


NOTES AND COMMENTS

Immunity *Ratione Materiae* of the Marines as Vessel Protection Detachments: A Case Note on the M/V *Enrica Lexie* Case

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Abstract

This case note critically analyses the logic of M/V *Enrica Lexie* of 2020 with a particular focus on the issue of the immunity *ratione materiae*. This judgment is important in terms of the development of the principle of sovereign immunity. It first reviews the background of the case and the judgment. It then examines (1) the basis of the principle of sovereign immunity and (2) the territorial exception and its relevance to the law of the sea. It criticizes the logic of the judgment, particularly on its reference to the United Nations Convention on Jurisdictional Immunities of States and Their Property, regardless of the fact that the instrument only applies to civil proceedings. Finally, it comments on the Award's implication for anti-piracy international cooperation.

Keywords: Immunity of state officials; foreign criminal jurisdiction; law of the sea

State sovereignty and equality under customary international law underpin the principle of immunity *ratione materiae*. Yet, the definition of the official acts, the exceptions, and the legal basis for this rule is unsettled. State practice is far from consistent.¹ The International Law Commission (ILC) has worked on the study of the Immunity of State Officials from Foreign Criminal Jurisdiction since 2007, only to agree on a limited number of provisions.²

Meanwhile, as piracy and armed robbery at sea sharply increased at the end of the 2000s, several states started to place their personnel on commercial vessels as vessel

¹ Aurel SARI, “The Status of Armed Forces in Public International Law: Jurisdiction and Immunity” in Alexander ORAKHELASHVILI, ed., *Research Handbook on Jurisdiction and Immunities in International Law* (Cheltenham, UK: Edward Elgar Publishing, 2015), 319 at 356; Rosanne VAN ALEBEEK, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (Oxford: Oxford University Press, 2008) at 103; Rosanne VAN ALEBEEK, “Functional Immunity of State Officials from the Criminal Jurisdiction of Foreign National Courts” in Tom RUYTS, Nicolas ANGELET, and Luca FERRO, eds., *The Cambridge Handbook of Immunities and International Law* (Cambridge: Cambridge University Press, 2019), 496; Hazel FOX and Philippa WEBB, *The Law of State Immunity*, 3rd ed. (Oxford: Oxford University Press, 2013) at 91; Malcolm N. SHAW, *International Law* (Cambridge: Cambridge University Press, 2017) at 523.

² The ILC has provisionally adopted seven draft articles and its commentaries. See *Report on the Work of the 69th Session*, International Law Commission (ILC), UN Doc. A/72/10 (2017) [ILC Report of the 69th Session] at 175.

protection detachments (VPDs).³ VPDs are most commonly uniformed military personnel protecting vessels from their own country. Alternatively, they could be procured and regulated through a Memorandum of Understanding or Status of Forces Agreement (SOFA) between the state VPDs and the vessel's flag state.

Do such VPDs enjoy immunity *ratione materiae*? The Award of the United Nations Convention on Law of the Sea (UNCLOS) Annex VII Tribunal on the M/V *Enrica Lexie* case, disputed between Italy and India, affirmed this question.⁴ This was a case where, on 15 February 2012, two Italian marines aboard a commercial vessel, the M/V *Enrica Lexie*, opened fire and killed two Indian fishermen on an Indian boat, the *St. Anthony*.⁵ Both ships lay outside India's territorial sea at the time of the incident. India detained the M/V *Enrica Lexie* at its port in Kochi in Kerala and arrested the marines.⁶ The Italian government sought their release through India's judicial procedure, but this was unsuccessful: the Supreme Court of India rejected Italy's claim on 18 January 2013.⁷ It held that the Indian Union, instead of the Tribunal of Kollam in Kerala, should set up a special court to try this case without specifically deciding on the issue of immunity.⁸ Italy requested the provisional measures be heard before the International Tribunal for the Law of the Sea (ITLOS).⁹ It then brought the case before the Annex VII Tribunal. The Tribunal issued a provisional measures order before ruling on the merits.¹⁰

The *Enrica Lexie* case provides an occasion to revisit fundamental questions regarding the immunity *ratione materiae* in the maritime law enforcement context. To elaborate on these points, this article will analyse the judgment to clarify its implications and potential repercussions for developing the principle of functional immunity. It will first briefly review the ruling in its pertinent part. It will not look into issues other than the present one. It will then examine the nature of an official act and the territorial tort exception. Finally, it will discuss this award's potential implications on state officials' law enforcement operations at sea.

