

Jurisdiction Beyond Territorial Sovereignty: Defining the Scope of Exclusive Flag-State Jurisdiction Under Art. 92 UNCLOS

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Abstract

Under Art. 92 of the United Nations Convention on the Law of the Sea (UNCLOS), ships sailing the high seas are subject to the exclusive jurisdiction of their flag State. Despite being considered a pivotal rule in the international law of the sea, the scope of this provision is nonetheless still unclear: indeed, as Art. 92 does not characterise the term ‘jurisdiction’, it leaves open the question of whether it only encompasses enforcement jurisdiction or also prescriptive and adjudicative one. In the well-known ‘*Lotus*’ case, the Permanent Court of International Justice (PCIJ) ruled that exclusive flag-State jurisdiction only refers to enforcement jurisdiction. This understanding prevailed until two recent cases (*M/V ‘Norstar’* and ‘*Enrica Lexie Incident*’) ruled that States are prohibited from attaching legal consequences to the conduct of foreign ships and of the people on board altogether. Against this backdrop, the work discusses the extent of the exclusivity of flag-State jurisdiction over ships sailing the high seas. It contends that jurisdiction under Art. 92 UNCLOS only encompasses the faculty to impede or otherwise interfere with the actual movement of ships, hence the jurisdiction to enforce.

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Keywords

Art. 92 UNCLOS – State jurisdiction – Exclusive flag-State jurisdiction – Enforcement jurisdiction

I. Introduction

One of the cornerstone principles of the international regime of the sea is that of the *freedom of the high seas*: the high seas are open to all States¹ and, as a corollary, '[n]o State may validly purport to subject any part of [them] to its sovereignty'.² This does not mean, however, that no legal rules apply on the high seas. Quite the contrary, the need for every individual and every space to be subject to the authority of a State that is able to exert control is no less urgent when it comes to the high seas, in which several activities may take place, from mere ship transit to deep-sea mining. As recognised by the International Law Commission (ILC), '[t]he absence of any authority over ships sailing the high seas would lead to chaos'.³ However, jurisdiction is not exercised over the high seas as such, but over the vessels sailing them by the State most closely connected to the ship, i.e. the flag State. This rule is today codified in Art. 92 UNCLOS, which prescribes that the jurisdiction of the flag State is *exclusive*. Indeed, according to said provision, '[s]hips 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'. UNCLOS certainly is one of the most successful attempts at codification of international law,⁴ with an almost global reach, having been ratified – as of today – by 168 parties. In addition, Art. 92 is usually considered to reflect customary international law.⁵ Nevertheless, the latter provision has proved to be a difficult one to interpret and has

¹ United Nations Convention on the Law of the Sea (UNCLOS) of 10 December 1982, 1833 UNTS 397, Art. 87 para. 1.

² UNCLOS (n. 1), Art. 89.

³ ILC, 'Articles Concerning the Law of the Sea with Commentaries', ILCYB 1956, Vol. II, (279), Commentary to Art. 30, para. 1.

⁴ On the legal nature of UNCLOS provisions in general see Robin R. Churchill, 'The 1982 United Nations Convention on the Law of the Sea' in: Donald R. Rothwell, Alex G. Oude Elferink, Karen N. Scott and Tim Stephens (eds), *The Oxford Handbook of the Law of the Sea* (Oxford: Oxford University Press 2015), 24-45 (29-31).

⁵ PCA, *The 'Enrica Lexie' Incident* (Italy v. India), award of 21 May 2020, para. 467. See also Douglas Guilfoyle, 'The High Seas' in: Rothwell, Oude Elferink, Scott and Stephens (eds) (n. 4), 203-225 (209); Doris König, 'Flag of Ships' in: Rüdiger Wolfrum (ed.), *MPEPIL* (online edn, Oxford: Oxford University Press 2009), para. 25.

raised some doubts as to the exact meaning of the term ‘jurisdiction’ used by it and, thus, as to the actual extent of States’ powers over ships on the high seas.

In its broadest sense, the term ‘jurisdiction’ refers to the ‘entitlement of states (and, for that matter, intergovernmental organisations such as the United Nations or the European Union) to authoritatively declare what the law is in their domain and how it is to be enforced’.⁶ However, jurisdiction can be exercised in different ways: *i*) by means of the enactment of legislation (‘jurisdiction to prescribe’); *ii*) by establishing procedures for identifying breaches of the rules and the consequences stemming from their violation (‘jurisdiction to adjudicate’); and *iii*) through mechanisms aimed at compelling the compliance with those rules or punishing their non-compliance (‘jurisdiction to enforce’).⁷ Some authors only distinguish between prescriptive and enforcement jurisdiction, the former also comprising jurisdiction to adjudicate. However, what is relevant is that States’ jurisdiction can manifest itself in different forms.⁸

As Art. 92 UNCLOS does not further define the term ‘jurisdiction’, it has been questioned whether it refers to all types of jurisdiction mentioned above or just to the jurisdiction to enforce. In other words, it is controversial whether the principle of exclusive flag-State jurisdiction only prohibits non-flag States from enforcing their legal rules on ships sailing the high seas (i. e. to impede or otherwise interfere with the actual movement of such ships through coercive acts) or whether it also prohibits the exercise of prescriptive and adjudicative powers over conduct taking place on board foreign ships on the high seas.

The question of which State is entitled to exercise jurisdiction over ships on the high seas is an old one. On the matter, the PCIJ, in 1927, rendered its seminal judgement in the ‘*Lotus*’ case.⁹ Although the judgement dealt with the peculiar case of a collision between ships flying different flags, it offered significant insights into the general issue relating to the criteria which entitle a State to exercise its jurisdiction and thus became a ‘paradigmatic judgement

⁶ Bruno Simma and Andreas Th. Müller, ‘Exercise and Limits of Jurisdiction’ in: James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge: Cambridge University Press 2012), 134-157 (135).

⁷ Bernard H. Oxman, ‘Jurisdiction of States’ in: Rüdiger Wolfrum (ed.), *MPEPIL* (online edn, Oxford: Oxford University Press 2007).

⁸ See, e. g. Christopher Staker, ‘Jurisdiction’ in: Malcolm D. Evans (ed.), *International Law* (5th edn, Oxford: Oxford University Press 2018), 289-315 (292-293).

⁹ PCIJ, *The Case of the S. S. ‘Lotus’* (France v. Turkey), judgement of 7 September 1927, PCIJ Collection of Judgments 1927, 4.

that set the tone [...] to everything else that followed'.¹⁰ As is well-known, the PCIJ ruled that while no State can claim to exercise jurisdiction *on* foreign ships on the high seas, States can exercise jurisdiction *in their own territory* with respect to acts that occurred on board, save an exceptional rule to the contrary.

This understanding of the principle of exclusive flag-State jurisdiction has prevailed for a long time, both in State practice and in scholarship. Nevertheless, two very recent decisions called into question the prevailing view according to which the exclusivity of flag-State jurisdiction is limited to *enforcement* jurisdiction: in the 2019 *M/V 'Norstar'* case¹¹ judgement, the International Tribunal for the Law of the Sea (ITLOS) ruled that Art. 92 UNCLOS would prevent any State other than the flag one from exercising *any kind of jurisdiction* over a ship sailing the high seas. This conclusion was later endorsed by an arbitral tribunal established under the auspices of the Permanent Court of Arbitration (PCA) in the *'Enrica Lexie' Incident* award¹² which, similarly to the *'Norstar'* decision, has been met with scholarly criticism in this respect.¹³

The issue is far from being merely a theoretical one and, instead, appears to be of great practical importance. Actually, under general international law, while a State has the power to enforce its legal order only within its territory, it enjoys – to a certain extent – the right to attach legal consequences to acts committed abroad and/or by foreigners. Indeed, the criteria according to which jurisdiction can be established are grouped into four categories: *i*) territoriality; *ii*) nationality; *iii*) the protective principle; and *iv*) universality.¹⁴ However, a distinction must be made between prescriptive/

¹⁰ Stéphane Beaulac, 'The *Lotus* Case in Context. Sovereignty, Westphalia, Vattel, and Positivism' in: Stephen Allen, Daniel Costelloe, Malgosia Fitzmaurice, Paul Gragl and Edward Guntrip (eds), *The Oxford Handbook of Jurisdiction in International Law* (Oxford: Oxford University Press 2019), 41-48 (41).

¹¹ ITLOS, *The M/V 'Norstar' Case* (Panama v. Italy), judgement of 10 April 2019, case no. 25.

¹² PCA, *The 'Enrica Lexie' Incident* (n. 5).

