

Dissenting Opinion

Judge Patrick Robinson

I.	INTRODUCTION.....	1
II.	IDENTIFICATION AND CHARACTERIZATION OF THE DISPUTE.....	2
	A. EXAMINATION OF THE DIPLOMATIC COMMUNICATIONS BETWEEN THE PARTIES PRIOR TO THE NOTIFICATION AND STATEMENT OF CLAIM	4
	B. THE NOTIFICATION AND STATEMENT OF CLAIM	7
	C. THE WRITTEN AND ORAL SUBMISSIONS OF THE PARTIES	9
	D. INFERENCES DRAWN FROM THE CONDUCT OF A PARTY OF ITS OPPOSING VIEW IN A DISPUTE	10
	E. CONCLUSION.....	14
III.	THE ARBITRAL TRIBUNAL DOES NOT HAVE JURISDICTION OVER THE ISSUE OF THE IMMUNITY OF THE MARINES	14
	A. THE LAW RELATING TO INCIDENTAL QUESTIONS	18
	B. CONCLUSION.....	23
IV.	ASSUMING THAT THE ARBITRAL TRIBUNAL HAS JURISDICTION OVER THE ISSUE OF IMMUNITY OF THE MARINES FROM THE EXERCISE OF INDIAN CRIMINAL JURISDICTION, DO THE MARINES ENJOY IMMUNITY <i>RATIONE MATERIAE</i>?	25
	A. THE STATE OF THE LAW ON IMMUNITY	25
	B. DISTINGUISHING THE PECULIAR CIRCUMSTANCES OF THIS CASE FROM OTHER SITUATIONS IN WHICH THE ISSUE OF THE IMMUNITY OF STATE OFFICIALS ARISES	32
	C. CONCLUSION.....	35
V.	WHETHER THE MARINES ARE ENTITLED TO IMMUNITY FROM THE CRIMINAL JURISDICTION OF INDIA IN THE ABSENCE OF AN AGREEMENT BETWEEN ITALY AND INDIA: THE ASSIMILATION OF THE MARINES TO THE STATUS OF VISITING FORCES.....	36
VI.	GENERAL CONCLUSIONS.....	39

I. INTRODUCTION

1. I disagree with the findings in paragraph 1094(A)(1), A(2), A(4), A(5), B(2), B(3), B(4)(a) and B(4)(b) of the Award. I am in agreement with the other findings in that paragraph. In this Opinion, I explain my disagreement with the first six findings.

2. The Opinion has the following parts: Part I: The identification and characterization of the dispute; Part II: The Arbitral Tribunal does not have jurisdiction over the issue of the immunity of the marines; Part III: Assuming that the Arbitral Tribunal has jurisdiction over the issue of the immunity of the marines from the exercise of Indian criminal jurisdiction, the marines do not enjoy immunity *ratione materiae*; Part IV: Whether the marines are entitled to immunity from the criminal jurisdiction of India in the absence of an agreement between Italy and India: the assimilation of the marines to the status of visiting forces; Part V: General Conclusions.
3. It is argued that the Majority wrongly characterized the dispute as the question of which State has jurisdiction over the incident; that, properly characterized, the dispute concerns the question of the exercise by India of its criminal jurisdiction over the marines in the face of their claim to immunity from that jurisdiction; that the issue of the immunity of the marines does not concern the interpretation or application of the Convention, and that consequently, since that issue is a core element of the dispute, and not an incidental question, the Arbitral Tribunal was obliged to decline jurisdiction over the dispute; and that in any event, the marines do not enjoy immunity from the criminal jurisdiction of India.

II. IDENTIFICATION AND CHARACTERIZATION OF THE DISPUTE

4. In accordance with Article 288, paragraph 1, of the Convention, the Arbitral Tribunal has “jurisdiction over any dispute concerning the interpretation or application of the Convention”. Therefore, in order for the Arbitral Tribunal to be vested with jurisdiction, there must be a dispute and that dispute must concern the interpretation or application of the Convention. Case law on how the task of identifying and characterizing a dispute is to be carried out is well-established. It is therefore regrettable that the Majority has failed to carry out this function in accordance with established jurisprudence.
5. It is settled that a dispute is a disagreement on “a point of law or fact, a conflict of legal views or of interests between two persons”.¹
6. Case law of the ICJ establishes three features in the process of identifying and characterizing a dispute. First, a court or tribunal examines how the parties themselves have identified and characterized the dispute, but in doing so it has particular regard to the applicant’s formulation of the dispute.² However, and second, it is ultimately the responsibility of the court or tribunal to

¹ *Mavrommatis Palestine Concessions (Greece v. Great Britain)*, Judgment of 30 August 1924, P.C.I.J. Series A, No.2, p. 11.

² *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, p. 432 at p. 448.

determine on an objective basis the dispute between the parties.³ Third, it does that by “isolate[ing] the real issue in the case and ... identify[ing] the object of the claim”.⁴ The logic of the case law is that it is the parties who are involved in the dispute that has been brought to the court or tribunal, and it is therefore entirely appropriate for the court or tribunal to examine how they, in particular the applicant, have described the dispute. Nonetheless, the court or tribunal is not bound to accept the description of the dispute by the parties. It has an obligation to determine the nature of the dispute on an objective basis and it carries out this task by examining all the pertinent evidence at hand, including diplomatic communications between the parties and their written and oral submissions. Thus, a party’s characterization of the dispute is only a starting point, and a dispute, properly characterized, may have more than one element, and indeed, a case may have more than one dispute.

7. From the very inception of this case, Italy has, both expressly and indirectly, referred to the Indian exercise of criminal jurisdiction over the marines and their claim to immunity therefrom as the core elements of the dispute. In characterizing the dispute in this case as the question of which State has jurisdiction over the Incident,⁵ the Majority has failed to acknowledge the centrality of the issue of the immunity of the marines in the disagreement between the Parties. In terms of the substance of the dispute, the issues of the exercise of Indian criminal jurisdiction and the marines’ claim to immunity therefrom are inseparable and core elements of the dispute.
8. In seeking to support its position that the immunity of the marines is not a part of the dispute, the Majority points to the absence of any statement in the pleadings of either Party “characteri[zing] the dispute between them as one primarily relating to immunity”.⁶ The precise meaning of that statement is not clear. However, what is beyond dispute is that Italy consistently claimed immunity from the exercise by India of its criminal jurisdiction over the marines and India consistently rejected that claim. An objective determination of the dispute shows that it concerns both the exercise by India of its criminal jurisdiction over the marines and their claim to immunity therefrom. In those circumstances, the question whether the dispute relates primarily to immunity does not arise.
9. The Majority maintains that when Italy refers to issues of immunity in defining the dispute, “it is with respect to its relevance as an exception to India’s exercise of criminal jurisdiction over the Marines and as one of several bases on which Italy alleges such exercise to be unlawful”.⁷ That statement warrants comment for three reasons. First, in paragraph 1.14 of its Memorial, Italy states

³ *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, p. 432 at p. 448.

⁴ *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 457 at p. 466, para. 30.

⁵ Paragraph 243 of the Award.

⁶ Paragraph 242 of the Award.

⁷ Paragraph 238 of the Award (Emphasis in original).

that, “reduced to its core the dispute between the Parties is a dispute about jurisdiction and immunity from jurisdiction”. There is absolutely nothing in that statement to suggest that Italy refers to immunity as an exception to India’s exercise of criminal jurisdiction over the marines. Second, even if Italy relied on the issue of immunity “as an exception to India’s exercise of criminal jurisdiction over the Marines”, that issue could nonetheless constitute a central element of the dispute between the Parties. For an objective determination of the real issue dividing the Parties and the object of Italy’s claim could show that the exceptional feature of immunity is a core element of the dispute. Third, even if Italy relied on immunity “as one out of several bases on which Italy alleges such exercise to be unlawful”, such reliance would only have significance if one of those bases itself was a core element of the dispute. No submission to that effect has been made. For example, no one has suggested that an alleged breach of Article 97 of the Convention by India constitutes the dispute between the Parties. What generates the dispute between the Parties is the Italian claim to immunity from the exercise of Indian criminal jurisdiction over the marines.