I. A Brief Overview of The Judgment

The Tribunal reviewed (1) whether India had the jurisdiction to prosecute the marines and (2) whether those marines enjoyed immunity from India's jurisdiction. On the first point, Italy argued that India lacked the legal basis to try the marines under the law of the sea because they were subject to the exclusive jurisdiction of Italy under UNCLOS

³ See Gian Maria FARNELLI, "Vessel Protection Detachments and Maritime Security: An Evaluation of Four Years of Italian Practice" (2015) 1 *Maritime Safety and Security Law Journal* 16; Valeria EBOLI and Jean Paul PIERINI, "Coastal State Jurisdiction over Vessel Protection Detachments and Immunity Issues: The *Enrica Lexie* Case" (2012) 51(1) *The Military Law and the Law of War Review* 117.

⁴ *The "Enrica Lexie" Incident (Italy v. India)*, Award of 21 May 2020, [2020] PCA Case No. 2015-28 [*Enrica Lexie*].

⁵ The boat was not registered under the Indian Merchant Shipping Act, which would have provided the nationality. Yet, the boat was registered under the fisheries law of the State of Kerala, and the issue of the nationality was not questioned in the Award.

⁶ For the facts of the case, see *Enrica Lexie*, *supra* note 4 at paras. 79–170. See also Natalino RONZITTI, "The *Enrica Lexie* Incident: Law of the Sea and Immunity of State Officials Issues" (2013) 22 *The Italian Yearbook of International Law* 3; Manimuthu GANDHI, "The *Enrica Lexie* Incident: Seeing Beyond the Grey Areas of International Law" (2013) 53 *Indian Journal of International Law* 1.

⁷ *Republic of Italy & Ors v. Union of India & Ors*, Judgment of 4 September 2012, [2012] Supreme Court of India Writ Petition (Civil) No. 135 of 2012 with Special Leave Petition (Civil) No. 20370 of 2012.

⁸ *Ibid.*, at para. 101.

⁹ *The "Enrica Lexie" Incident (Italy v. India)*, Order of 24 August 2015, Provisional Measures, [2015] ITLOS Case No. 24.

¹⁰ *The "Enrica Lexie" Incident (Italy v. India)*, Order of 29 April 2016, Request for the Prescription of Provisional Measures, [2016] PCA Case No. 2015-28.

Article 92(1).¹¹ In response, India invoked the territoriality and passive personality principles to support its prescriptive jurisdiction.¹² The Tribunal stated that “where an offence was commenced on board one vessel and completed on board another vessel, the flag States of both vessels may have concurrent jurisdiction over the offence”,¹³ by analogy with a case where an offence was commenced in the territory of one state and completed in the territory of another state. Accordingly, it upheld that India was entitled to exercise jurisdiction over the incident according to the territoriality principle.¹⁴ The Tribunal did not address the passive personality principle, stating that it was unnecessary.¹⁵

The Tribunal then decided that its competence extended to the determination of immunity because it was an “incidental question” that necessarily presented itself in the UNCLOS application.¹⁶ Regarding the applicable law, Italy claimed that India’s assertion and continued exercise of criminal jurisdiction violated India’s obligation to respect the immunity of the marines under UNCLOS Articles 2(3), 56(2), 58(2), and 100, because they were Italian state officials exercising official functions.¹⁷ The Tribunal stated that these provisions were not pertinent to the present issues.¹⁸ It also held that Article 297 (1), which Italy invoked as a “subsidiary argument”, was irrelevant.¹⁹ Because there was no provision in the Convention that expressly addressed the immunity *ratione materiae* of state officials, the Tribunal decided to examine how this matter was governed by customary international law.²⁰