¹³ See, e.g. Arron N. Honniball, 'Freedom of Navigation Following the M/V "Norstar" Case', The NCLOS Blog, 4 June 2019, available at <<https://site.uit.no/nclos/2019/06/04/freedom-of-navigation-following-the-m-v-norstar-case/>>; Richard Collins, 'Delineating the Exclusivity of Flag State Jurisdiction on the High Seas: ITLOS Issues its Ruling in the M/V "Norstar" Case', EJIL:Talk!, 4 June 2019, available at <<https://www.ejiltalk.org/>>; Vasco Becker-Weinberg, 'The MV "Norstar" Case (Panama v. Italy)', *Il Diritto marittimo* 121 (2019), 760-766; Cameron Miles, 'The MV "Norstar" Case (Panama v. Italy)', *AJIL* 114 (2020), 116-123; Enrico Zamuner, 'Giurisdizione penale dello Stato costiero e libertà di navigazione in alto mare: in margine alla sentenza del Tribunale internazionale del diritto del mare nel caso "Norstar"', *Riv. Dir. Int.* 102 (2019), 819-827; James G. Devaney and Christian J. Tams, 'In re Arbitration Between the Italian Republic and the Republic of India Concerning the "Enrica Lexie" Incident', *AJIL* 115 (2021), 513-519.

¹⁴ Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, Oxford: Oxford University Press 2015), 101; Oxman (n. 7); Staker (n. 8), 294.

adjudicative jurisdiction and enforcement jurisdiction. As for the latter, it is generally accepted that States are only entitled to exercise it within their territory, while any enforcement activity on the territory of another State would be subject to the latter's consent.¹⁵ As for prescriptive/adjudicative jurisdiction, it can be based on all of the four mentioned criteria, with territoriality and nationality (at least, *active* nationality) most firmly anchored in general international law.

According to the territoriality principle, as is intuitive, States can exercise jurisdiction over conduct occurring within their territory (including, of course, territorial waters and airspace).¹⁶ Under the nationality principle, instead, jurisdiction can be exercised by the State of nationality of either the author (*active* nationality) or the victim (*passive* nationality) of a conduct, wherever the latter has been committed. While the active nationality criterion is today unquestioned, the situation is slightly different for passive nationality, as some authors still disagree on its status as a rule of general international law.¹⁷

¹⁵ Frederick A. Mann, 'The Doctrine of International Jurisdiction Revisited After Twenty Years', RdC 186 (1984) 34; Simma and Müller (n. 6), 147; Staker (n. 8), 311.

¹⁶ Legal literature usually distinguishes between the objective territoriality principle and the subjective territoriality principle. The latter refers to a State's exercise of jurisdiction for acts initiated within its territory but completed outside it; contrariwise, the former refers to the exercise of jurisdiction for acts completed within a State's territory, wherever initiated. See Staker (n. 8), 297; Simma and Müller (n. 6), 139; Ryngaert (n. 14), 78. In addition, the 'effects doctrine' has been developed by some States to assert jurisdiction over acts which produce effects within their territory. Despite being considered as a form of extraterritorial jurisdiction by some (see, e.g. Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press 1995), 74; Menno T. Kamminga, 'Extraterritoriality' in: Rüdiger Wolfrum (ed.), *MPEPIL* (online edn, Oxford: Oxford University Press 2020). See also ILC, 'Report on the Work of the Fifty-eight Session, Annex E: Extraterritorial Jurisdiction (Note by the Secretariat)', available at <https://legal.un.org/ilc/reports/2006/english/anne_xes.pdf>, 229, para. 10), the doctrine has been conceived as an evolution of the objective territoriality principle, to the point that some authors do not distinguish between the two concepts (see, for instance, Oxman (n. 7)). Others do distinguish between the 'effects doctrine' and the objective territorial jurisdiction, using the former expression to identify all the situations in which there is no element of intraterritorial conduct: Simma and Müller (n. 6), 139; Carlo Focarelli, *Trattato di Diritto internazionale* (San Mauro Torinese: UTET Giuridica 2015), 692; Staker (n. 8), 298. See also ILC, 'Report on the Work of the Fifty-eight Session, Annex E: Extraterritorial Jurisdiction' (Note by the Secretariat), 231, para. 12). However, as it emerges from the mentioned literature, the customary nature of the 'effects doctrine' is today rather controversial.

¹⁷ See, for an analysis, Ryngaert (n. 14), 110. Today, however, the passive personality principle seems to be increasingly more accepted (Malcolm N. Shaw, *International Law* (9th edn, Cambridge: Cambridge University Press 2021), 571); Staker (n. 8), 306, all citing ICJ, *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), jurisdiction and admissibility, judgement of 14 February 2002, joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, ICJ Reports 2002, 63, para. 47.

As for the protective principle, it entitles States to exercise jurisdiction to protect their vital interests even when they are threatened by the conduct of non-nationals taking place outside their territory.¹⁸ For instance, the protective principle has been invoked by some States to establish jurisdiction for crimes such as terrorism or the counterfeiting of currency.¹⁹ Lastly, the universality principle allows every State to exercise its jurisdiction with respect to certain activities considered of common concern (e. g. international crimes).²⁰

It follows from the foregoing that the two proposed interpretations of Art. 92 UNCLOS lead to rather different results: if one considers Art. 92 UNCLOS as prescribing the exclusivity of *all types* of jurisdiction, this provision would supersede the general international law criteria for its allocation, as only the flag State would have the power to attach legal consequences to the conduct of its ships and of people on board. By contrast, if Art. 92 UNCLOS is deemed to only encompass enforcement jurisdiction, this would simply mean that non-flag States are prevented from enforcing their legal order on foreign ships sailing the high seas, that is to say to interfere with their movement. Apart from that, however, non-flag States would still be free to exercise prescriptive and adjudicative powers over such ships, inasmuch as there exists an accepted ground for doing so under general international law.²¹

Against this puzzling background, this article will discuss the extent of the exclusivity of flag-State jurisdiction over ships sailing the high seas and examine whether such exclusivity only refers to enforcement jurisdiction or also to prescriptive and adjudicative powers. In this respect, it is submitted that the principle of exclusive flag-State jurisdiction should be interpreted as meaning that only the faculty to impede or otherwise interfere with the actual movement of a ship, that is to say the jurisdiction to enforce, is exclusive.

¹⁸ ILC, 'Report on the Work of the Fifty-eight Session, Annex E: Extraterritorial Jurisdiction (Note by the Secretariat)' (n. 16), para. 13.

¹⁹ For examples see ILC, 'Report on the Work of the Fifty-eight Session, Annex E: Extraterritorial Jurisdiction (Note by the Secretariat)' (n. 16), para. 20.

²⁰ ILC, 'Report on the Work of the Fifty-eight Session, Annex E: Extraterritorial Jurisdiction (Note by the Secretariat)' (n. 16), para. 16.

²¹ As for the nature of the jurisdiction exercised by States over ships flying their flag, some authors classify it as personal (i. e. they equate the ship to a national of the flag State, see, e. g. Oxman (n. 7), para. 20), others classify it as territorial (i. e. they consider the ship as part of the flag-State territory, Focarelli (n. 16), 690). Some authors consider it a *sui generis* jurisdiction which can be deemed to be neither personal nor territorial (Sondre T. Helmersen, 'The Sui Generis Nature of Flag State Jurisdiction', Japanese Yearbook of International Law 58 (2015), 319-335. It is beyond the scope of this work to delve into such a complex issue; for a thorough analysis, see Helmersen).

In greater detail, the analysis will proceed as follows: after an examination of the different positions that have emerged in the few decisions of international courts and tribunals that have explicitly addressed exclusive flag-State jurisdiction (Section II.), an argument is framed for the narrow interpretation of Art. 92 UNCLOS by analysing the exceptions to it (Section III.). The last Section (Section IV.) then examines whether such an interpretation is supported by State practice.

II. From ‘*Lotus*’ to ‘*Enrica Lexie*’: Exclusive Flag-State Jurisdiction in the Case Law of International Courts and Tribunals

Few international tribunals have so far directly addressed the question of the extent of State powers on the high seas, the ‘*Lotus*’ case being the most famous one. The case concerned the collision between the French mail steamer ‘*Lotus*’ and the Turkish collier ‘*Boz-Kourt*’, which caused the death of eight Turkish nationals. When the ‘*Lotus*’ reached Constantinople, Turkish authorities started investigations and put Lieutenant Demons – the officer of the watch of the ‘*Lotus*’ and a French national – under arrest. Later, he was sentenced to eighty days of imprisonment and a twenty-two pounds fine. France contended that Turkish authorities, in instituting criminal proceedings against Lieutenant Demons, had breached international law as only France itself was authorised to do so, being the ‘*Lotus*’ flag State.

As is well-known, the PCIJ found that Turkey had not violated international law; this finding was premised on the distinction between enforcement jurisdiction and other types of jurisdiction. Indeed, the Court stated that

[i]t is certainly true that – apart from certain special cases which are defined by international law – vessels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them.²²

Despite the reference to ‘any kind of jurisdiction’, the Court also noted that

²² PCIJ, *The Case of the S. S. ‘Lotus’* (n. 9), 25.