10. The Opinion now proceeds to an examination of the evidence, which shows that the exercise by India of its criminal jurisdiction over the marines and their claim to immunity therefrom are the core elements of the dispute. Four areas will be examined. First, diplomatic communications between the Parties prior to Italy’s filing of its Notification and Statement of Claim. Second, the Notification and Statement of Claim. Third, the written and oral submissions of the Parties and fourth, the drawing of inferences of a Party’s opposing views to a dispute from the conduct of the Parties.

A. EXAMINATION OF THE DIPLOMATIC COMMUNICATIONS BETWEEN THE PARTIES PRIOR TO THE NOTIFICATION AND STATEMENT OF CLAIM

11. Although there were several diplomatic communications between the Parties prior to the filing by Italy of its Notification and Statement of Claim on 26 June 2015 which point to the treatment by them of the exercise by India of its criminal jurisdiction over the marines and their claim to immunity therefrom as the core elements of the dispute, the Majority has not cited any of these communications in its identification and characterization of the dispute. Diplomatic communications are a fertile ground for evidence of a dispute. The ICJ frequently examines such communications in its identification and characterization of a dispute; for example, in *Belgium v. Senegal*, the Court was only able to conclude that there was no dispute in respect of certain claims on the basis of its examination of diplomatic exchanges between the Parties prior to the filing of the application.⁸ The *notes verbales* that will be examined below were written and communicated in the period not long after the incident on 15 February 2012. They provide material relevant to the

⁸ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 445, para. 55.

characterization of the dispute that is as valuable as the written and oral submissions of the Parties; in fact, it is arguable that, by reason of their closeness in time to the incident, they are more valuable than the written and oral submissions of the Parties. Although in these *notes* Italy is not expressly setting out to define the dispute as it does in its written pleadings, they provide evidence of Italy's perception of the dispute.

- (i) On 16 February 2012, the day after the incident, the Indian Coast Guard boarded the "Enrica Lexie" and informed the marines that the incident fell under the jurisdiction of India's territorial waters. The marines responded that they were only answerable to the Italian authorities, who had already commenced an investigation. They gave the Coast Guard a written document stating that they were entitled to immunities as military forces in transit. The Coast Guard nonetheless carried out its investigation. On the same day, Italy sent a *note verbale* to India stating that the Italian marines were, "exclusively answerable to the Italian judicial Authorities, under Article 97".⁹ On the following day (17 February 2012), Italy sent a *note verbale* to India indicating that "based on international law, the Italian judicial Authorities are the sole competent judicial Authorities for the case in question".¹⁰ These communications constitute the first twinning by Italy of the Indian exercise of criminal jurisdiction over the marines and their claim to immunity therefrom as the core elements of the dispute. The subsequent *notes* examined also illustrate this twinning.
- (ii) In the second paragraph of the *note verbale* of 29 February 2012 from Italy to India, fourteen days after the incident, Italy states, "State organs enjoy jurisdictional immunity for acts committed in the exercise of their official functions. The Italian Navy Military Detachment that operated in international waters on board the ship Enrica Lexie must be considered as an organ of the Italian State".¹¹ The *note verbale* in its fifth paragraph reasserts Italian exclusive jurisdiction in respect of the said military personnel, and in its penultimate paragraph it states that the marines were carrying out official functions and that their conduct "should not be open to judgement scrutiny in front of any court other than the Italian ones". In the same *note verbale*, Italy also stated that "State organs enjoy jurisdictional immunity for acts committed in the exercise of their official functions". Italy also asserted that it had exclusive jurisdiction in respect of the marines.

⁹ Paragraph 14 of the Notification and Statement of Claim, *Note Verbale* 67/438 of 16 February 2012 (Annex 10).

¹⁰ *Note Verbale* 69/465 of 17 February 2012.

¹¹ *Note Verbale* 95/553 of 29 February 2012.

- (iii) In the first paragraph of another *note verbale* dated 11 March 2013, less than a month after the incident, from Italy to India, Italy refers to the “Supreme Court decision of 18 January 2013, in which it was denied the Italian jurisdiction on the incident”.¹² In the second paragraph, Italy stated that India was in “violation of International Law obligations including the principle of immunity of jurisdiction for agents of a Foreign State and the provisions of the [UNCLOS]”. This *note verbale*, just like the others, provides the basis for an objective determination that both the exercise by India of its criminal jurisdiction over the marines and their claim to immunity therefrom are the core elements of the dispute. In the third paragraph of this *note verbale*, Italy states that “in the light of said decision of the Indian Supreme Court and of the lack of answer to the Note Verbale dated 6 of march ... there is an existing controversy with India concerning the provisions of said Convention and the general principles of International Law applicable to this incident”. This statement reveals that Italy did not accept the “said decision of the Indian Supreme Court” which rejected its claims of immunity for the marines and that it had jurisdiction over the “Enrica Lexie” and the marines; this statement also reveals that Italy did not accept the Indian Court’s exercise of jurisdiction over the marines. It is beyond doubt that in this *note verbale*, Italy twins the elements of the Indian exercise of criminal jurisdiction over the marines and the Italian claim to immunity therefrom as the core elements of what that country describes as “the existing controversy [dispute] with India”.
- (iv) In the *note verbale* of 7 February 2014¹³ Italy stated that “the two Italian Marines enjoy immunity from jurisdiction of Indian courts under international customary law, and that Italy has jurisdiction over the matter”.
- (v) A *note verbale* of 15 February 2014 in similar terms to the one of 7 February 2014.¹⁴
- (vi) In the *note verbale* of 10 March 2014,¹⁵ Italy stated that it expected the Indian authorities to dispose of the case in conformity with international law and “with special regard to the international rules on immunity of State officials on duty and on the exclusive jurisdiction of the flag State on the high seas”.

12. On the whole, these diplomatic communications show that, although Italy at times referred to its jurisdiction over the marines on the basis of Articles 92 and 97 of the Convention, the real issue separating the Parties and the object of Italy’s claim was the termination of the exercise by India of

¹² *Note Verbale* 89/635 of 11 March 2013.

¹³ *Note Verbale* 56/259 of 7 February 2014.

¹⁴ *Note Verbale* 67/319 of 15 February 2014.

¹⁵ *Note Verbale* 93/6446 of 10 March 2014.

its criminal jurisdiction over the marines and their claim to immunity therefrom. In these *notes*, when Italy asserts that it has jurisdiction over the “Enrica Lexie” and the marines, it is in fact saying that India has no jurisdiction because the marines are entitled to immunity; therefore, that assertion also relates to the issue of the immunity of the marines. Italy’s main focus was to employ immunity as the most effective means to secure the release of the marines from Indian criminal jurisdiction. No doubt Italy had this concern because at that time the marines had been arrested and detained by the Indian authorities. The marines were granted bail subject to very severe conditions: they were required to surrender their passports; remain within “the territorial limits of the City Police Commissioner, Kochi”, except to attend Court in Kollam; “stay in a building within a distance of 10 kilometres from the office of the City Police Commissioner, Kochi”; and appear before the “City Police Commissioner, Kochi” every day between 10:00 and 11:00.