The Tribunal upheld Italy’s claim and concluded that the marines enjoyed immunity from India’s criminal jurisdiction. While the Tribunal noted that the various aspects of the discussion on this issue were still in flux, the acts “were indeed acts within the scope of their duties as State organs”.²¹ It further stated that the parties did not dispute the existence of the norm.²² It cursorily referred to the International Criminal Tribunal for the Former Yugoslavia’s (ICTY’s) *Blaškić* case²³ and the International Court of Justice’s (ICJ’s) *Djibouti* case²⁴ which affirmed this rule of customary international law.²⁵

The reasons why the marines were immune from India’s criminal jurisdiction were as follows. First, the marines in the present case qualified as state officials according to the Italian domestic statutes. They were subject to a military chain of command. They also had the status as agents of the judicial police, which authorized them to arrest pirates

¹¹ *Enrica Lexie*, *supra* note 4 at para. 300.

¹² *Ibid.*, at paras. 331–40.

¹³ *Ibid.*, at para. 366.

¹⁴ *Ibid.*, at para. 367.

¹⁵ *Ibid.*, at para. 368.

¹⁶ *Ibid.*, at para. 811. This part is also important for the development of the judicial dispute settlement under UNCLOS regime. This article will not get into this issue for the space limit.

¹⁷ *Ibid.*, at para. 812.

¹⁸ *Ibid.*, at para. 798.

¹⁹ *Ibid.*, at para. 803.

²⁰ *Ibid.*, at para. 842. In other words, the present issue is no longer a dispute over the application and interpretation of UNCLOS (see UNCLOS art. 297(1)). The Tribunal affirmed its jurisdiction to decide on the issue of the immunity because it is “an incidental question” to the issue whether India has a jurisdiction: *Ibid.*, at para. 811.

²¹ *Ibid.*, at para. 844. The Tribunal cited the ILC’s report of Roman Anatolevich Kolodkin, the ILC project’s first special rapporteur, and the ILC’s draft articles.

²² *Ibid.*, at para. 846.

²³ *Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (Prosecutor v. Blaškić)*, Judgment of 29 October 1997, [1997] ICTY Case No. IT-95-14-AR 108 bis [*Blaškić*] at para. 38.

²⁴ *Certain Question of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment of 4 June 2008, [2008] I.C.J. Rep. 177 [*Djibouti*] at 243, para. 191.

²⁵ *Enrica Lexie*, *supra* note 4 at para. 844.

and maintain them under their custody and conduct investigations into crimes of piracy in support of the public prosecutor.²⁶

Second, the marine's acts fulfilled a state function.²⁷ Italy deployed them according to a mandate from the Italian State. In this context, the Tribunal relied on Kolodkin, the ILC's first rapporteur's explanation that the immunity *ratione materiae* was linked with the attribution to the state.²⁸ It looked into the ILC Articles on Responsibility of States, which provided that the "conduct of any State organ shall be considered an act of that State".²⁹ It stated that "there is a presumption under international law that a state is right about characterizing its official's conduct as being official in nature".³⁰ The marines were acting as officers of the Italian Navy and as officers and agents of the judicial police. Even if the marines' acts were found to be *ultra vires* or contrary to their instructions or orders, upon which the Tribunal did not decide, it would not preclude them from enjoying immunity as long as they acted in the name of the state and their official capacity.³¹