‘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. 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. All that can be said is that by virtue of the principle of the freedom of the seas, a ship is placed in the same position as national territory; but there is nothing to support the claim according to which the rights of the State under whose flag the vessel sails may go farther than the rights which it exercises within its territory properly so called’.²³

Thus, the Court seemed to accept that only enforcement flag-State jurisdiction could be seen as exclusive under international law. This is confirmed by the example the Court makes to clarify its stance:

‘Thus, if a war vessel, happening to be at the spot where a collision occurs between a vessel flying its flag and a foreign vessel, were to send on board the latter an officer to make investigations or to take evidence, such an act would undoubtedly be contrary to international law’.²⁴

Hence, the Court stated that ships are to be considered as territory of the State whose flag they fly; accordingly, no other State can claim to exercise jurisdiction *on* them. Nevertheless, in *their own territory*, States remain free to exercise jurisdiction also with respect to acts occurred on board foreign ships, as long as there is no specific rule (treaty-based or general) providing for a prohibition. The Court did not find any such rule applicable to the case of high seas collisions.

The ‘*Lotus*’ decision was already controversial when it was rendered (as it was adopted with the President’s casting vote) and was later harshly criticised by scholarship, in particular for the Court’s position according to which, in international law, everything that is not prohibited is permitted.²⁵

Be that as it may, the idea that the exclusivity of flag-State jurisdiction only covers enforcement jurisdiction has been embraced by the majority of

²³ PCIJ, *The Case of the S. S. ‘Lotus’* (n. 9), 25.

²⁴ PCIJ, *The Case of the S. S. ‘Lotus’* (n. 9), 25.

²⁵ This idea has been defined as ‘a most unfortunate and retrograde theory’ by Frederick A. Mann, ‘The Doctrine of Jurisdiction in International Law’, RdC 111 (1964), 35. According to Judge Simma, the ‘*Lotus*’ judgement expresses ‘an old, tired view of international law’ (ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, advisory opinion of 22 July 2010, declaration of Judge Simma, ICJ Reports 2010, 478, para. 2).

scholars dealing with the issue, both before²⁶ and after²⁷ the adoption of UNCLOS in 1982. For instance, in the words of Douglas Guilfoyle,

‘the phrase “exclusive jurisdiction” may be misleading. Certainly, the most important aspect of so-called “exclusive” flag State jurisdiction is that it confers immunity upon a ship from interference by foreign government vessels. The flag State thus has exclusive *enforcement* jurisdiction over its national vessels on the high seas (subject to exceptions based on consent, treaty law and custom). Nonetheless, it is clear in State practice that flag State jurisdiction does not prevent other States from attaching consequences to the conduct of their nationals on the high seas, even when aboard foreign vessels’.²⁸

However, as already mentioned, in 2019, in the *M/V ‘Norstar’* case a very different view emerged. The case concerned an oil tanker (the *M/V ‘Norstar’*) flying the Panamanian flag which, from 1994 to 1998, was engaged in selling gasoil to mega yachts in the international waters beyond the territorial seas of Italy, France and Spain. The *M/V ‘Norstar’* activities were investigated in 1997 by Italian authorities, which believed that the ship sold fuel purchased in Italy in exemption of tax duties to leisure boats in the international waters off the coast of the Italian city of Sanremo. In particular, it was believed that the *M/V ‘Norstar’* deliberately positioned itself beyond Italian, French and Spanish territorial seas and supplied yachts moored at European ports with fuel bought in Italy exempt from taxes. In doing so, the *M/V ‘Norstar’* evaded payment of custom duties and taxes. Criminal proceedings were instituted in Italy against, *inter alia*, the *M/V ‘Norstar’* captain. During these proceedings, Italian authorities seized the tanker and requested the judicial assistance of Spain to enforce the decree of seizure. Following such request,

²⁶ Gilbert Gidel, *Le droit international public de la mer: le temps de paix*, Vol. I (Paris: Sirey 1932), 256; Benedetto Conforti, *Il regime giuridico dei mari* (Napoli: Jovene 1957), 71; see also Rolando Quadri, *Diritto internazionale pubblico* (5th edn, Napoli: Liguori editore 1968), 740.

²⁷ Natalino Ronzitti, ‘La difesa contro i pirati e l’imbarco di personale militare armato sui mercantili: il caso della *Enrica Lexie* e la controversia Italia-India’, *Riv. Dir. Int.* 96 (2013), 1073-1115 (1091); Benedetto Conforti, ‘In tema di giurisdizione penale per fatti commessi in acque internazionali’ in: VV.AA., *Scritti in onore di Giuseppe Tesauero*, Vol. IV (Napoli: Editoriale Scientifica 2014), 2619; Focarelli (n. 16), 704; Guilfoyle (n. 5), 209; Arron N. Honniball, ‘The Exclusive Jurisdiction of Flag States: A Limitation on Pro-active Port States?’, *TIJMCL* 31 (2016), 499-530; Douglas Guilfoyle, ‘Art. 92. Status of Ships’ in: Alexander Proelß (ed.), *The United Nations Convention on the Law of the Sea: A Commentary* (Munich: Beck/Hart 2017), 700; Amina Manegga, *La giurisdizione negli spazi marini non sottoposti a sovranità territoriale* (Padova: CEDAM 2018), 132. Cedric Ryngaert, *Selfless Intervention. Exercising Jurisdiction in the Common Interest* (Oxford: Oxford University Press 2020), 145. *Contra* see Robin R. Churchill and Alan V. Lowe, *The Law of the Sea* (3rd edn, Manchester: Manchester University Press 1999), 208; König (n. 5), para. 25; Yoshifumi Tanaka, *The International Law of the Sea* (3rd edn, Cambridge: Cambridge University Press 2019), 189.

²⁸ Guilfoyle (n. 5), 209.

Spanish authorities seized the vessel in 1998 when it entered Spanish territorial waters. All of the persons accused of offshore bunkering were later acquitted and Italian courts revoked the *M/V 'Norstar'* seizure. In 2015, Panama initiated proceedings against Italy before ITLOS claiming that the latter, by ordering and requesting the arrest of the *M/V 'Norstar'*, had violated, among others, Panama's right to enjoy freedom of navigation (of which 'the principle of exclusive flag State jurisdiction is an inherent component'²⁹) enshrined in Art. 87 UNCLOS.

The Tribunal found that Italy had indeed breached said provision; in reaching this conclusion, it had to delve into the issue of the extent of States' jurisdiction on ships sailing the high seas, since Italy's alleged infringement was committed by means of the exercise of prescriptive and adjudicative jurisdiction over the vessel (that is to say, by applying Italian criminal and custom laws to activities materially carried out on a foreign ship sailing the high seas). The Tribunal held that the normative framework envisaged by UNCLOS prohibits any interference with foreign ships on the high seas, even non-physical interference. Thus, the Tribunal stated that the mere circumstance that a State applies its laws to acts committed onboard foreign ships on the high seas is a breach of UNCLOS, irrespective of where (and if) such laws are ultimately enforced. In other terms, the Tribunal considered UNCLOS to prohibit States not only from enforcing laws and regulations on the high seas, but also from attaching legal consequences to the conduct of foreign ships sailing the high seas altogether.³⁰ Surprisingly enough, the Tribunal primarily based this assertion on the first of the three excerpts of the '*Lotus*' judgement quoted above, emphasising the reference to 'any kind of jurisdiction', but omitting the subsequent passages.³¹

The *M/V 'Norstar'* decision was strongly criticised by seven of the judges sitting in the Tribunal, whose dissenting opinion evinces a different understanding of both Arts 87 and 92 UNCLOS, according to which

'nothing in the text of the Convention, in its *travaux préparatoires*, in other international treaties, in customary international law, or in the practice of States suggests that article 87 and its corollary article 92 altogether excludes the right of non-flag States to exercise their prescriptive criminal jurisdiction with respect to activities on the high seas'.³²

²⁹ ITLOS, *The M/V 'Norstar' Case* (n. 11), para. 225.

³⁰ ITLOS, *The M/V 'Norstar' Case* (n. 11), para. 188 and following. In particular, see paras 223 and 225.

³¹ ITLOS, *The M/V 'Norstar' Case* (n. 11), para. 216.

³² ITLOS, *The M/V 'Norstar' Case* (n. 11), joint dissenting opinion of Judges Cot, Pawlak, Yanai, Hoffmann, Kolodkin and Lijnzaad and Judge *ad hoc* Treves, para. 19.