B. THE NOTIFICATION AND STATEMENT OF CLAIM

13. In characterizing the dispute, the tribunal is required to isolate the real issue dividing the parties and to determine the object of the claim. In seeking to identify the object of Italy’s claim, although all relevant material must be examined, one would be forgiven for paying particular attention to Italy’s Statement of Claim.
14. Italy’s twinning of the exercise by India of criminal jurisdiction over the marines and the claim to immunity therefrom is very evident in the relief sought in Section VI of its Notification and Statement of Claim. It is noteworthy that immediately after requesting in paragraph 33(a) a declaration that India “is acting in breach of international law by asserting and exercising jurisdiction over the *Enrica Lexie* and the Italian Marines ...”, Italy requests in the very next paragraph, 33(b), a declaration that “[t]he assertion and exercise of criminal jurisdiction by India is in violation of India’s obligation to respect the immunity of the marines as State officials exercising official functions”. Therefore, paragraph 33(b) should be read as follows: that assertion of jurisdiction, meaning the assertion and exercise of jurisdiction referred to in paragraph 33(a), violates India’s obligation to respect the immunity of the marines. By this juxtaposition of the exercise of Indian criminal jurisdiction in paragraph 33(a) and the claim in paragraph 33(b) that that exercise of criminal jurisdiction violates the immunity of the marines, Italy has specifically targeted immunity as the most effective means of terminating India’s exercise of criminal jurisdiction over the marines. Significantly, Italy does not seek a specific declaration that India’s exercise of its criminal jurisdiction over the marines violates its rights under Articles 92 and 97 of the Convention as the flag State of the “Enrica Lexie” or, indeed, under any other Article. Rather, in paragraphs 33(a) and 33(b) of its Notification and Statement of Claim, Italy centres its attention on the claim to the immunity of the marines as the most effective means of securing their release from Indian

criminal jurisdiction. For that reason, it is inconsequential that, as argued by the Majority, immunity is “but one of several bases” on which Italy argues that India’s exercise of its criminal jurisdiction over the marines breaches the Convention.¹⁶ What is decisive is that of the “several bases”, it is immunity that Italy has selected in paragraphs 33(a) and 33(b) as the best means of securing the release of the marines from Indian criminal jurisdiction. It is the very specific relationship between the exercise of jurisdiction in paragraph 33(a) and the claim to immunity in paragraph 33(b) that is determinative in isolating the real issue dividing the Parties and determining the object of Italy’s claim. That very specific relationship is therefore critically important in the characterization of the dispute.

15. Of course, one must not overlook Italy’s request in paragraph 33(c) of its Notification and Statement of Claim for a declaration that it “has exclusive jurisdiction over the ... Italian Marines in connection with the *Enrica Lexie* Incident”. But when that request is set against the background of the very specific request in paragraph 33(b) for a declaration that India’s exercise of its criminal jurisdiction over the marines breaches their entitlement to immunity, it takes on the character of a claim that is incidental, reflecting Italy’s confidence in its immunity claim.
16. It is entirely reasonable to seek an explanation for Italy’s concentration on the entitlement of the marines to immunity in its Statement of Claim. As noted before, the explanation is that the stark reality facing Italy at the time of the filing of its Statement of Claim was that the marines had been arrested, detained, and granted bail subject to the very severe conditions set out in paragraph 12 of this Opinion. The object of Italy’s claim was to use the marines’ claim to immunity as the most effective tool to terminate Indian criminal jurisdiction over them. Immunity is therefore a core element of the dispute dividing the Parties.
17. Not to be ignored is Italy’s request in paragraph 33(d) for a declaration that “India must cease to exercise any form of jurisdiction over the *Enrica Lexie* Incident and the Italian Marines, including any measure of restraint with respect to Sergeant Latorre and Sergeant Girone”. Here, Italy has in mind the threshold link for a claim to immunity, which is achieved by the exercise of “any measure of restraint” by the forum State against officials of the foreign State. In other words, in seeking this declaration, Italy’s real purpose is to argue that by virtue of the entitlement of the marines to immunity, India must not exercise “any form of jurisdiction”, “including any measure of restraint” against them. It is also telling that in paragraph 34 Italy “request[ed] the Tribunal to order India not to prosecute the criminal case against the Italian Marines and to terminate all legal proceedings connected to the *Enrica Lexie* Incident before the Indian Courts”. The rationale for this request is

¹⁶ Paragraph 239 of the Award.

that since, on Italy's case, the marines are entitled to immunity from India's criminal jurisdiction, India is obliged to terminate the criminal case it has brought against them. Here again, Italy is emphasizing its argument that on the basis of the marines' claim to immunity, India has no right to initiate or continue criminal proceedings against them and accordingly India is obliged to terminate those proceedings.

18. Notably, Italy's Statement of Claim is virtually wholly devoted to the use of the claim to immunity as the measure that would be most effective in extricating the marines from Indian criminal jurisdiction.

C. THE WRITTEN AND ORAL SUBMISSIONS OF THE PARTIES

19. A curious feature of this case is that the Majority cites¹⁷ a passage from Italy's Memorial, which illustrates that the dispute is about the exercise by India of its criminal jurisdiction over the marines and their claim to immunity therefrom. As noted before, in paragraph 1.14 of its Memorial, Italy states that "reduced to its core, the dispute between the Parties is a dispute about jurisdiction and immunity from jurisdiction". Nothing could be plainer: in Italy's view, the dispute has two core elements *viz*, first, the exercise by India of its criminal jurisdiction over the marines and, second, their claim to immunity therefrom; in this statement, Italy twins questions of jurisdiction and immunity as central and inseparable elements of the dispute.
20. The Majority relies on passages from Italy's Notification and Statement of Claim as well as its Memorial in which Italy only refers to the question of which party is entitled to exercise jurisdiction over the marines as constituting the dispute between the Parties. For example, the Majority cites the statement in paragraph 1.1 of Italy's Memorial that the dispute was about which State had jurisdiction over the M/V "Enrica Lexie" and the Italian marines. The Majority also cites¹⁸ five other passages from Italy's pleadings to the same effect. For its own part, India did not describe the dispute in express terms in its Counter-Memorial. But in the oral proceedings, India submitted that "the core issue the real subject matter of the dispute is the question whether the marines are entitled to immunity from criminal proceedings arising out of the Enrica Lexie incident".¹⁹ The Arbitral Tribunal is therefore faced with a statement from Italy and one from India indicating their view that the dispute is about the exercise by India of its criminal jurisdiction over the marines and the marines' claim to immunity therefrom, as well as statements from Italy that the dispute only concerns which State has jurisdiction over the marines and the Incident. Italy's position is therefore

¹⁷ Footnote 326 of the Award.

¹⁸ Footnote 325 of the Award.

¹⁹ Hearing Transcript, 13 July 2019, 107:5-110:8.

not consistent, as is argued by the Majority.²⁰ However, the Arbitral Tribunal is bound to look beyond the subjective description of the dispute by the Parties and apply the law relating to the identification and characterization of a dispute. The most important requirement in that exercise is the duty to determine on an objective basis the dispute between the parties by “isolate[ing] the real issue [dividing the parties] and identify[ing] the object of [Italy’s] claim”.²¹ The Arbitral Tribunal must therefore examine all the pertinent material at hand if it is to correctly isolate the real issue that is in dispute. In this case, there is, regrettably, a basis for concluding that rather than making an objective determination as to what constitutes the dispute, the Majority has attached too much weight to the subjective characterization of the dispute by Italy and too little to India’s characterization of the dispute. For example, in the Section of the Award headed “Characterisation of the Dispute by the Arbitral Tribunal”, the Majority makes no mention of India’s submission that “the core issue the real subject matter of the dispute is the question whether the marines are entitled to immunity from criminal proceedings arising out of the Enrica Lexie Incident”.²²

D. INFERENCES DRAWN FROM THE CONDUCT OF A PARTY OF ITS OPPOSING VIEW IN A DISPUTE

21. The lament of the Majority that neither Party has characterized the dispute “as one primarily relating to immunity” is certainly puzzling; it overlooks many important aspects of the law relating to the identification of disputes; more specifically, it misses the point, well developed in case law, that the position of the parties may be inferred from their conduct.
22. In *Land and Maritime Boundary between Cameroon and Nigeria*,²³ it was argued by Cameroon that Nigeria had not made any explicit challenge to the whole of the boundary. However, the Court held that the position of the parties does not have to be stated “*expressis verbis*” and that a party’s opposing view in a dispute could be inferred from conduct, “whatever the professed view of that party may be”.²⁴ In the case between Switzerland and Nigeria²⁵ before the ITLOS, it was argued by Switzerland that Nigeria did not respond to its position relating to the interception, arrest and

²⁰ Paragraph 238 of the Award.

²¹ *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 457 at p. 466, para. 30.

²² Hearing Transcript, 13 July 2019, 107:5-110:8.

²³ *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 275; also referred in footnote 368 of this Award citing *M/T “San Padre Pio” (Switzerland v. Nigeria)*, Provisional Measures, Order of 6 July 2019, ITLOS Reports 2018-2019 (forthcoming).