Finally, the Tribunal stated that the "territorial tort" exception did not preclude them from enjoying such an immunity.³² India argued that the alleged crime was committed against Indian nationals on an Indian flagged boat assimilated into India's territory for the application of criminal law, and the marines had been found on India's territory.³³ Recognizing that there was disagreement on whether the exception was established under customary international law, the Tribunal observed that it was incorporated in Article 12 of the United Nations Convention on Jurisdictional Immunities of States and Their Property (UNCIS).³⁴ Then, "to the extent the rule is thought to exist",³⁵ it held that the exception would only apply in cases where (1) the acts at issue were committed in the territory of the forum state and (2) by a foreign official who had been present in the territory of that state at the time of the acts.³⁶ The Tribunal did not find that the present case met the first condition because "the legal fiction that ships may be assimilated for jurisdictional purposes with the flag state's land territory has since been universally rejected".³⁷ Furthermore, the Tribunal stated that there was no support to the argument that the second condition was dispensable. Because the marines were on board the *Enrica Lexie* and not on Indian Territory, the Tribunal concluded that the exception would not apply in this case.

Accordingly, the Tribunal decided that India must "take the necessary steps to cease to exercise its criminal jurisdiction over the Marines".³⁸ In reaching this decision, it took note of Italy's commitment to resume its criminal investigation over the incident and that both parties would cooperate in pursuing that investigation.³⁹

²⁶ *Ibid.*, at paras. 848–55.

²⁷ *Ibid.*, at paras. 859–62.

²⁸ *Ibid.*, at para. 857.

²⁹ *Ibid.*, at para. 858.

³⁰ *Ibid.*

³¹ *Ibid.*, at para. 860.

³² *Ibid.*, at para. 872. The "territorial tort" exception is a rule that the court must deny the immunity when the defendant State's tortious conduct in the territory of the forum State resulted in harm or loss to the claimant.

³³ *Ibid.*, at para. 830.

³⁴ *Convention on Jurisdictional Immunities of States and Their Property*, 2 December 2004, GA Res. 59/38, UN Doc. A/59/508 (not yet entered in force).

³⁵ *Enrica Lexie*, *supra* note 4 at para. 868.

³⁶ *Ibid.*

³⁷ *Ibid.*, at para. 869.

³⁸ *Ibid.*, at para. 888.

³⁹ *Ibid.*, at para. 889.

II. The Basis for The Immunity *Ratione Materiae*

A. The Tribunal's Approach

Jurisprudence and authorities confirm that functional immunity applies “with respect to acts performed in an official capacity”, which are acts performed by a state official in the exercise of state authority. Beyond this point, there seems to be no unitary understanding of the functional immunity rule.⁴⁰

On the one hand, an approach holds that the legal regime of functional immunity has a general scope of application.⁴¹ In other words, the immunity applies to all state officials and all acts performed to exercise their duties. The ILC supports this position and leaves the form of the link between the state officials and the state to domestic laws.⁴²

On the other hand, there is the view that the legal regime is “not governed by a single and sole customary norm, as international practice demonstrates that such a regime is both fragmented and complex”.⁴³ It claims a range of norms that change according to various officials, acts, or the exercise of criminal or civil jurisdiction. It supports a context-dependent approach. In this second approach, one maintains that different norms concerning foreign officials’ functional immunity apply depending on their activities. In other words, it looks into “whether they are ‘official’ acts prohibited by international law, acts only lawful in international law, or acts specifically protected by international law”.⁴⁴ One of the grounds for such an argument is that the approach to immunity of state officials in the context of crimes diverges significantly.⁴⁵

The Tribunal endorsed the former view, looking at the marines’ status and functions. The majority seems to have excluded the context-based approach expressed in the dissenting opinions of Judges Patrick Robinson⁴⁶ and Sreenivasa Rao Pemmaraju.⁴⁷ It also did not distinguish between civil and criminal jurisdictions when relying on the territorial tort exception (see *infra*). However, there remain a few shortcomings in the Award’s reasonings.