Nevertheless, the conclusions in *M/V 'Norstar'* were later endorsed by a PCA arbitral tribunal established in accordance with Annex VII UNCLOS to settle the dispute between Italy and India concerning the '*Enrica Lexie*' incident. As is well-known, the dispute originated from the shooting of two Indian fishermen by two members of the Italian marines deployed on board the Italian-flagged oil tanker '*Enrica Lexie*'. The incident occurred in the Exclusive Economic Zone (EEZ) of India, to which Art. 92 UNCLOS applies by virtue of the reference contained in Art. 58 para. 2 ('Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part'). Following the shooting, the '*Enrica Lexie*' entered Indian territorial waters and the two marines were later arrested by Indian authorities and accused of murder. In 2015, Italy instituted proceedings against India under Annex VII UNCLOS, alleging, *inter alia*, that India did not have jurisdiction over the incident as the only State entitled to prosecute the marines was the flag State, meaning Italy itself; in addition, Italy claimed that the marines enjoyed functional immunity.³³

The Tribunal – in its May 2021 award –, before finding that the marines did actually enjoy functional immunity, stated that India's criminal proceedings were justified under UNCLOS, as India was the flag State of the vessel on which the offence was completed (that is to say, on which the fishermen were killed).³⁴ However, it had the chance to clarify that

'the principle of exclusive flag State jurisdiction under the Convention is violated when a State other than the flag State seeks to prescribe laws, rules, or regulations over a ship of the flag State, or applies or enforces such laws, rules, or regulations in respect of such a ship. The Arbitral Tribunal also recalls in this respect the observation of ITLOS in *M/V "Norstar"* that the principle of exclusive flag State jurisdiction "prohibits not only the exercise of enforcement jurisdiction

³³ For a thorough analysis of the case and the award see Natalino Ronzitti, 'Il caso della *Enrica Lexie* e la sentenza arbitrale nella controversia Italia-India', Riv. Dir. Int. 103 (2020), 937-958; Giuseppe Cataldi, 'The *Enrica Lexie* Award Amid Jurisdictional and Law of the Sea Issues', The Italian Yearbook of International Law 30 (2020), 169-190; Tullio Treves, 'The International Tribunal for the Law of the Sea and Other Law of the Sea Jurisdictions (2020)', The Italian Yearbook of International Law 30 (2020), 321-355 (336-355). Attila M. Tanzi, 'Adjudication at the Service of Diplomacy: The *Enrica Lexie* Case', Journal of International Dispute Settlement 12 (2021), 448-461; Roberto Virzo, 'The Dispute Concerning the *Enrica Lexie* Incident and the Role of International Tribunals in Provisional Measure Proceedings Instituted Pursuant to the United Nations Convention on the Law of the Sea' in: James Crawford, Abdul Koroma, Said Mahmoudi and Alain Pellet (eds), *The International Legal Order: Current Needs and Possible Responses. Essays in Honour of Djamchid Momtaz* (Leiden: Brill 2017), 519-532.

³⁴ PCA, *The 'Enrica Lexie' Incident* (n. 5), para. 368.

on the high seas by States other than the flag State but also the extension of their prescriptive jurisdiction to lawful activities conducted by foreign ships on the high seas”.³⁵

This *dictum* is surprising, as it went much further than Italy’s proposition. Indeed, Italy contended that it had exclusive adjudicative jurisdiction over the incident (i. e. the exclusive right of instituting criminal proceedings against the two marines). However, it did not derive this right from Art. 92 UNCLOS, but solely from Art. 97 UNCLOS,³⁶ which confers the right of instituting criminal and disciplinary proceedings against the persons responsible for collisions or other incidents of navigation only upon the flag State and the national State of these persons, a provision which the Tribunal considered not to be applicable as the shooting could not be deemed an ‘incident of navigation’.³⁷ As for Italy’s claim regarding Art. 92 UNCLOS, it was only that ‘[b]y directing and inducing the *Enrica Lexie* to change course and proceed into India’s territorial sea through a ruse, as well as by interdicting the *Enrica Lexie* and escorting her to Kochi,³⁸ India violated [...] Italy’s exclusive jurisdiction over the *Enrica Lexie*’. This was merely a claim concerning the unlawful exercise of enforcement jurisdiction by Indian authorities, which the Tribunal, after having examined all the evidence, dismissed on the ground that India did not coerce the ship into entering Indian territorial waters and, accordingly, had not exercised enforcement

³⁵ PCA, *The ‘Enrica Lexie’ Incident* (n. 5), para. 527.

³⁶ PCA, *The ‘Enrica Lexie’ Incident* (n. 5), para. 68 lit. d).

³⁷ PCA, *The ‘Enrica Lexie’ Incident* (n. 5), para. 638 and following, and, in particular, para. 656. Contrariwise, on the applicability of Art. 97 UNCLOS to the facts of the ‘*Enrica Lexie*’ incident see Gian Maria Farnelli, ‘Back to *Lotus*? A Recent Decision by the Supreme Court of India on an Incident of Navigation in the Contiguous Zone’, *International Community Law Review* 16 (2014), 106-122 (112).

³⁸ According to Italy, ‘[t]he Maritime Rescue Co-ordination Centre of India (“MRCC”) contacted the *Enrica Lexie* by telephone, claimed that it had caught two suspected pirate boats in connection with a “piracy incident/firing incident” and (on that false pretext) instructed the *Enrica Lexie* to sail to Kochi to identify suspected pirates. In a subsequent email sent to the Master, the MRCC referred to this conversation and again asked the *Enrica Lexie* to head for Kochi, without explaining that the *Enrica Lexie* itself was the suspect vessel. The Indian authorities also used coercion to ensure that the *Enrica Lexie* stopped, changed course, sailed to Kochi anchorage and remained there. They did so by sending out a Dornier coast guard aircraft and at least two vessels (thought to include the “ICGS Samar” and the “ICGS Lakshmbai”, both of which were armed and at least one of which had police personnel on board). The aircraft and the vessels intercepted the *Enrica Lexie* in international waters, instructed her to proceed to Kochi, followed her there, and continued to patrol around and monitor her when she reached Kochi anchorage at night’. See PCA, *The ‘Enrica Lexie’ Incident* (n. 5), Italy’s Notification Under Article 287 and Annex VII, Article 1 of UNCLOS and Statement of Claim and Grounds on Which it is Based, 26 June 2015, paras 11-12.

jurisdiction.³⁹ The same conclusion was opposed to Italy's claim concerning the breach of freedom of navigation, i. e. that '[b]y directing the *Enrica Lexie* to proceed to Kochi while it was navigating beyond India's territorial sea, by interdicting it, and by escorting it to Kochi, India breached Italy's freedom of navigation under Article 87(1)(a) of UNCLOS'.⁴⁰ In this respect, the Tribunal also found that India did not interfere with the '*Enrica Lexie*' freedom of navigation.⁴¹

The decisions are evidence that the issue of the breadth of States' powers over ships sailing the high seas is today quite controversial. Indeed, after a first phase in which the '*Lotus*' view prevailed and was endorsed by the majority of scholars, the '*Norstar*' and '*Enrica Lexie*' decisions reversed it, demonstrating the need for a comprehensive re-evaluation of the problem. In the following paragraphs, an attempt at interpreting Art. 92 UNCLOS will be made, starting from a reading of this provision which will take into account the Articles providing exceptions to the rule of exclusive flag-State jurisdiction as well as their drafting history.

III. Art. 92 UNCLOS in Context: Exceptions that Prove the Rule?

The first thing an interpreter trying to elucidate the meaning of Art. 92 UNCLOS would certainly note is the fact that such provision uses the term 'jurisdiction' without further specifications. This could suggest that the ordinary meaning of the term refers to *all* types of jurisdiction. However, it would be erroneous to let the matter rest here. Actually, several contextual elements can be derived from provisions other than Art. 92 UNCLOS and should be taken into account in the interpretation of the latter. In this respect, one cannot but notice that other UNCLOS provisions are usually clear in specifying whether they refer to the power of States to adopt laws and regulations or to the power to enforce them. An example of a provision referring to *prescriptive* powers of States can be found in Art. 42 para. 1 UNCLOS, according to which

³⁹ PCA, *The 'Enrica Lexie' Incident* (n. 5), para. 75 (emphasis added) and paras 535-536: 'In the view of the Arbitral Tribunal, Italy has not discharged its burden of proving that the Indian Coast Guard, by "interdicting" and "escorting" the "Enrica Lexie", exercised enforcement jurisdiction. In conclusion, the conduct of the Indian authorities while the "Enrica Lexie" was in India's exclusive economic zone did not amount to an exercise of jurisdiction. The Arbitral Tribunal accordingly finds that India did not violate Article 92, paragraph 1, of the Convention'.

⁴⁰ PCA, *The 'Enrica Lexie' Incident* (n. 5), para. 474.

⁴¹ PCA, *The 'Enrica Lexie' Incident* (n. 5), para. 505.

‘States bordering straits may adopt laws and regulations relating to transit passage through straits, in respect of any of the following: (a) the safety of navigation and the regulation of maritime traffic [...]; (b) the prevention, reduction and control of pollution [...]; (c) [...] the prevention of fishing, including the stowage of fishing gear; (d) the loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary laws and regulations of States bordering straits’.⁴²

Another provision referring to States’ right of *enforcing* their laws and regulations is Art. 73 para. 1 UNCLOS, establishing that

‘[t]he 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’.⁴³

This would *prima facie* seem to corroborate the idea that the use of the term ‘jurisdiction’ encompasses prescriptive, adjudicative and enforcement powers. However, looking closer at the Convention as a whole, there also exist other contextual elements that point towards a different interpretation of Art. 92 UNCLOS. In particular, as Art. 92 UNCLOS expressly allows for exceptions to the rule of exclusive flag-State jurisdiction provided for in UNCLOS itself, the provisions enshrining such exceptions ought to be taken into account. They are primarily contained in Arts 105, 109, 110, 111. These provisions are clearly of an *enforcement nature*.