²⁴ *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 315, para. 89.

²⁵ See also *M/T “San Padre Pio” (Switzerland v. Nigeria)*, Provisional Measures, Order of 6 July 2019, ITLOS Reports 2018-2019 (forthcoming); *M/V “Norstar” (Panama v. Italy)*, Preliminary Objections Judgment, ITLOS Reports 2016.

detention of the vessel, “San Padre Pio”. However, ITLOS, holding that Nigeria’s views could be inferred from conduct, stated that, “[t]he fact that the Nigerian authorities intercepted, arrested and detained the M/T “San Padre Pio” and commenced criminal proceedings against it and its crew members indicates that Nigeria holds a different position from Switzerland on the question whether the events that occurred on 22-23 January 2018 gave rise to the alleged breach of Nigeria’s obligations under the Convention”.²⁶

23. In the instant case, not only have the Parties addressed the question of the immunity of the marines in their pleadings and the oral hearing as a core issue in the dispute, but their conduct also provides evidence as to the existence of a dispute, of which the question of immunity is a core element. The marines consistently claimed that they were immune from Indian criminal jurisdiction and India consistently rejected that claim by exercising jurisdiction over them both through their law enforcement personnel and their Judiciary. This refrain of claim and rejection provides testimony as to the centrality of the question of the immunity of the marines in the dispute between the Parties.
24. On 15 February 2012, the very day of the incident, the Kerala Police started investigating the complaint about the killing of the two Indian fishermen – this was an investigation into the crime of murder. On 16 February 2012, an Indian party of thirty-six police officers boarded the “Enrica Lexie”. The Coast Guard told the marines that the Incident came “under the jurisdiction of their territorial waters”.²⁷ Following a discussion between the Indian officials and the marines, Sergeant Latorre maintained that the VPD is “exclusively answerable to Italian Judicial Authorities” and that Italian authorities were investigating the incident.²⁸ Sergeant Latorre then gave the boarding party a written document which included the statement that “[u]nder International Law the detachment is afforded with judicial immunities as internationally recognised in respect of military forces in transit”. Nonetheless the Indian boarding party “‘formally detained’ the ‘Enrica Lexie’”²⁹ and continued to put “pressure ... on the crew and master to furnish details of the weapons and surrender them”.³⁰ The Indian Ministry of External Affairs instructed Commandant [REDACTED] “to bar the ‘Enrica Lexie’ from leaving the Kochi anchorage and to bring the ship into port”.³¹

²⁶ See also *M/T “San Padre Pio” (Switzerland v. Nigeria)*, Provisional Measures, Order of 6 July 2019, ITLOS Reports 2018-2019 (forthcoming), p. 16, paras 57-58; *M/V “Norstar” (Panama v. Italy)*, Preliminary Objections Judgment, ITLOS Reports 2016, p. 44, para. 69.

²⁷ Paragraph 158 of the Award.

²⁸ Paragraph 159 of the Award.

²⁹ Paragraph 162 of the Award.

³⁰ Paragraph 160 of the Award.

³¹ Paragraph 162 of the Award.

25. This claim of immunity by the marines and its rejection by the Indian exercise of jurisdiction over them unmistakably shows that from the day after the incident, the question of immunity from India's criminal jurisdiction had become engaged as a central issue in the dispute between the Parties. From that time, properly analysed, every exercise of jurisdiction over the marines, whether by India's law enforcement personnel or its Judiciary, proceeds on the basis that the claim of immunity was rejected by India; and, in light of the formal nature of the claim of immunity by the marines on 16 February 2012, evidenced by its presentation in a written form, this conclusion applies even if the exercise of jurisdiction was not preceded by an explicit claim for immunity. This is a classic illustration of a dispute inferred from the conduct of Parties in the form of a claim by one Party and the demonstration by the other Party of its opposition through its conduct.
26. Set out below are illustrations of this phenomenon of India's exercise of criminal jurisdiction over the marines in the face of their claim to immunity from that jurisdiction, showing that the legal requirement of positive disagreement for the existence of a dispute has been met.
- (i) On 16 February 2012, the Indian officials required the "Enrica Lexie" to enter the port of Kochi.³²
 - (ii) On 19 February 2012, the Indian police "disembarked Captain Vitelli for questioning" and the Indian mercantile marine department boarded the vessel to commence investigations.³³
 - (iii) On the same day, "the Kerala police escorted the Marines from the 'Enrica Lexie' and arrested them ... 'on an allegation of murder'."³⁴
 - (iv) On 20 February 2012, the "Enrica Lexie", obviously on the instruction of the Indian Coast Guard, moved from Kochi oil terminal to another position in Indian internal waters, with fifteen Indian policemen remaining on board.³⁵
 - (v) On 1 March 2012, the marines challenged their detention before the "Chief Judicial Magistrate in Kollam on grounds of safety concerns and their immunity ..." and on 5 March 2012 "the Chief Judicial Magistrate ordered that the marines be transferred to 'judicial custody' in the central prison ...".³⁶

³² Paragraph 164 of the Award.

³³ Paragraph 167 of the Award.

³⁴ Paragraph 168 of the Award.

³⁵ Paragraph 170 of the Award.

³⁶ Paragraph 173 of the Award.

- (vi) On 2 May 2012, the Supreme Court ordered that the Government of Kerala and its authorities shall allow the “Enrica Lexie” to commence her voyage.³⁷
- (vii) On 9 May 2012, the Supreme Court gave leave for the marines to apply for bail and the bail application was rejected by the Chief Judicial Magistrate in Kollam on 11 May 2012.³⁸
- (viii) On 18 May 2012, the Kerala Police concluded their investigation and filed a “Final Report” (or “Charge Sheet”) against the marines, referring to the crime of murder.³⁹
- (ix) On 19 May 2012, the Court of the Sessions Judge, Kollam, rejected another bail application by the marines.⁴⁰
- (x) The marines were detained in custody until 30 May 2012, when they were granted bail by the High Court of Kerala subject to certain conditions.⁴¹
- (xi) On 18 January 2013, the Supreme Court found that the Union of India had jurisdiction over the marines.⁴²
- (xii) On 22 February 2012, Italy and the marines filed Petition 4242 in the High Court of Kerala. They contended that India did not have jurisdiction, Italy had exclusive jurisdiction “and that in any event, under international law, the marines had immunity from Indian criminal jurisdiction”.⁴³ On 29 May 2012, the High Court of Kerala dismissed the Writ Petition, finding that India and the Kerala authorities had jurisdiction, and in what can only be described as a blunt rejection of immunity, the Court stated that the Incident “can be treated only as a case of brutal murder and can in no way be masqueraded as a discharge of the sovereign function”.⁴⁴

27. There are many other examples of the centrality of the issue of immunity from the exercise by India of its criminal jurisdiction in the disagreement between the Parties that is reflected in the rejection by India’s law enforcement authorities and Judiciary of the claim to immunity from that jurisdiction. It is difficult to understand how in light of that overwhelming evidence the Majority can maintain that the dispute between the Parties did not encompass the question of the marines’ claim to

³⁷ Paragraph 172 of the Award.

³⁸ Paragraph 174 of the Award.

³⁹ Paragraph 175 of the Award.

⁴⁰ Paragraph 175 of the Award.

⁴¹ Paragraph 176 of the Award.

⁴² Paragraph 178 of the Award.

⁴³ Paragraph 179 of the Award.

⁴⁴ Paragraph 180 of the Award.

immunity from Indian jurisdiction. The Indian rejection of the claim of immunity through the exercise by its law enforcement personnel and Judiciary of criminal jurisdiction over the marines is a concrete and graphic reflection of the core elements of the dispute between the Parties.

28. It is also difficult to understand why the Majority makes so much of the lack of a reference to the question of immunity in the section of India's Counter-Memorial entitled, "What the Case is really about: The Killing of Its Nationals on the St. Antony". Here, India as the aggrieved Party, whose nationals have been killed, understandably focuses on that horrific incident. There was no need for India to include in that section of its Counter-Memorial any reference to questions of immunity, because its conduct, as discussed in this Section of the Opinion, unambiguously showed that by its exercise of jurisdiction over the marines, it rejected their claims of immunity. Here again, the Arbitral Tribunal should be seeking to isolate on an objective basis the real issue dividing the Parties and to identify the object of Italy's claim. In that regard, it is of no consequence that India did not refer to the question of immunity in the section of its Counter-Memorial cited above. The Majority's reasoning is scarcely persuasive.