⁴⁰ *Immunity of State Officials from Foreign Criminal Jurisdiction*, Fourth Report on Immunity of State Officials from Foreign Criminal Jurisdiction, by Concepción Escobar HERNÁNDEZ, UN Doc. A/CN.4/686 (2015) [Fourth Special Report] at 7. For an attempt to categorize divergent theories, see Riccardo Pisillo MAZZESCHI, “The Functional Immunity of State Officials from Foreign Jurisdiction: A Critique of the Traditional Theories” (2015) 17 *Questions of International Law* 3.

⁴¹ Mazzeschi, *Ibid.*, at 7.

⁴² ILC Report of the 69th Session, *supra* note 2 at 235.

⁴³ Mazzeschi, *supra* note 40 at 8.

⁴⁴ *Ibid.*

⁴⁵ Ramona PEDRETTI, *Immunity of Heads of State and State Officials for International Crimes* (Leiden, Boston: Brill Nijhoff, 2014) at 101.

⁴⁶ *Enrica Lexie*, Dissenting Opinion of Judge Patrick Robinson, *supra* note 4 at para. 63. Judge Robinson emphasized “a very peculiar, direct and specific contractual relationship between the Italian Government and the ship-owners of the *Enrica Lexie*”.

⁴⁷ *Enrica Lexie*, Dissenting Opinion of Judge Sreenivasa Rao Pemmaraju, *supra* note 4 at paras. 75–8. Judge Rao stated that “the terms and conditions of the placement of the Marines ... are decisive to determine the eligibility of the Marines for immunity under international law”. The VPDs’ protection of the commercial vessels, based on the contract between the government and the shipowners, was not for the “government non-commercial purpose”. It is noted, however, there was hardly any commercial element in marine’s opening of the fire against Indian fishermen. For the critique, see the comments at Aurel SARI, “Part 1 – Tanker, Jailer, Soldier, Sailor: Functional Immunity and the *Enrica Lexie* Award” *Just Security* (4 September 2020), online: [Just Security <https://www.justsecurity.org/72284/part-1-tanker-jailer-soldier-sailor-functional-immunity-and-the-enrica-lexie-award>](https://www.justsecurity.org/72284/part-1-tanker-jailer-soldier-sailor-functional-immunity-and-the-enrica-lexie-award).

B. The Official Acts and the Relevance of the Law of State Responsibility

A twist is how the Tribunal relied on the link between the offensive act and its attribution to the state under the law of state responsibility. It supported the view that functional immunity covers foreign officials when they cannot be held personally responsible for their acts because they were conducted under their state's authority.⁴⁸ The difficulty is that its doctrinal basis is not uniform.

The second special rapporteur, Concepción Escobar Hernández, addressed the criteria for identifying an "act performed in an official capacity" in detail. She described that the characteristics of an act performed in an official capacity are (1) the criminal nature of the act, (2) the attribution of the act to a state, and (3) the governmental authority of the act.⁴⁹

She pointed out that the ILC defined the attribution criteria in the context of international responsibility, with a clear purpose of preventing a state from using private entities as a cover-up. She then analyzed the suitability of the state responsibility criteria for the purposes of immunity.⁵⁰ However, the Tribunal did not pay attention to this analysis.⁵¹

In fact, the first Special Rapporteur, Roman Anatolevich Kolodkin, explicitly supported this connection. Yet, he based his argument on Eileen Denza's comment on the 1961 Vienna Convention on Diplomatic Relations that "the correct test to be applied ... is one of imputability. If the conduct question is imputable or attributable to the sending state ... then continuing immunity *ratione materiae* should apply."⁵² However, it is questionable whether this statement is persuasive in the context of jurisdictional immunity.

It is because "[i]ndividual criminal responsibility and State responsibility often coincide, but they are based nevertheless on different concepts".⁵³ Immunity concerns exemption from jurisdiction, of which historical development and legal structure do not correspond to that of the state's responsibility.⁵⁴ The elements required for the functional immunity and the attribution criteria under the ILC Draft Articles on the State Responsibility for the Internationally Wrongful Acts⁵⁵ (ILC Articles on State Responsibility) are different.