Art. 105 UNCLOS deals with the right of every State to *seize – on the high seas or in any place outside State jurisdiction –* a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, *arrest* the persons and *seize* the property on board. Art. 109 UNCLOS, on the other hand, is concerned with the suppression of unauthorised broadcasting: it provides for a closed list of States before whose courts the persons engaged in such activity may be prosecuted (para. 3) as well as the right of one of these States to *arrest* any person or ship engaged in unauthorised broadcasting and to *seize* the broadcasting apparatus (para. 4). As for Art. 110 UNCLOS, it concerns the *right of boarding and visiting* foreign vessels suspected of engaging in certain illicit activities or vessels without nationality or which refuse to show their flag. Lastly, Art. 111 UNCLOS enshrines the right of *hot pursuit* of ships which a coastal State believes have violated its laws and regulations.

When analysing the normative context of Art. 92 UNCLOS, another fundamental element that must be kept in mind is Art. 97 UNCLOS which

⁴² Other examples could be Art. 21 and Art. 60.

⁴³ Other examples could be Arts 213-222.

reads as follows: ‘1. In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national’.

This provision – which has been defined as ‘the exception that proves the rule’⁴⁴ – establishes a limitation to the right of instituting criminal and disciplinary proceedings against the persons responsible for collisions or other incidents of navigation on States other than the flag State and the national State of these persons. Such a limitation would be redundant and superfluous if adjudicative jurisdiction were altogether prohibited by Art. 92 UNCLOS.⁴⁵ The correctness of a similar interpretation of Art. 97 UNCLOS is confirmed by several elements: *i*) first, its wording according to which no criminal or disciplinary proceedings may be instituted *except before* the flag State and the national State of the accused persons, clearly indicating that the provision is construed as limiting an otherwise existent right rather than carving out an exception for the national State to what is permitted under Art. 92 UNCLOS; *ii*) secondly, para. 3 of Art. 97 UNCLOS restates the exclusivity of the flag-State enforcement jurisdiction by maintaining that ‘[n]o arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag State’.

It appears from the foregoing that the context of UNCLOS presents conflicting elements. Thus, in order to clarify the still ambiguous meaning of Art. 92 UNCLOS, recourse can be had to the drafting history of the Convention, as a supplementary means of interpretation under Art. 32 of the Vienna Convention on the Law of Treaties (VCLT).⁴⁶ The drafting history, and more precisely the work leading to the adoption of the 1958 Geneva Conventions on the Law of the Sea, appears to suggest that Art. 92 UNCLOS only encompasses enforcement jurisdiction.⁴⁷

⁴⁴ Honniball (n. 27), 525.

⁴⁵ Honniball (n. 27), 525; Conforti (n. 27); Maneggia (n. 27), 134 and 154; Cataldi (n. 33), 176.

⁴⁶ Vienna Convention on the Law of Treaties of 23 May 1969, 1155 UNTS 331.

⁴⁷ The 1958 Geneva Conventions on the Law of the Sea (the Convention on the Territorial Sea and the Contiguous Zone of 29 April 1958, 516 UNTS 205; the Convention on the High Seas of 29 April 1958, 450 UNTS 11; the Convention on Fishing and Conservation of the Living Resources of the High Seas of 29 April 1958, 559 UNTS 285; the Convention on the Continental Shelf of 29 April 1958, 499 UNTS 311; and the Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes of 29 April 1958, 450 UNTS 169) were the result of the first United Nations Conference on the Law of the Sea, held in Geneva from 24 February to 27 April 1958. The work of the Conference mostly built upon the work of the ILC and its 1956 ‘Articles Concerning the Law of the Sea’ (n. 3).

In the United Nations (UN) Memorandum on the Regime of the High Seas, dated 1950, it is pointed out that:

‘The permanent subjection of the ship to the jurisdiction of the flag-State does not mean [...] that there may not arise circumstances in which a private vessel on the high seas may be subject to several concurrent jurisdictions. That point was clarified only a few years ago by the judgment of the Permanent Court of International Justice on the *Lotus* case’.⁴⁸

The possibility of a private ship being subject to the jurisdiction of more than one State is explained, in the Memorandum, in terms of validity and effectiveness:

‘The legal status of the high seas is characterised by the fact that, except in special circumstances arising out of agreements between states, several jurisdictions may have a simultaneous validity, whereas only one of those jurisdictions, that of the flag, is effective. *As applied to the high seas, the effectiveness of a jurisdiction lies in the power to perform coercive acts on the high seas; its validity lies in the power to apply a particular juridical order to the appraisal of a legal situation on the high seas*’ (emphasis added).⁴⁹

The same idea appears to lie at the heart of the provisions concerning jurisdiction on the high seas contained in the 1956 ILC Articles Concerning the Law of the Sea. The commentary to Art. 30 (which – together with Art. 31 – would later become Art. 6 of the 1958 Geneva Convention on the High Seas and then Art. 92 UNCLOS),⁵⁰ seems to consider the term jurisdiction as referring to the exercise of *policing rights*. In this respect, it states that

‘[o]ne of the essential adjuncts to the principle of the freedom of the seas is that a ship must fly the flag of a single State and that it is subject to the jurisdiction of that State.

In certain cases, policing rights have been granted to warships in respect of foreign ships. Such of these rights as are recognized in international law are incorporated in the present articles (articles 43, 46 and 47)’.⁵¹

The provisions incorporating the exceptions giving policing rights to warships over foreign vessels are clearly of an enforcement nature. Indeed, Art. 43 codifies the right to *seize* a pirate ship or aircraft, or a ship taken by

⁴⁸ ‘Memorandum on the Regime of the High Seas, Prepared by the Secretariat’, 14 July 1950, A/CN.4/32, available at <<https://digitallibrary.un.org/record/697831>>, 17.

⁴⁹ ‘Memorandum on the Regime of the High Seas’ (n. 48), 18.

⁵⁰ ILC, ‘Articles Concerning the Law of the Sea with Commentaries’ (n. 3), 279.

⁵¹ ILC, ‘Articles Concerning the Law of the Sea with Commentaries’ (n. 3), 279, Commentary to Art. 30, paras 1-2.

piracy and under the control of pirates, *arrest* the persons and *seize* the property on board; it was later transposed into Art. 19 of the 1958 Geneva Convention and then into the aforementioned Art. 105 UNCLOS; Similarly, Art. 46 – concerned with the right of *visiting* and *boarding* vessels on the high seas – later became Art. 22 of the 1958 Geneva Convention and then, with modifications, Art. 110 UNCLOS. Lastly, Art. 47 on *hot pursuit* formed the basis for Art. 23 of the 1958 Geneva Convention and then, with modifications, for Art. 111 UNCLOS.

As for the above-quoted Art. 97 UNCLOS, its history also clearly indicates that the provision was originally intended to limit the adjudicative jurisdiction which every State, under customary international law, may exercise *within its territory* over facts that occurred on board foreign ships on the high seas. Indeed, Art. 97 UNCLOS was conceived as a response to the ‘*Lotus*’ *dictum*, since the PCIJ stance according to which nothing in customary international law prohibits the exercise of adjudicative criminal jurisdiction over foreign ships by States other than the flag State ‘caused serious disquiet in international maritime circles’.⁵² This first led to the adoption, in 1952, of the International Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collision or Other Incidents of Navigation,⁵³ whose Art. 1 provides that

‘[i]n the event of a collision or any other incident of navigation concerning a sea-going ship and involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, criminal or disciplinary proceedings may be instituted only before the judicial or administrative authorities of the State of which the ship was flying the flag at the time of the collision or other incident of navigation’.

In addition, Art. 3 provides for the jurisdiction of the national State of the accused persons:

‘Nothing contained in this Convention shall prevent any State from permitting its own authorities, in cases of collision or other incidents of navigation, to take any action in respect of certificates of competence or licences issued by that State or to prosecute its own nationals for offences committed while on board a ship flying the flag of another State’.

⁵² ILC, ‘Articles Concerning the Law of the Sea with Commentaries’ (n. 3), 281, Commentary to Art. 35, para. 1.

⁵³ International Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collision or Other Incidents of Navigation of 10 May 1952, 439 UNTS 233.

Later, the concerns surrounding the ‘*Lotus*’ rule were also shared by the ILC which, in 1956, adopted a very similar wording in Art. 35 of the Articles Concerning the Law of the Sea.⁵⁴ Art. 35 UNCLOS provided the basis for Art. 11 of the 1958 Geneva Convention on the High Seas, which later became Art. 97 UNCLOS.