E. CONCLUSION

29. In light of the inconsistency in Italy's position on the identification of the dispute and the opposing views of India on that subject, there is a heightened obligation on the Arbitral Tribunal to examine all the pertinent evidence so as to isolate on an objective basis the real issue and identify the object of Italy's claim. An examination of this evidence shows that the issue of the immunity of the marines is a core element of the dispute, which is characterized as the question of the exercise by India of its criminal jurisdiction over the marines in the face of their claim to immunity therefrom.

III. THE ARBITRAL TRIBUNAL DOES NOT HAVE JURISDICTION OVER THE ISSUE OF THE IMMUNITY OF THE MARINES

30. The significance of a jurisdictional clause such as Article 288, paragraph 1, of the Convention is that it demarcates the boundaries of a court's or tribunal's jurisdiction over a dispute. By conferring on a court or a tribunal jurisdiction over a dispute concerning the interpretation or application of a treaty, a jurisdictional clause reflects the limits of a State's consent to a court or tribunal's jurisdiction over that dispute. Consequently, if the question of the immunity of the marines does not concern the interpretation or application of the Convention, it would be a breach of India's consent to the jurisdiction of the Arbitral Tribunal for it to pronounce on that question. In other words, the Arbitral Tribunal would have no jurisdiction to determine that question.

31. The Majority devoted five paragraphs⁴⁵ to consider whether it had jurisdiction over the issue of the immunity of the marines. Although there is no provision in the Convention that expressly refers to the kind of immunity claimed by the marines, Italy argued that the references to “other rules of international law” in Article 2, paragraph 3, of the Convention, “the rights and duties of other States” in Article 56, paragraph 2, of the Convention, and “other pertinent rules of international law” in Article 58, paragraph 2, of the Convention, “import immunity by *renvoi*”;⁴⁶ therefore, Italy maintains that the issue of the immunity of the marines concerns the interpretation and application of the Convention. The Majority concluded that these Articles were “not pertinent and applicable in the present case”⁴⁷ because, while they apply to the territorial sea and the exclusive economic zone, India only enforced its jurisdiction in its internal waters and on land. Italy also argued that the reference in Article 297, paragraph 1, subparagraph (a), of the Convention to “other rules of international law not incompatible with this Convention” was a *renvoi* to general international law. The Arbitral Tribunal found that this Article “does not pertain to the exercise of freedoms, rights and uses of the sea ‘in contravention of ... the laws and regulations adopted by the coastal State in conformity with this Convention and other rules of international law not incompatible with this Convention’.”⁴⁸ Thus, the Majority did not conduct any enquiry, and therefore did not make any finding, as to whether customary international law was imported into the Convention on the basis of the Articles relied on by Italy. As a matter of law, those Articles do not constitute a *renvoi* to customary international law. The ICJ’s decision in *Immunities and Criminal Proceedings*, discussed in paragraph 36 of this Opinion, supports that conclusion. Moreover, India was right in its submission that while the Articles may be relied on for the purpose of interpreting the relevant provisions of the Convention, they cannot be used as a basis for ascertaining whether the Arbitral Tribunal has jurisdiction over the issue of the immunity of the marines.⁴⁹ In other words, the Articles are relevant as part of the applicable law, but they have no relevance for jurisdictional purposes.
32. The Arbitral Tribunal correctly decided that Articles 95 and 96 of the Convention devoted to warships and ships used for government non-commercial service were “not applicable to Italy’s claim”.⁵⁰
33. Not having examined and determined whether the Convention “provide[s] a basis for entertaining an independent immunity claim under general international law”, the Majority is not in a position

⁴⁵ Paragraphs 797-802 of the Award.

⁴⁶ Italy’s Memorial, paras 8:17, 11.1.

⁴⁷ Paragraph 798 of the Award.

⁴⁸ Paragraph 802 of the Award.

⁴⁹ Hearing Transcript, 12 July 2019, 86: 8-14; 88: 18-23.

⁵⁰ Paragraph 799 of the Award.

to conclude that “the Convention may not provide [such] a basis”. The failure of the Majority to carry out such an examination and arrive at a conclusion based on it explains the hesitancy and uncertainty in its finding that “while the Convention may not provide a basis for entertaining an independent immunity claim under general international law, the Arbitral Tribunal’s competence extends to the determination of the issue of the immunity of the Marines that necessarily arises as an incidental question in the application of the Convention”.⁵¹ The speculation that is all too evident in that conclusion provides the basis for the Majority’s sortie into the murky waters of the law on incidental questions.

34. There is another troubling aspect of the Majority’s finding.⁵² The Majority speaks of “an independent immunity claim under general international law”. But independent of what? Not of jurisdiction, since immunity, as we are reminded in the Separate Opinion of Judges Higgins, Kooijmans, and Buergethal in the *Arrest Warrant* case, is but a “common short-hand phrase for immunity from jurisdiction”.⁵³ A claim to immunity is therefore, definitionally incapable of being independent. It will always relate to jurisdiction (and in some cases to enforcement). In this case, the immunity claimed is immunity from the exercise by India of its criminal jurisdiction over the marines.
35. It is important for the position taken in this Opinion to establish that the Arbitral Tribunal has no jurisdiction to address the issue of the immunity of the marines, because that issue does not concern the interpretation or application of the Convention. The uncertain and hesitant manner in which this matter has been addressed by the Majority is wholly inappropriate.
36. The ICJ’s recent decision on immunity in *Immunities and Criminal Proceedings*⁵⁴ is instructive. The Arbitral Tribunal is, of course, not bound by that decision, but the approach taken by the Court is persuasive. Essentially, the Court had to determine whether the issue of immunity arose under the United Nations Convention against Transnational Organized Crime. The Court found that, even though Article 4 of that Convention obliged States Parties to discharge their obligations under that Convention in a manner consistent with the principle of sovereign equality, the reference to that principle was not a *renvoi* to immunity under general international law. It made that finding even though it is generally accepted that the principle of sovereign equality of States provides the

⁵¹ Paragraph 809 of the Award (My Emphasis).

⁵² Paragraph 809 of the Award.

⁵³ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergethal, I.C.J. Reports 2002, p. 3 at p. 64, para. 3.

⁵⁴ *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, I.C.J. Reports 2018, p. 292.

jurisprudential foundation for the law of State immunity. Indeed the Court itself recalled that “... the rules of State immunity derive from the principle of sovereign equality of States”.⁵⁵ In *Al-Adsani* the European Court of Human Rights held that “sovereign immunity is a concept of international law, developed out of the principle *par in parem non habet imperium*, by virtue of which one State shall not be subject to the jurisdiction of another State”.⁵⁶ The ILC’s Special Rapporteur on Immunity of State Officials from Foreign Criminal Jurisdiction also emphasized that the basis for the immunity of States, reflected in the Latin tag, *par in parem non habet imperium*, is the principle of sovereign equality of States. Despite this well-established connection between the law of immunity and the principle of the sovereign equality of States, the Court nonetheless held that Article 4 “[did] not refer to the customary international law rules, [on] State immunity that derive from the principle of the sovereign equality [of States]”.⁵⁷ Similarly, in this case the Articles relied on by Italy do not refer to the customary international law rules of immunity of State officials.