In addition, the Tribunal held *obiter dictum* that the *ultra vires* acts constituted an official act, which was "corroborated by Article 7 of the [ILC Articles on State Responsibility]".⁵⁶ State practice is not unanimous on whether the individual enjoys functional immunity, notwithstanding the consensus that the act is attributable to the state, even if the individual acts to exercise governmental authority elements. Several domestic courts have refused to recognize immunity *ratione materiae* regarding illegal *ultra vires* conduct.⁵⁷ This decision

⁴⁸ See for instance, Van Alebeek, *The Immunity of States and Their Officials*, *supra* note 1 at 106; Rosanne VAN ALEBEEK, "National Courts, International Crimes and the Functional Immunity of State Officials" (2012) 59 *Netherlands International Law Review* 5; Van Alebeek, "Functional Immunity of State Officials", *supra* note 1 at 498; Antonio CASSESE and Paola GAETA, *Cassese's International Criminal Law*, 3rd ed. (Oxford: Oxford University Press, 2013) at 240.

⁴⁹ Fourth Special Report, *supra* note 40 at 42.

⁵⁰ *Ibid.*, at 49.

⁵¹ *Enrica Lexie*, *supra* note 4 at paras. 856–862.

⁵² *Immunity of State Officials from Foreign Criminal Jurisdiction*, Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction, by Roman A. KOLODKIN, UN Doc. A/CN.4/631 (2010) [Second Report by Roman Anatolevich Kolodkin] at 404, para. 25, citing Eileen DENZA, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, 3rd ed. (Oxford: Oxford University Press, 2008) at 363.

⁵³ Pedretti, *supra* note 45 at 332. Note, Pedretti assumes that crimes pursuant to international law are often committed by state officials in their official capacity on behalf of the state.

⁵⁴ In the present case, too, Italy granted substantial payment to the victims' families, not as a legal due but as *ex gratia*. See Ronzitti, *supra* note 6 at 6.

⁵⁵ *Responsibility of States for Internationally Wrongful Acts*, GA Res. 56/83, UN Doc. A/56/49 (Vol. 1)/Corr.4 (2001).

⁵⁶ *Enrica Lexie*, *supra* note 4, at para. 860. The Tribunal made it clear that it would not prejudge whether the conducts were *ultra vires* or contrary to the instructions or orders.

⁵⁷ Pedretti, *supra* note 45 at 325.

did not give rise to any material consequence, since the Tribunal did not prejudice the question.⁵⁸

III. The Territorial Exception

The decision regarding territorial exception seems to be more problematic. First, the Tribunal's observation that Article 12 of the UNCSI incorporated this exception was incorrect. It is clear from the Convention's texts that the clause is inapplicable to criminal proceedings.⁵⁹ Instead, the Tribunal should have looked into the state practice and *opinio juris*.⁶⁰ The Tribunal did not – presumably because the ILC decided not to include the exception regarding the commission of the crimes within the forum state's territory in the Draft Article 7, which provided the exception to the immunity *ratione materiae* in its members' disagreements.⁶¹ The following assessment is based on the territorial exception, which does not include the "tort" concept under customary international law.⁶²

The doctrinal basis of the territorial exception is in dispute.⁶³ There is no dispute that the negligent offence in the present case does not constitute an international crime to which immunity principle shall not apply.⁶⁴

When it comes to an offence that does not constitute a crime under international law, one way to explain the territorial exception is based on the consent regime. The official is in the territory where they commit the crime because the territorial state agrees on such a presence.⁶⁵ Kolodkin relied on this reasoning in his Second Report to the ILC. He stated that "there are sufficient grounds to talk of an absence of immunity" when the territorial state has not given its consent to the performance of the activity.⁶⁶ A case before the English High Court supported this standpoint.⁶⁷

On the other hand, there is another explanation; functional immunity cannot be enjoyed to the commission of a crime within the forum state's territory. The ILC took this approach when it stated:⁶⁸

that certain crimes, such as murder, espionage, sabotage or kidnapping, committed in the territory of a State in the aforementioned circumstances are subject to the

⁵⁸ *Enrica Lexie*, *supra* note 4 at para. 860.