In conclusion, it emerges from the normative context of Art. 92 UNCLOS – interpreted in light of its drafting history – that the principle of exclusive flag-State jurisdiction was never conceived as being able to limit other States’ capacity ‘to apply a particular juridical order to the appraisal of a legal situation on the high seas’,⁵⁵ but only to limit their possibility of enforcing such legal order while the ship is sailing the high seas. First and foremost, this results from the exceptions to the principle, which are of an enforcement nature, as confirmed by their drafting history and by the work of the ILC.

IV. Exclusive Flag-State Jurisdiction in State Practice

It was argued in the previous Section that a contextual and historical reading of Art. 92 UNCLOS suggests an interpretation which only prescribes the exclusivity of enforcement flag-State jurisdiction *while the ship is on the high seas*. This conclusion is also supported by State practice; most of this practice concerns criminal jurisdiction, as the prevention and repression of crimes in areas beyond national jurisdiction, such as the high seas, is the field in which States felt most urgent the need to cooperate and adopt common norms.

To start with, indeed, there exists a number of treaties whose provisions seem to confirm that exclusive flag-State jurisdiction only refers to enforcement measures taken against vessels sailing the high seas. These conventions often impose on State parties the obligation to criminalise a certain conduct and to assume adjudicative jurisdiction over it, even when such conduct is carried out on board foreign-flagged vessels. Such treaties – inasmuch as they have been ratified by a great number of States which also ratified UNCLOS and deal with the issue of jurisdiction – are relevant in determining the meaning of Art. 92 UNCLOS under Art. 31 para. 3 lit. b) VCLT, as they represent ‘subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’.

⁵⁴ ILC, ‘Articles Concerning the Law of the Sea with Commentaries’ (n. 3), 281.

⁵⁵ ‘Memorandum on the Regime of the High Seas’ (n. 48), 18.

The first and most notable example is the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention),⁵⁶ adopted in 1988 and entered into force in 1992; as of today, the SUA Convention counts 166 State parties.⁵⁷ Its Art. 6 provides that:

- ‘1. 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.
2. A State Party may also establish its jurisdiction over any such offence when:
- a. it is committed by a stateless person whose habitual residence is in that State; or
 - b. during its commission a national of that State is seized, threatened, injured or killed; or
 - c. it is committed in an attempt to compel that State to do or abstain from doing any act’.

Thus, this provision clearly grants States criminal domestic jurisdiction over certain conduct carried out on board foreign ships.

It is certainly true that Art. 92 UNCLOS itself, in setting forth the principle of exclusive flag-State jurisdiction, allows for exceptions ‘expressly provided for in international treaties’. However, the SUA Convention does not appear to be one of those exceptions. Indeed, Art. 9 of the SUA Convention explicitly reaffirms the idea of the exclusivity of enforcement jurisdiction, by stating that ‘[n]othing in this Convention shall affect in any way the rules of international law pertaining to the competence of States to exercise investigative or enforcement jurisdiction on board ships not flying their flag’. This provision, read in conjunction with the preamble – which recognises the ‘need for all States, in combating unlawful acts against the safety of maritime navigation, strictly to comply with rules and principles of general international law’ – seems to support a narrow reading of Art. 92 UNCLOS rather than providing an exception to it.

Another example can be found in the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances⁵⁸ (entered into force

⁵⁶ Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention) of 10 March 1988, 1678 UNTS 221.

⁵⁷ <[https://wwwcdn.imo.org/localresources/en/About/Conventions/StatusOfConventions/StatusOfTreaties%20\(1\).pdf](https://wwwcdn.imo.org/localresources/en/About/Conventions/StatusOfConventions/StatusOfTreaties%20(1).pdf)>. For the list of States parties to the SUA Convention see <<https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx>>.

⁵⁸ Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988, 1582 UNTS 95.

in 1990), to which there are 191 parties⁵⁹ and whose Art. 4 para. 1 lit. b) allows States to take any measure as may be necessary to establish jurisdiction over the offences defined in Art. 3 of the same Convention, whenever such offences are committed by a national or by a person that has his/her habitual residence in that State (Art. 4 para. 1 lit. b(i)). If one looks more closely at the Convention, however, this provision seems to be no exception to the exclusivity of flag-State jurisdiction. Quite the contrary, the applicability of general international law norms pertaining to the exercise of jurisdiction of a non-enforcement kind seems to form its basis: Art. 17 of the Convention (entitled 'Illicit Traffic by Sea'), indeed, opens with the assertion that '[t]he Parties shall co-operate to the fullest extent possible to suppress illicit traffic by sea, in conformity with the international law of the sea' and then proceeds to restate the exclusivity of flag-State enforcement on the high seas.⁶⁰

Lastly, a look at the Protocol Against the Smuggling of Migrants by Land, Sea and Air supplementing the UN Convention Against Transnational Organized Crime,⁶¹ adopted in 2000 and entered into force in 2004, is also instructive. Art. 6 of the Protocol – to which there are 150 parties⁶² – imposes upon Contracting States the obligation to establish certain conduct as criminal offences within their domestic legal order. Nonetheless, its Art. 7 provides that 'States Parties shall cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, *in accordance with the international law of the sea*' (emphasis added), and thus provide, in Art. 8, that non-flag enforcement on the high seas is subject to the authorisation of the State whose flag the smuggling vessel flies.

All of the mentioned instruments, to a certain extent, confer upon States prescriptive and adjudicative jurisdiction over conduct committed outside their territory; in doing so, they do not provide for exceptions for crimes committed on board foreign ships. At the same time, all of these treaties explicitly state – in the preamble or in specific provisions – that States do need to respect the international law of the sea when combating crimes; furthermore, they always provide for the exclusivity of flag-State enforcement on the high seas.

⁵⁹ <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6&clang=_en>.

⁶⁰ See Tullio Treves, 'Intervention en haute mer et navires étrangers', A.F.D.I. 41 (1995), 651-675.

⁶¹ Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime of 15 November 2000, 2241 UNTS 507.

⁶² <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-b&chapter=18>.

The proposition according to which States enjoy prescriptive and adjudicative rights over acts committed on foreign-flagged vessels sailing the high seas is also confirmed by domestic case law. In the following pages, some examples will be provided, which show that States do not actually consider themselves as being prevented from trying the individuals responsible for these acts. Some of these examples refer to States which are parties to UNCLOS and are therefore surely relevant when interpreting it, even if under Art. 32 VCLT as supplementary means of interpretation.⁶³ Other examples are taken from the practice of States which are not parties to UNCLOS; such cases could not be *directly* relevant for the interpretation of Art. 92 UNCLOS. Yet, they contribute to elucidate the meaning of the exclusive flag-State jurisdiction rule under general international law, which – given that Art. 92 UNCLOS was intended to codify it – can in turn be taken into consideration under Art. 31 para. 3 lit. c) as a ‘relevant [rule] of international law applicable in the relations between the parties’. The latter consideration also holds true for the case law predating the entry into force of UNCLOS.

In some of the mentioned cases, jurisdiction was exercised upon grounds whose status as general international law is quite controversial (for instance, the passive personality principle or the objective territoriality principle, see *supra*, Section I.). Nevertheless, what is relevant for the purposes of the present analysis is that States recognised themselves as being allowed to exercise prescriptive and adjudicative jurisdiction in such cases.

One of the first – and, possibly, most famous – cases is the ‘*Achille Lauro*’ affair. The facts are well-known: in October 1985, four armed members of the Palestine Liberation Front hijacked the Italian cruise liner ‘*Achille Lauro*’ while the ship was headed to Port Said. The hijackers threatened to kill the crew and passengers if Israel did not release 50 Palestinian prisoners. A few days after, they murdered Leon Klinghoffer, an American passenger, and threw his body overboard. After their surrender, the hijackers took off on board an Egyptian aircraft which was intercepted by United States (US) fighter planes and forced to land at the Italian North Atlantic Treaty Organi-

⁶³ Domestic case law can only be deemed relevant under Art. 32 VCLT as a supplementary means of interpretation as it does not fit into any of the categories provided for by Art. 31 VCLT. In particular, it cannot be considered as ‘subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’ under Art. 31 para. 3 lit. b). Indeed, such an agreement would require other UNCLOS parties to ‘accept’ this case law. However, unless one construes the silence of States upon the issuance of the decision as a form of acquiescence, no such agreement can be said to exist.

zation (NATO) base of Sigonella. The terrorists were then taken into custody by the Italian authorities.⁶⁴

Despite the crime having been committed on the high seas and on an Italian-flagged ship, the United States of America (USA) expressed its will to try the terrorists and demanded their extradition. It is worth noting that USA is not a party to UNCLOS and that the latter, in 1985, had not entered into force yet;⁶⁵ thus, its position can be considered as reflecting its view on the exercise of jurisdiction *under general international law*. Moreover, USA is a party to the 1958 Geneva Convention on the High Seas, whose Art. 6 mirrors Art. 92 UNCLOS. In particular, the view of the US was that *both* Italian and US courts had jurisdiction over the incident. In this respect, US President Ronald Reagan publicly declared that '[the hijackers] could be tried in both countries, and in this country they would be tried for murder, where in Italy they will probably be tried on the basis of piracy because of the taking over of the Italian vessel'.⁶⁶

Thus, USA considered to have jurisdiction over the murder of a citizen, despite it having occurred on a foreign-flagged ship on the high seas, a position which was later reaffirmed in other cases.⁶⁷

⁶⁴ For the facts of the case see Chiara Ragni, 'Achille Lauro Affair (1985)' in: Rüdiger Wolfrum (ed.), *MPEPIL* (online edn, Oxford: Oxford University Press 2009).