37. This approach to determining the Court’s jurisdiction is deferential to, and protective of, the limits of a State party’s consent to jurisdiction in a compromissory clause conferring on the Court jurisdiction over a dispute concerning the interpretation or application of a treaty. In this case, the Majority has not been deferential to and protective of the limits of India’s consent to the Arbitral Tribunal’s jurisdiction over the dispute.
38. Although the Majority correctly concludes that Articles 95 and 96 of the Convention “are not applicable to Italy’s claim”, these two articles have another significance that the Majority has failed to emphasize. There is a strong *a contrario* inference to be drawn from the fact that the only provisions in the Convention on immunity do not relate to the kind of immunity claimed by the marines: the inference is that the drafters of the Convention did not intend that the Convention should apply to types of immunity other than the complete immunity in respect of warships and ships used only on government non-commercial service. Those other types of immunity would include immunities for State officials like the marines. The inference is particularly strong because the provisions of Articles 95 and 96 of the Convention were included verbatim in Articles 8 and 9 of the 1958 Convention on the High Seas. The drafters of UNCLOS III therefore had ample time in the Convention’s negotiating history of eight years to modify those provisions, if they so wished, to include the immunities of State officials. The failure to do so strengthens the inference that the clear

⁵⁵ *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, I.C.J. Reports 2018, p. 321, para. 93.

⁵⁶ *Al-Adsani v. The United Kingdom*, Application No. 35763/97, [2001] ECHR 752, Judgment of 21 November 2001, p. 17, para. 54.

⁵⁷ *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, I.C.J. Reports 2018, p. 321, para. 93.

intention of the drafters was to exclude those qualified and functional immunities from coverage by the Convention. Therefore, it is not merely that, as stated by the Majority “these two Articles are not applicable to Italy’s claim”;⁵⁸ rather, it is that the provisions of Articles 95 and 96 of the Convention give rise to an irresistible *a contrario* inference that the Convention does not cover the kind of immunities claimed by the marines.

39. As has been shown in Part I, the issue of immunity of the marines is a core element of the dispute dividing the Parties. A core element of a dispute cannot at the same time be an incidental question in relation to that dispute.
40. The Majority’s reasoning appears to be that the issue of the immunity of the marines is incidental because “the Arbitral Tribunal could not provide a complete answer to the question as to which Party may exercise jurisdiction without incidentally examining whether the Marines enjoy immunity”.⁵⁹ Although this appears to be the reasoning, it is noticeable that nowhere in the Award does the Majority attempt to identify the characteristics of an incidental question. Incidentally, it is not the examination of the issue of the immunity of the marines that is claimed to be incidental; rather, it is that issue itself that is claimed to be incidental.
41. There is no main issue in this case; there is no incidental issue in this case. Rather, there is one issue: the question of the Indian exercise of criminal jurisdiction over the marines in the face of their claim to immunity therefrom. Immunity is central, and not incidental, to the dispute between the Parties. If the Majority is right that the dispute, as characterized by it, cannot be resolved without examining the issue of the immunity of the marines, then that would suggest that that issue is anything but an incidental question;⁶⁰ it would also flatly contradict the Majority’s theory in paragraph 235 of the Award that on Italy’s claim, the dispute could be resolved without determining the issue of the immunity of the marines.

A. THE LAW RELATING TO INCIDENTAL QUESTIONS

42. Even if the immunity of the marines from the exercise of Indian jurisdiction is an incidental question, *quod non*, the Majority has misdirected itself as to the applicable law.
43. Generally, the four cases that will be examined below demonstrate that a determination as to whether a question is incidental calls for a proper characterization of the dispute dividing the Parties and a

⁵⁸ Paragraph 799 of the Award.

⁵⁹ Paragraph 808 of the Award.

⁶⁰ Paragraph 808 of the Award

careful separation of a question that is incidental from the real issue in the dispute. A subset of the analysis of the law on incidental questions in the cases relating to the Convention is that the need to ensure that the question is indeed incidental becomes more urgent because the Convention is the result of a package deal, and conferring jurisdiction on a court or tribunal over a question that does not fall within the provisions of the Convention may disturb the balance in the compromise solutions that were reached in the negotiations that led to its adoption. This is particularly the case in relation to the exceptional regime for the compulsory settlement of disputes under Part XV of the Convention.

44. The first case is the *Case Concerning Certain German Interests*.⁶¹ The Majority relies on this case. In that case, Germany brought a claim against Poland under Article 23 of the Geneva Convention, which conferred jurisdiction on the PCIJ over differences of opinion respecting the construction and application of Articles 6 to 23 of that Convention. Article 6 prohibited Poland from expropriating property of German nationals in Polish Upper Silesia. Germany argued that Poland had contravened Article 6 by expropriating the factory of a German national. Poland responded that the national did not own the nitrate factory because it had been transferred to him in violation of Article 256 of the Treaty of Versailles, which provided that: “Powers to which German territory is ceded shall acquire all property ... situated therein belonging to the German Empire ...”. The PCIJ had to determine whether it had the competence to interpret Article 256 of the Treaty of Versailles, over which it had no jurisdiction. The Court held that:

It is true that the application of the Geneva Convention is hardly possible without giving an interpretation of Article 256 of the Treaty of Versailles and the other international stipulations cited by Poland. But these matters then constitute merely questions preliminary or incidental to the application of the Geneva Convention. Now the interpretation of other international agreements is indisputably within the competence of the Court if such interpretation must be regarded as incidental to a decision on a point in regard to which it has jurisdiction.

45. Three comments are in order. First, although this case has been cited by the Majority as setting out the law on incidental questions, it is noteworthy that the PCIJ confined its findings to the interpretation of Article 256 of the Treaty of Versailles, and even when the Court spoke more generally, it also confined its analysis to the interpretation of other treaties when “such interpretation must be regarded as incidental to a decision on a point in regard to which it had jurisdiction”.⁶² The PCIJ appeared to have focused more on the interpretation rather than the application of the Treaty of Versailles. It is not uncommon for courts and tribunals to interpret treaties other than the one over which they have jurisdiction in discharging their judicial function. Second, the analysis in the case

⁶¹ *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Judgment of 25 August 1925, P.C.I.J. Series A, No. 6, p. 18.

⁶² My Emphasis.

suggests that an incidental question is one over which a court or tribunal does not have jurisdiction, but the determination of which is necessary for the resolution of the dispute concerning the interpretation or application of the Convention. The Court held that the application of the Geneva Convention was “hardly possible” without interpreting Article 256 of the Treaty of Versailles. Thus, the word “incidental” does not bear its ordinary dictionary meaning of a minor accompaniment – an accompaniment, yes, but certainly not a minor one. Although in the first part of the quotation the Court speaks of “preliminary or incidental” questions, in its conclusion in the last sentence it only refers to an interpretation that is incidental. An incidental question is not necessarily a preliminary question nor is a preliminary question necessarily an incidental question. However, the PCIJ appears to have used the terms interchangeably, although settling on incidental in its conclusion. In terms of the facts of the case, the question raised by Article 256 of the Versailles Convention would seem to be better described as preliminary or ancillary. Third, there is noticeably absent from the PCIJ’s decision in this case any significant examination of the relationship between the incidental question over which the Court had no jurisdiction and the dispute over which it had jurisdiction; in particular, there is no discussion as to whether the incidental question was the real issue dividing the Parties; if it warranted that description, the Court would have had no jurisdiction over it since it did not relate to the interpretation or application of the Geneva Convention. The later cases show that since a court or tribunal would normally not have jurisdiction over the incidental question, it is of the greatest importance to ensure that the question is properly characterized as incidental.

46. The second case is *Chagos Marine Protected Area Arbitration*.⁶³ It has not been cited by the Majority in its characterization of the dispute. In that case, Mauritius submitted, *inter alia*, that the United Kingdom was not entitled to declare a marine protected area around the Chagos Archipelago because it was not the coastal State within the meaning of Articles 2, 55, 56, and 76 of the Convention. The tribunal made three important pronouncements. In the first, it held that “as a general matter, the Tribunal concludes that, where a dispute concerns the interpretation or application of the Convention, the jurisdiction of a Court or Tribunal pursuant to Article 288(1) extends to making such findings of fact or ancillary determinations of law as are necessary to resolve the dispute presented to it”.⁶⁴ That finding is consistent with the reasoning in the PCIJ case of *Case Concerning Certain German Interests*. In the second pronouncement, it held that “[w]here the ‘real issue in the case’ and the ‘object of the claim’ ... do not relate to the interpretation or application of the Convention, however, an incidental connection between the dispute and some matter regulated

⁶³ PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015.

