

The Court of Kerala also referred to anti-piracy and anti-terrorism laws to assert jurisdiction over the case. The rules on universal jurisdiction in relation to piracy contained in UNCLOS have not been invoked by India, since the incident does not constitute ‘an act of violence or detention [...] or an act of depredation committed for private ends by the crew or the passengers of a private ship.’¹¹² Conversely, India invoked the application of the SUA Convention, implemented in Indian legislation with the SUA Act of 2002.

The territorial application of the Indian SUA Act ‘extends to the whole of India including the limit of the territorial waters, the continental shelf, the exclusive economic zone or any other maritime zone of India within the meaning of Section 2 of the Maritime Zones Act.’¹¹³ Furthermore, the Court of Kerala maintained that the incident alleged would also amount to an offence punishable under Section 3 of the SUA Act¹¹⁴, since Article 3(a) of the latter prescribes that it is punishable ‘whoever unlawfully and intentionally [...] commits an act of violence against a person on board a fixed platform or a ship which is likely to endanger the [...] safe navigation of the ship’ as well as whoever ‘injures or kills any person, in connection with the commission [...] of any of the [enumerated] offences.’

Article 6 of the SUA Convention grants coastal States the jurisdiction under the passive nationality principle and under the protective principle. Indeed, the application of the SUA Convention would allow India to exercise its criminal jurisdiction under Articles 6(1)(1) and 6(2)(2). Alternatively, it also grants jurisdiction to Italy under Articles 6(1)(1) and 6(1)(3). By applying the SUA Act, it is undisputable that Indian Courts would have concurrent jurisdiction over the case. This is probably why Indian authorities have insisted on applying the Convention to the *Enrica Lexie* incident. However, after the diplomatic crisis, and thanks to the mediation of European diplomats, the Indian government decided to halt further efforts to try Latorre and Girone under the SUA Convention. Thus, the applicability of the SUA Convention is not at stake in the *Enrica Lexie* case anymore. Nevertheless, the relationship between the rules on jurisdiction set forth in UNCLOS and in the SUA Convention needs to be addressed. Indeed, the SUA Convention exists to provide rules that are complementary to those available in UNCLOS but, at the same time, it makes the application of the international rules on jurisdiction over the seas even more complex and sometimes arbitrary.

Conclusions

In analysing the *Enrica Lexie* incident, it is clear that the international law of the sea is still partly unclear as to which State is allowed to exercise prescriptive and enforcement jurisdiction over the different zones of the sea.¹¹⁵ Indeed, what can be taken for granted is that, ‘with the creation by international conventions in the second half of the twentieth century of such new maritime zones [...] the problems of defining and regulating the exercise of jurisdiction have become even greater and more urgent.’¹¹⁶ In fact, while UNCLOS is specific up to a point respecting the several scales of maritime jurisdiction, it is ‘not infused with a coherent theory of jurisdiction which would add to [its] precision’.¹¹⁷ The result is a danger of the phenomenon familiar to international lawyers of ‘creeping jurisdiction’.¹¹⁸

¹¹² See A. N. HONNIBALL, ‘Private Political Activists and the International Law Definition of Piracy: Acting for ‘Private Ends’’, *Adelaide Law Review*, 36, II, pp. 279 et ss.

¹¹³ Indian SUA Act, Article 1(2).

¹¹⁴ Supreme Court of India, Writ Petition No. 135 of 2012, para. 22.

¹¹⁵ A. L. MORGAN, ‘The New Law of the Sea: Rethinking the Implications for Sovereign Jurisdiction and Freedom of Action’, *Ocean Development and International Law*, 27, 1, 1996, pp. 5 et ss.

¹¹⁶ I. A. SHEARER, op. cit., pp. 321-322.

¹¹⁷ D. P. O’CONNELL, *The International Law of The Sea*, Vol.1, Clarendon Press, 1982.

¹¹⁸ On the topic of ‘creeping jurisdiction’, see E. FRANCKX, ‘The 200-mile Limit: Between Creeping Jurisdiction and Creeping Common Heritage?’, *German Yearbook of International Law*, 48, 2005, pp. 117 et ss.; J. A. KNAUSS, ‘Creeping Jurisdiction and Customary International Law’, *Ocean Development and International Law*, 15, 2, 1985, pp. 209 et ss.

As previously discussed, the exercise of jurisdiction over different maritime zones involves not only the application of UNCLOS, but also other international legal instruments and national criminal law. Although a *prima facie* reading of the provisions of UNCLOS may appear to hold that a coastal State's criminal jurisdiction cannot be exercised beyond the territorial sea or onto a foreign vessel, jurisdiction might be justified in some cases since, by better analysing the issue, 'UNCLOS does not seem to have provided an ultimate frame of reference for every legal question.'¹¹⁹ Moreover, the concrete extension of the sovereign rights granted to States within the contiguous zone and the EEZ is still rather unclear.¹²⁰

Furthermore, and arguably of most importance, a problem arises concerning the status of the *Lotus* Doctrine as still valid law after the ratification of UNCLOS. This issue is paramount not only for the law of the sea but for international law as a whole. A solution to this dilemma can only be provided by the ITLOS or by some other International Tribunals.¹²¹ What is certain, for now, is that 'the age-old question posed by the *Lotus* Court, i.e. whether international law prohibits what is not expressly allowed, or permits what is not expressly prohibited, cannot readily be answered in an area such as the EEZ, where the rights and obligations of States are only partially defined.'¹²²

In any case, as Professor Gandhi notes, we must probably admit that, in similar circumstances, 'law has its own limitations in settling disputes in an adversarial setting'. Hence, in order to avoid dangerous conflicts between States in cases such as the *Enrica Lexie* incident, peaceful diplomatic means should be preferred, and States should be more prone to negotiate at a table, rather than try to impose their legal interpretation of international law by force or retaliation.

¹¹⁹ M. GANDHI, *op. cit.*, p. 14.

¹²⁰ L. JUDA, 'The Exclusive Economic Zone: Compatibility of National Claims and the UN Convention on the Law of the Sea', *Ocean Development and International Law*, 16, 1, 1986, pp. 1 et ss.; J. E. BAILEY III, 'The Exclusive Economic Zone: Its Development and Future in International and Domestic Law', *Louisiana Law Review*, 45, 6, 1985.

¹²¹ U. K. RAHA & K. D. RAJU, 'The *Enrica Lexie* Case at the Permanent Court of Arbitration: An Analysis', *Indian Journal of International Law*, 1, 2017, pp. 1 et ss.

¹²² G. DES ROSIERS, 'The *Enrica Lexie* Case: Criminal Jurisdiction at Sea', *International Law Student Association Quarterly*, 22, II, 2013, p. 18.