⁵⁹ The clause only covers "torts" and provides the pecuniary compensation. Roger O'Keefe explains that the Convention is inapplicable to criminal proceedings. Roger O'KEEFE, "The 'General Understandings'" in Roger O'KEEFE, Christian J. TAMS, and Antonios TZANAKOPOULOS, eds., *The United Nations Convention on Jurisdictional Immunities of State and Their Property: A Commentary* (Oxford: Oxford University Press, 2013), 19 at 21.

⁶⁰ Elizabeth Helen FRANEY, "Immunity from The Criminal Jurisdiction of National Courts" in Alexander ORAKHELASHVILI, ed., *Research Handbook on Jurisdiction and Immunities in International Law* (Cheltenham, UK: Edward Elgar Publishing, 2015), 205 at 227.

⁶¹ ILC Report of the 69th Session, *supra* note 2 at 183, para. 11.

⁶² Commentators are not unanimous on this point. For instance, Joanne Foakes and Roger O'Keefe stated in the Commentary of UNCSI that it remains to be seen whether such an exception is established under customary international law: Joanne FOAKES and Roger O'KEEFE, "Article 12" in Roger O'KEEFE, Christian J. TAMS, and Antonios TZANAKOPOULOS, eds., *The United Nations Convention on Jurisdictional Immunities of State and Their Property: A Commentary* (Oxford: Oxford University Press, 2013), 209 at 224.

⁶³ ILC Report of the 69th Session, *supra* note 2 at 172, para. 126.

⁶⁴ *Ibid.*, at 176, Article 7.

⁶⁵ Franey, *supra* note 60 at 227.

⁶⁶ Second Report by Roman Anatolevich Kolodkin, *supra* note 52 at 426, para. 94(p).

⁶⁷ *Khurts Bat v. Investigating Judge of the German Federal Court*, [2011] EWHC 2029, 147 ILR 633, at paras. 96–9. See Andrew SANGER, "Immunity of State Officials from the Criminal Jurisdiction of A Foreign State" (2013) 62 *International and Comparative Law Quarterly* 193.

⁶⁸ ILC Report of the 69th Session, *supra* note 2 at 188, para. 24.

principle of territorial sovereignty and do not give rise to immunity from jurisdiction *ratione materiae*, and therefore there is no need to include them in the list of crimes for which this type of immunity does not apply.

If one takes this approach, it is possible to argue that the same applies regarding the crimes committed in a vessel registered to a state. While the theory which assimilates the vessel with a floating territory is no longer supported, the exclusivity and the superiority of the flag state's authority remain in the present context.

Notwithstanding the divergence of these views, the Tribunal stuck with the former approach. It stated that ILC's commentary on this subject underscores the importance of the presence of the foreign official in the territory of that state at the time of the acts at issue, and whether such presence was with or without the state's express *consent* for the discharge of his or her official functions for the exception to apply.⁶⁹ While it did not affect the final outcome of the case, it presents another logical leap of the Tribunal's analysis.

IV. The Award's Implications on Anti-Piracy International Cooperation

Beyond the Award's scope, the following implication of the Award on anti-piracy international cooperation deserves comments. First, this decision will be favourable to the VPDs operating under anti-piracy efforts. While the Tribunal was silent on the normative relationship between functional immunity and maritime law enforcement, VPDs will be immune from foreign criminal proceedings as long as they qualify as an official and their conduct falls within their domestic law mandate.⁷⁰ This decision may put fishermen and other innocent users in a vulnerable position because they may have to seek criminal redress from the VPDs state's courts.