⁶⁴ PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, p. 90, para. 220.

by the Convention is insufficient to bring the dispute, as a whole, within the ambit of Article 288(1)".⁶⁵ In the third, it held that "[t]he Tribunal does not categorically exclude that in some instances a minor issue of territorial sovereignty could indeed be ancillary to a dispute concerning the interpretation or application of the Convention".⁶⁶ Although these pronouncements provide a valuable insight into the characteristics of an incidental question, they are arguably *obiter dicta*, since the *ratio* of the case was that the real issue dividing the parties was a question of land sovereignty which did not fall within the provisions of the Convention, and over which therefore, the tribunal had no jurisdiction. Thus, the land sovereignty issue, far from being an incidental question, was the real issue dividing the parties. The tribunal declined jurisdiction for that reason. It also stressed the importance of the proper characterization of an issue as an incidental question. In relation to Mauritius' argument that Article 298, paragraph 1, subparagraph (a) (i), of the Convention could be read *a contrario*, the tribunal concluded that "... [a]t most, an *a contrario* reading of the provision supports the proposition that an issue of land sovereignty might be within the jurisdiction of a Part XV Court or Tribunal if it were genuinely ancillary to a dispute over a maritime boundary or a claim of historic title".⁶⁷ Here, the tribunal was emphasizing the importance of not confusing an incidental question with the real issue dividing the parties.

47. The *Chagos* tribunal made another finding that is pertinent to the instant case. It held that reading Article 298, paragraph 1, subparagraph (a)(i), of the Convention as conferring jurisdiction over issues of land sovereignty "would do violence to the intent of the drafters of the Convention to craft a balanced text and to respect the manifest sensitivity of States to compulsory settlement of disputes relating to sovereign rights and maritime territory".⁶⁸ In *Chagos Marine Protected Area Arbitration*, the Annex VII tribunal exhibited appropriate sensitivity to the negotiation of the Convention as a package deal on the basis of which a balanced text was achieved. It declined jurisdiction because territorial sovereignty did not fall within the provisions of the Convention. The Majority should have exhibited the same sensitivity to the question of the immunity of the marines which, like matters of land sovereignty, is the real issue in dispute and does not fall within the provisions of the Convention.

⁶⁵ PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, p. 90, para. 220.

⁶⁶ PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 221.

⁶⁷ PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, p. 89, para. 218 (My Emphasis).

⁶⁸ PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 219.

48. The third case, the *South China Sea Arbitration*, is cited by the Majority. In this case, which involved issues of maritime entitlements and activities in the South China sea, one of the questions was whether the dispute concerned sovereignty over certain maritime features and was therefore not a matter concerning the interpretation or application of UNCLOS. The arbitral tribunal had to determine whether deciding the Philippines' claim would have required it first to give a decision explicitly or implicitly on the issue of sovereignty and whether the true objective of the claim by the Philippines was to advance its position in the dispute between the parties on sovereignty.⁶⁹ The arbitral tribunal determined both issues in the negative because it was of the view that the Philippines' claim did not expressly or impliedly require it to rule on issues of land sovereignty.⁷⁰ In another issue, the tribunal, considering a submission of the Philippines, held that it had jurisdiction, but made it clear that, had the tribunal found that a certain maritime feature claimed by China within 200 nautical miles of the relevant areas was an island and therefore able to generate an entitlement to an exclusive economic zone and continental shelf, the tribunal would have had to decline jurisdiction over the dispute.⁷¹

49. The fourth decision on incidental questions is the *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. The Russian Federation)* (hereinafter "*Ukraine v. Russia*").⁷² This case was not cited by the Majority. Ukraine made certain claims against Russia, which argued that the tribunal had no jurisdiction over the claims because the dispute between the parties related to Ukraine's claim to sovereignty over Crimea and that such a dispute did not concern the interpretation or application of the Convention. In upholding the Russian submission, the tribunal reasoned that there was a dispute concerning territorial sovereignty over Crimea, which was not, as argued by Ukraine, ancillary to the dispute concerning the interpretation or application of the Convention. In particular, the tribunal held that the dispute concerning sovereignty over Crimea was not a minor issue ancillary to the dispute concerning the interpretation or application of the Convention; rather, it was a prerequisite to the decision on a number of claims made by Ukraine. The tribunal therefore ruled that the question of land sovereignty over Crimea was the real issue in

⁶⁹ PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Award on Jurisdiction and Admissibility of 29 October 2015, para. 153.

⁷⁰ PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Award on Jurisdiction and Admissibility of 29 October 2015, para. 153.

⁷¹ PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Award of 12 July 2016, para. 711.

⁷² PCA Case No. 2017-06: *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. The Russian Federation)*, Award Concerning the Preliminary Objections of the Russian Federation, 21 February 2020.

dispute and that it had no jurisdiction because that issue did not concern the interpretation or application of the Convention.⁷³

B. CONCLUSION

50. The Majority's baseless conclusion – “while the Convention may not provide a basis for entertaining an independent immunity claim under general international law, the Arbitral Tribunal's competence extends to the determination of the issue of immunity of the marines that necessarily arises as an incidental question in the application of the Convention” – is an error of law that invalidates the subsequent decisions that are founded on it. These decisions are the conclusion that the Arbitral Tribunal has jurisdiction over the issue of the immunity of the marines as an incidental question, the examination of the immunity *ratione materiae* of the marines under customary international law, and the conclusion that the marines are entitled to immunity in relation to the acts they committed during the incident of 15 February 2012. Had the Majority enquired and determined whether any Article in the Convention imported the customary rules on immunity by way of *renvoi*, it would have found that there was no *renvoi* to customary international law; consequently, the issue of the immunity of the marines did not concern the interpretation or application of the Convention. Since that issue is a core element of the dispute, the Arbitral Tribunal was obliged to decline jurisdiction over the dispute, in which event the examination of the issue of the immunity of the marines as an incidental question would not have arisen.

51. In any event, the Majority misdirected itself as to the law on incidental questions: the issue of the immunity of the marines is not an incidental question.

52. There is a major difference between the *Case Concerning Certain German Interests of 1925* and the three later cases, which all dealt with the issue of sovereignty as an incidental question under the Convention. In the 1925 case, the PCIJ decided that its competence extended to the issue raised in Article 256 of the Treaty of Versailles, over which it had no jurisdiction, on the ground that the determination of that issue was necessary for the resolution of the dispute under the Geneva Convention, over which it had jurisdiction. However, in the three later cases, all under Part XV of UNCLOS, the Annex VII tribunals went beyond the approach adopted by the PCIJ, for whom the only criterion for competence over an incidental question was that that question was necessary for the resolution of the dispute. The Annex VII tribunals did not simply decide that sovereignty was an incidental question, the determination of which was necessary for a resolution of the various disputes, and then conclude that their jurisdiction extended to that question. Rather, the approach

⁷³ PCA Case No. 2017-06: *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov and Kerch Strait*, Award Concerning the Preliminary Objections of the Russian Federation, 21 February 2020.

adopted by the tribunals was to objectively isolate the real issue dividing the parties, ascertain the relationship of the incidental question to that issue and exhibit appropriate sensitivity to the balance reflected in the compulsory dispute settlement regime in Part XV. Today, a tribunal deciding the 1925 *Case Concerning Certain German Interests* would at least have considered whether the issue raised by Article 256 of the Treaty of Versailles was the real issue dividing the parties; an affirmative answer to that question would oblige the tribunal – as it did the Annex VII tribunals in the *Chagos* case and the case between Ukraine and Russia – to decline jurisdiction over the case on the ground that the dispute, of which the issue in Article 256 of the Treaty of Versailles was a core element, did not relate to the interpretation or application of the Geneva Convention. The 1925 *Case Concerning Certain German Interests* therefore offers little help in determining whether this Arbitral Tribunal has jurisdiction over the issue of the immunity of the marines as an incidental question under the Convention. It can only offer guidance if it is read subject to the three later cases. The premise on which the doctrine of the incidental question, as reflected in the 1925 case operates, is not applicable to the instant case: the parties impliedly consent to the tribunal extending its jurisdiction over the incidental question (over which it has no jurisdiction) because it is necessary for the determination of the dispute (over which it has jurisdiction); the premise does not apply because in the instant case, the Parties cannot be said to have impliedly consented to the extension of the Arbitral Tribunal’s jurisdiction over the so-called incidental question, because it is in fact the real issue in dispute and therefore the Arbitral Tribunal has no jurisdiction since that issue, which is outside the Convention, does not concern its interpretation or application.