⁶⁵ UNCLOS entered into force on 16 November 1994.

⁶⁶ 'Remarks and a Question-and-Answer Session with Reporters', 11 October 1985, ILM 24 (1985), 1514-1516 (1515). However, when the US District Court for the District of Columbia issued an arrest warrant against Abu Abbas (ILM 24 (1985), 1553-1557), considered to be an accessory in the hijacking, it regarded the facts as an act of piracy (a crime in respect of which scholarship has contended there exists universal criminal jurisdiction: see Roger O'Keefe, *International Criminal Law* (Oxford: Oxford University Press 2015), 18. Some authors have suggested that this was only due to the fact that in 1985 US law did not contemplate the principle of passive personality, which was only introduced later. See Laura Magi, 'Criminal Conduct on the High Seas: is a General Rule on Jurisdiction to Prosecute still Missing?', Riv. Dir. Int. 98 (2015), 79-113 (102-103). However, the facts of the '*Achille Lauro*' incident could not be qualified as piracy under international law. See Natalino Ronzitti, 'Alcuni problemi giuridici sollevati dal dirottamento dell'"Achille Lauro"', Riv. Dir. Int. 68 (1985), 584-588 (585). See also Giorgio Gaja, 'Sulla repressione penale per i fatti dell'"Achille Lauro"', Riv. Dir. Int. 68 (1985), 588-590.

⁶⁷ See, for instance, the case of *United States v. Roberts* (US District Court for the Eastern District of Louisiana, 6 April 1998, and the other decisions therein cited). In that case, the defendant was charged with sexual abuse of a minor (a US citizen) which took place on board the Liberian-flagged vessel *M/V 'Celebration'* while the latter was sailing the high seas. The defendant objected to the jurisdiction of US courts on the ground that the *M/V 'Celebration'* was not an American vessel and that, under international law, only the flag State could have exercised its jurisdiction. The Court, on the contrary, concluded that it did have jurisdiction under both the passive personality and the objective territoriality principle (as the crime had had detrimental effects within the United States), all jurisdictional grounds it considered to be recognized by international law. Therefore, the Court accepted that under general international law a State other than the flag State can exercise its jurisdiction on crimes committed on ships

Another example could be the case of *R. v. Kelly*,⁶⁸ in which three British nationals travelling on board a Danish ship damaged the latter's fittings while it was sailing the high seas. The Crown Court held that it had jurisdiction and the accused pleaded guilty. They later appealed against the conviction, arguing that British courts did not have jurisdiction. The House of Lords, however, upheld the Crown Court judgement and maintained that the Court had indeed jurisdiction under Section 686(1) of the Merchant Shipping Act 1894.⁶⁹

Turning to more recent cases, the '*Mavi Marmara*' and the *M/V 'Tajima*' cases deserve to be mentioned. The former concerned a clash that occurred, in May 2010, on the high seas between Israeli forces and the '*Mavi Marmara*', a Comoros-flagged ship which was part of a flotilla (the 'Gaza freedom flotilla') trying to breach the Israeli naval blockade of the Gaza strip to deliver humanitarian assistance and supplies.⁷⁰ What is relevant for the purposes of the present discussion is the circumstance that, during the incident, nine Turkish nationals perished and therefore, in 2012, the High Criminal Court in Istanbul brought to trial four members of the Israeli military forces.⁷¹

As for the *M/V 'Tajima*' case of 2002, two Filipinos were suspected of having murdered a Japanese seafarer on board a Panamanian ship on the high

sailing the high seas. However, it also seemed to imply that Art. 92 UNCLOS (to which the USA is not a party) is not reflective of general international law on the matter. Indeed, it stated that the defendant was prevented from invoking it as it was not self-executing. Moreover, the Court also dealt with Art. 6 of the High Seas Convention (identical to Art. 92), another provision invoked by the defendant as prohibiting US courts jurisdiction. In this respect, the Court noted that 'the United States, by ratifying the Convention on the High Seas, did not intend "to incorporate the *restrictive language of article 6*, which limits the permissible exercise of jurisdiction to those provided by treaty, into its domestic law and make it available in a criminal action as a defense to the jurisdiction of its courts"' (emphasis added).

⁶⁸ House of Lords, 28 July 1981, ILR 77 (1988), 284-292. The case precedes the adoption of UNCLOS but is nevertheless relevant for the purposes of the present work since the customary rule therein codified predates its equivalent treaty provision. In addition, the United Kingdom had ratified the 1958 Geneva Convention on the High Seas and was therefore bound by its Art. 6. United Kingdom acceded to UNCLOS in 1997.

⁶⁹ Which is similar to Section 281 of the *Merchant Shipping Act 1995* (see *infra*, n. 75).

⁷⁰ After the incident, a fact-finding mission was established by the Human Rights Council: 'Report of the International Fact-finding Mission to Investigate Violations of International Law, Including International Humanitarian and Human Rights Law, Resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance', 27 September 2010, A/HRH/15/21, available at <https://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.21_en.pdf>.

⁷¹ The charges were later withdrawn as part of the negotiations between Turkey and Israel to resume normal diplomatic relations which had deteriorated after the incident. See 'Israel and Turkey End Rift Over Gaza Flotilla Killings', available at <<https://www.bbc.com/news/world-middle-east-36639834>>.

seas. The vessel then entered a Japanese port and Japan, after an official request from Panama, temporarily detained the two suspects. Japan ultimately did not try the offenders; however, in the document submitted by the Government of Japan to the Legal Committee of the International Maritime Organization (IMO), it clearly stated that this was only due to the lack of specific domestic legislation:

‘[...] The Republic of Panama, as the flag State, was the only State that could exercise its criminal jurisdiction over the vessel. Neither Japan nor the Philippines could exercise their criminal jurisdictions in relation to such suspected murders on board the vessel flying the flag of another State, *due to the absence of appropriate provisions in their respective domestic laws*’ (emphasis added).⁷²

Other examples that could be mentioned refer to the practice of States relating to the trafficking of migrants at sea. In this respect, the practice of Italy is worth mentioning. For instance, in decision no. 32960 of 5 May 2010 of the Italian Supreme Court, the defendants were accused of migrant smuggling committed on board a Turkish ship on the high seas. The Court, in annulling the judgement of the Court of Appeal of Reggio Calabria, declared that Italian courts did not have jurisdiction over the facts due to what it called the ‘flag principle’. However, looking more closely, the Court actually seemed to accept the existence of crimes over which there is Italian jurisdiction even if committed on foreign vessels on the high seas and ultimately declined the jurisdiction for lack of any jurisdictional criteria under Italian criminal law. Indeed, the Court maintained that Italy did not have jurisdiction since the offence was not contemplated among those on which Italian courts can adjudicate even when committed abroad by Italian citizens or by foreigners (enshrined in Art. 7 of the Italian Criminal Code).⁷³

The abovementioned cases demonstrate that States do not consider themselves as being prevented from exercising their prescriptive and adjudicative

⁷² ‘Discussion on the Measures to Protect Crews and Passengers Against Crimes on Vessels, Submitted by Japan’, IMO LEG 85/10, Yearbook of the Comité Maritime International 2002, 149-152 (para. 2). See also para. 6 lit. b), and para. 6 lit. c)(ii).

⁷³ For further Italian practice see Andrea Saccucci, ‘La giurisdizione esclusiva dello Stato della bandiera sulle imbarcazioni impegnate in operazioni di soccorso umanitario in alto mare: il caso della *Iuventia*’, Riv. Dir. Int. 101 (2018), 223-234 (although the author is critical of the Court’s decision as he considers the exclusive flag-State jurisdiction rule to refer to any kind of jurisdiction); Fulvia Staiano, ‘Universal Jurisdiction Over Transnational Maritime Crimes Beyond Piracy’, Riv. Dir. Int. 102 (2019), 663-693; Irini Papanicolopulu, ‘Immigrazione irregolare via mare ed esercizio della giurisdizione: il contesto normativo internazionale e la recente prassi italiana’ in: Amedeo Antonucci, Irini Papanicolopulu and Tullio Scovazzi, *L’immigrazione irregolare via mare nella giurisprudenza italiana e nell’esperienza europea* (Torino: Giappichelli 2012), 1-22. For other practice, see also the discussion on *civil* jurisdiction for compensation of damages resulting from collisions in Maneggia (n. 27), 157.

powers over facts occurred on foreign-flagged ships on the high seas. Even if in some of these cases there was no discussion by the relevant court of international law norms on the allocation of jurisdiction, they are nonetheless relevant. Indeed, they are proof that States in specific circumstances *exercise* such prescriptive and adjudicative powers.