On the other hand, because the flag state of the perpetrator's vessel has criminal jurisdiction over an individual who discharged weapons, whether VPDs or private maritime security contractors, the flag state will have to administer the operations on their registered vessels appropriately.⁷¹ It will include the obligation of due regard, including giving prior warnings, avoiding the fatal use of arms, and the obligation to respect the principles of proportionality and humanity.

The second is its impact on shiprider programmes on territorial seas. Shiprider agreements are concluded between a state with maritime law enforcement capabilities and a state that does not have such law enforcement assets.⁷² The host state allows the assisting state to come into their territorial water to suppress unlawful activities. It is usually the case that the coastal state's law enforcement officers are aboard the vessel. However, in an emergency, the coastal state may agree that the assisting state's officer chases and arrests the suspects without such the officer of the coastal state. It is possible

⁶⁹ *Enrica Lexie*, *supra* note 4 at para. 870.

⁷⁰ The function and the mandate differ from a State to another. For the assessment of the legal nature of the VPDs, see Kiara NERI, "The Use of Force by Military Vessel Protection Detachments" (2012) 51 *Military Law and The Law of War Review* 73.

⁷¹ IMO has adopted guidelines for private contractors' use of arms: *Revised Interim Recommendations for Flag States regarding the use of Privately Contracted Armed Security Personnel on board ships in the High Risk Area*, International Maritime Organization (IMO), IMO Doc. MSC.1/Circ.1406/Rev.3 (2015). There are efforts to promote the human rights law at sea. See Human rights at Sea, "Geneva Declaration on Human Rights at Sea" (January 2022), online: Human rights at Sea at <<https://www.humanrightsatsea.org/GDHRAS>>. For a comprehensive study on the human rights protection at anti-piracy operations, see Anna PETRIG, *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspects* (the Hague: Martinus Nijhoff, 2014).

⁷² See in general, Douglas GUILFOYLE, *Shipping Interdiction and the Law of the Sea* (Cambridge: Cambridge University Press, 2009) at 79.

to envision a scenario where the assisting state's personnel accidentally shoot an innocent individual within the host state territory. According to the logic of the Tribunal, the territorial exception may apply, and the officer may be prosecuted before the coastal state's national court. It is more so because the Tribunal made no distinction based on the vessel's status – whether it was a merchant vessel or a coast guard vessel – that VPDs are aboard.

Unlike SOFA, which typically provides the waiver of the host state's jurisdiction, shiprider agreements often do not offer such a clause. Usually, such an arrangement provides that if any loss, injury, or death is suffered as a result of any action taken by the law enforcement agency of one party, in contravention of the agreement or as a result of any improper or unreasonable action taken by that party, the parties shall consult to resolve the matter and decide any questions relating to compensation.⁷³ In the case of shooting innocent civilians, even by mistake, there may be a dispute about whether the operation falls within the agreement's scope and whether the law enforcement officer of the assisting state would enjoy jurisdictional immunity from criminal proceedings in the host state. Therefore, shiprider agreements should include the waiver of jurisdiction clauses to avoid such conflicts.

V. Conclusion

The present Award has brought more confusion than clarity to the immunity *ratione materiae* from foreign criminal jurisdiction. The Tribunal should have based its argument on the flag state's jurisdiction rather than territorial jurisdiction and the territorial exception without referring to the territorial “tort” jurisdiction under Article 12 of the UNCIS. Nevertheless, it shed light on the rules concerning jurisdictional allocation in anti-piracy operations. Considering the fact that the number of piracy and armed robbery cases continues to rise, the Award is still a welcome development for law enforcing states. Whether this judgment will be supported by state practice is yet to be seen.

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⁷³ For instance, see the *U.S.-Vanuatu Agreement Concerning Counter Illicit Transnational Maritime Activity Operations*, 31 October 2016 (entered into force 31 October 2016), online: U.S. Department of State at <<https://www.state.gov/wp-content/uploads/2019/05/39-Signed-Shiprider-Agreement-with-Vanuatu.pdf>> at Article XIX.

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