Lastly, the possibility for States to attach legal consequences to the conduct of foreign ships (or of people aboard them) is further confirmed by the work of the *Comité Maritime International* (CMI). The latter is a non-governmental organisation primarily composed of national or multinational associations of maritime law. Thus, its work cannot be considered as State practice. Nevertheless, the CMI is the oldest existing organisation in the world concerned with maritime law, and its aim is precisely that of fostering and contributing to the unification of maritime law in all its aspects. To this end, the CMI promotes international conventions and partners with international organisations, such as the IMO. Therefore, the positions expressed by the *Comité* are highly authoritative and can certainly help in elucidate the meaning of the provision discussed in the present work. The CMI adopted, in 2007, certain draft guidelines for national legislations on maritime criminal acts. The guidelines were developed by a joint working group composed of representatives of several international organisations⁷⁴ and then submitted for consideration to the IMO.

In the introduction of the guidelines, it is pointed out that

‘the problem [of maritime criminal acts] is international in scope and that, to be effective, national law must be able to deal not only with criminal acts committed on waters outside national jurisdiction but also, to the maximum extent permitted by international law, *those committed on board foreign-flag ships coming within a port or place under national jurisdiction, wherever located at the time of commission of the act*’ (emphasis added).

Thus, after having clarified the meaning of the expressions ‘maritime criminal acts’ and ‘piracy’ in Art. I, Art. II, entitled ‘Jurisdiction and prosecution’, provides that the offences set forth in the preceding Article are to be prosecuted – to the extent permitted by the 1958 Geneva Conventions on the

⁷⁴ CMI, ‘Resolution Concerning Criminal Offences on Board Foreign Flag Ships’, Yearbook of the Comité Maritime International 2004, 346, available at <<https://comitemaritime.org/>>. The working group was composed of representatives of the CMI itself, the Baltic and International Maritime Council, the International Chamber of Shipping, the International Criminal Police Organization, the International Group of P&I Clubs, the ICC International Maritime Bureau, the International Maritime Organization, the International Transport Workers Federation, and the International Union of Marine Insurance. The guidelines are available at <<https://comitemaritime.org/wp-content/uploads/2018/06/Maritime-Criminal-Acts-Draft-guidelines-for-national-legislation.pdf>>.

High Seas and Contiguous Zone and by UNCLOS – also when committed in any place outside the jurisdiction of any State. Accordingly, it confers jurisdiction to prosecute, *inter alia*, to: the State apprehending or having custody of the accused person (Art. II para. 3); the State of nationality or of residence (Art. II para. 4); the State of nationality of the victim (Art. II, para. 5); the State whose ‘peace and tranquillity’ have been disturbed by the commission of the act (Art. II para. 6(ii)).⁷⁵

In addition, the guidelines were later submitted to the Legal Committee of the IMO, in which several States’ delegations expressed the view that

‘existing international treaties, such as UNCLOS and the SUA Conventions, did not comprehensively address the effective prosecution and punishment of criminals. In particular, these treaties did not effectively address the interaction between coastal State jurisdiction, flag-State jurisdiction and the jurisdiction which could be exerted by the State of a national affected by a crime at sea, leaving gaps in the investigation and punishment of criminal acts’.⁷⁶

However, ‘it was also noted that [... t]he effort to develop model national legislation was beyond the competency of the Committee, and could potentially infringe on a range of sensitive issues of sovereignty of Member States’⁷⁷ and

⁷⁵ In general, the idea that States enjoy prescriptive and adjudicative powers over crimes committed on the high seas, even on foreign vessels, emerges from the work of the CMI. In this respect, see CMI, ‘Summary of Current National Law Applicable to the Jurisdictional Issues Re Criminal Offences Committed on Board Foreign-flagged Ships, as derived from the Responses to the Questionnaire by CMI National Member Associations’, Yearbook of the Comité Maritime International 2003, 582-583. In particular 583, where (although with a somewhat unclear formulation) it is stated that: ‘A State’s national law may enable the prosecution of a foreign national suspect over whom it has personal jurisdiction for a serious criminal offence under its law committed on board a foreign-flag ship within its EEZ or archipelagic waters, or within an adjacent international strait, if the coastal State can reasonably assert that the crime and/or its consequences either has had a direct adverse impact upon the coastal State or has disturbed the good order or peace and tranquillity of the waters in question’. See also CMI, ‘Working Paper for the Committee on Maritime Security Re Criminal Offences Committed on Foreign Flagged Ships’, Yearbook of the Comité Maritime International 2003, 584-585. CMI, ‘Model National Law on Acts of Piracy and Maritime Violence’, Yearbook of the Comité Maritime International 2000, 418-423. For examples of national legislations entitling States to assert jurisdictions over foreign-flagged vessels on the high seas see: UK *Merchant Shipping Act* (1995), Sections 279 and 281; Australian *Crimes at Sea Act* (2000), Section 6; 18 US Code § 7.

⁷⁶ IMO, ‘Report of the Legal Committee on the Work of its Ninety-third Session’, LEG 93/13, available at <<https://www.dco.uscg.mil/Portals/9/DCO%20Documents/5p/5ps/International%20Maritime%20Organization/LEG/leg93-report.pdf?ver=2017-06-29-130001-603>>, para. 12(b).6. The delegations disagreeing with such view mainly recalled Arts 27, 97 and 98 UNCLOS (para. 12(b).9).

⁷⁷ IMO, ‘Report of the Legal Committee on the Work of its Ninety-third Session’ (n. 76), para. 12(b).11.

thus '[r]eservations were also expressed in relation to engaging IMO in the task of *limiting the sovereign rights of States in the exercise of their criminal jurisdiction by introducing an international regime governing crimes at sea in general*'.⁷⁸

In conclusion, State practice supports the idea that States in no way feel themselves as being prevented from exercising prescriptive/adjudicative jurisdiction over facts occurred on the high seas and on ships not flying their flag, where there is a valid jurisdictional basis under general international law.

V. Concluding Remarks

The exclusivity of flag-State jurisdiction on ships sailing the high seas is a longstanding and widely recognised principle governing the international regime of the seas, today codified in Art. 92 UNCLOS. Yet, the question of the scope of this exclusive jurisdiction is far from being settled. Quite the contrary, the debate concerning the nature of States' powers on foreign ships sailing the high seas has attracted renewed attention after the '*Norstar*' and '*Enrica Lexie*' decisions, which embraced a view that had been supported only by a minority of scholars before.

This paper has argued that exclusive flag-State jurisdiction on the high seas only encompasses *enforcement* jurisdiction, meaning the right to interfere – through coercive actions – with the actual movement of a ship.

It goes without saying that this does not mean that States, in exercising their prescriptive and adjudicative powers over ships sailing the high seas, can act as they see fit. It only signifies that the facts occurred on the high seas may fall under the prescriptive and adjudicative jurisdiction of a State other than the flag State *that can validly claim the existence of a jurisdictional basis recognised by international law*. Furthermore, the assertion of jurisdiction without a valid connecting factor can still be a violation of UNCLOS. Some authors have suggested that the exercise of prescriptive powers without a valid legal basis can represent a breach of the freedom of navigation enshrined in Art. 87 UNCLOS.⁷⁹ Moreover, it is also obvious that the title for the exercise of jurisdiction by non-flag States can never be territoriality. Indeed, to extend the territorial jurisdiction over the high seas would result in a violation of the already mentioned Art. 89 UNCLOS, according to which

⁷⁸ IMO, 'Report of the Legal Committee on the Work of its Ninety-third Session' (n. 76), para. 12(b).¹³ (emphasis added).

⁷⁹ Honniball (n. 13).

‘[n]o State may validly purport to subject any part of the high seas to its sovereignty’.

The idea that exclusive flag-State jurisdiction only prevents non-flag States from *enforcing* their laws and regulations on the high seas also appears to be coherent with the overall legal framework governing the exercise of jurisdiction. As already recalled, it is quite undisputed that under general international law States are only entitled to exercise enforcement jurisdiction within their territory (or on another State’s territory, subject to that State’s consent). Since the high seas are no one’s territory, enforcement jurisdiction is exercised over ships sailing them by the State which is most closely connected to the ship. Apart from enforcement jurisdiction, however, in international law the existence of concurring jurisdictions of more than one State is the rule, not the exception. For the high seas to be that exception would make no sense. Actually, if one looks at some of the cases examined in this work (such as the *M/V ‘Tajima’* and the *‘Mavi Marmara’* cases), it is evident that flag States can have little or no interest at all in regulating and assuming jurisdiction over situations occurring onboard their ships on the high seas. Thus, to exclude prescriptive and adjudicative powers of non-flag States could potentially lead to such situations escaping the jurisdiction of any State and to the high seas being an under-regulated area.