53. The various Annex VII tribunals’ treatment of the issue of sovereignty as an incidental question shows that it is vital to have a proper characterization of the dispute in order to determine whether a so-called “incidental question” is genuinely ancillary to the dispute over which the tribunal has jurisdiction. In this case, there is a dispute about the issue of the immunity of the marines. That dispute is not ancillary to the dispute between the Parties concerning the exercise by India of criminal jurisdiction over the marines. It is, to use the language in *Chagos Marine Protected Area Arbitration*, “the real issue” dividing the parties, or to use the language in *Ukraine v. Russia*, at the “heart of ...”⁷⁴ or, at the “front and centre”⁷⁵ of that dispute.

54. The issue of the immunity of the marines does not fall within the provisions of the Convention, as such, it does not concern the interpretation or application of the Convention; therefore, the Arbitral

⁷⁴ PCA Case No. 2017-06: *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait*, Award Concerning the Preliminary Objections of the Russian Federation, 21 February 2020, para. 161, citing the submission of the Russian Federation.

⁷⁵ PCA Case No. 2017-06: *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait*, Award Concerning the Preliminary Objections of the Russian Federation, 21 February 2020, para. 192.

Tribunal has no jurisdiction over that issue which, so far from being an incidental question, is a core element of the dispute between the Parties. Consequently, the Arbitral Tribunal was obliged to decline jurisdiction over the dispute.

IV. ASSUMING THAT THE ARBITRAL TRIBUNAL HAS JURISDICTION OVER THE ISSUE OF IMMUNITY OF THE MARINES FROM THE EXERCISE OF INDIAN CRIMINAL JURISDICTION, DO THE MARINES ENJOY IMMUNITY *RATIONE MATERIAE*?

55. The Opinion now proceeds to consider the immunity *ratione materiae* of the marines, but in light of the Opinion's conclusions in Parts I and II, it does so only in the interest of completeness.

A. THE STATE OF THE LAW ON IMMUNITY

56. While some aspects of the law on immunity, whether of States and their property or of State officials, are fairly well established as reflecting customary international law, there remain areas that do not have that status. In 2004, the United Nations adopted the United Nations Convention on Jurisdictional Immunities of States and their Property. Sixteen years afterwards, that Convention has only received twenty two of the thirty ratifications required for entry into force, although it must be acknowledged that some of its provisions, and, indeed, the Convention itself, are seen as reflecting customary international law.⁷⁶ While Italy has ratified the Convention, India has signed but not ratified it.

57. The ILC has been working for thirteen years on draft Articles on the Immunity of State officials from foreign criminal jurisdiction. The law on this topic is not as clear-cut as the Majority makes out in its reference to the Commission's "uncontroversial premise" that "the acts of State officials performed in an official capacity are subject to immunity".⁷⁷ Indeed, one State, Poland,⁷⁸ in commenting on the Report of the International Law Commission at its Sixty Seventh Session (2015), concluded that the question of the immunity of State officials was not regulated by general international law and that the entire matter was "... not so much the subject of codification, [but was one of] ... 'the progressive development of international law'".⁷⁹

⁷⁶ In *Jones v. Minister of Interior of Kingdom of Saudi Arabia* [2006] 2 WLR 70, p. 23, para. 47, Lord Hoffman described the Convention as a codification of the law of State immunity. See also *Oleynikov v. Russia* no 3670/04 Judgment on March 14 2013 in which the European Court of Human Rights expressed the view that the 2004 Convention applied as customary international law to a State that was not a party to that Convention.

⁷⁷ Paragraph 845 of the Award.

⁷⁸ Warsaw, 27 April 2015 Opinion by Legal Advisory Committee to the Minister of Foreign Affairs of the Republic of Poland on the immunities of State officials from foreign criminal jurisdiction.

⁷⁹ Warsaw, 27 April 2015 Opinion by Legal Advisory Committee to the Minister of Foreign Affairs of the

58. The aspect of the law on immunities that has the greatest level of certainty as a customary rule is that the troika – the Head of State, Head of Government, and Minister of Foreign Affairs – enjoys full personal immunity; for all else, there is either a lower degree of certainty or no certainty.
59. The approach that the Majority has taken in its analysis is traditional: the marines are State officials and therefore enjoy immunity under customary international law because they acted in an official capacity. In that regard, the Majority relies on the draft articles of the International Law Commission on Immunity of State Officials from Foreign Criminal Jurisdiction. However, the novel context in which the claim to immunity arises in this case calls for a different approach.
60. This is far from being the usual case where the acts of an official and a determination as to whether they were carried out in an official capacity are the only considerations. Rather, this is a case in which the acts of the State also influence the determination whether the marines enjoy immunity *ratione materiae*. The immunity of a State official is in large measure a reflection of the immunity of the State, and “the functional immunity of (former) foreign State official is often approached as a corollary of the rule of State immunity”.⁸⁰ There are many dicta to that effect. Thus in *Certain Questions of Mutual Assistance in Criminal Matters*, the ICJ, referring to a reformulated claim of Djibouti in respect of the Procureur of the Republic and Head of National Security, held that “such a claim is in essence a claim of immunity for the Djiboutian State, from which the Procureur de la République ... would be said to benefit”.⁸¹ In *Propend Finance Limited v. Sing*, the United Kingdom Court of Appeal held that “the protection afforded by the [State Immunity Act] to States would be undermined if employees, officers or ... ‘functionaries’ could be sued as individuals for matters of State conduct in respect of which the State they were serving had immunity. [The relevant provision of the SIA] must be read as affording individual employees or officials of a foreign State protection under the same cloak as protects the State itself”.⁸² The ‘cloak’ imagery is very apt. The foreign State official wears the same cloak of immunity as the cloak of immunity worn by his State; the foreign State official ‘benefits’ from the protection offered by the cloak of immunity of his State. Therefore, if for some reason the State has no immunity, then it has no cloak of immunity to provide protection to its official.

Republic of Poland on the immunities of State officials from foreign criminal jurisdiction, p. 8.

⁸⁰ UN Doc. A/CN.41/631, International Law Commission, Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction, 2010, (hereafter the 2010 ILC Report on Immunity of State Officials) p. 13, footnote 51 citing R. van Alebeek, *The Immunity of States and their Officials in the light of International Criminal Law and International Human Rights Law*, 2006, p. 153.

⁸¹ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, para. 188 (My Emphasis).

⁸² 1997, 111 ILR 611 at p. 669 (My Emphasis).

61. The underlined dicta of the ICJ and the United Kingdom Court of Appeal in the previous paragraph reflect the correspondence between the immunity of a State official and the immunity of the State itself for an act carried out by its official. Thus, the immunity of a State official in general proceeds on the basis that the State itself enjoys immunity in respect of the acts of its officials. If the State does not enjoy immunity in respect of that conduct, it is difficult to see how the official could, since the State is the fountainhead of the immunity of its official.
62. The law on State immunity changed about one hundred years ago from the doctrine of absolute immunity for all acts, enunciated by Marshall CJ in *Schooner Exchange v. McFadden*,⁸³ to a doctrine of restrictive or qualified immunity in respect of sovereign acts. There is no longer immunity for State acts of a commercial character. The majority of States follow the restrictive approach, which can be said to reflect customary international law.⁸⁴ The law calls for a determination as to whether an act is *jure imperii* or *jure gestionis*; the former act, being sovereign, attracts immunity while the latter, being commercial, does not. In distinguishing between the two acts, the law, as is evident from the practice of the majority of States, calls for an identification of the nature of the act or transaction, and not its purpose. The preponderance of authorities supports the use of the criterion of the nature of the act rather than its purpose or motive to distinguish between an act *jure imperii* and an act *jure gestionis*. Article 2, paragraph 2, of United Nations Convention on Jurisdictional Immunities of States and their Property provides that the nature of the contract or transaction primarily determines whether it has a commercial character. However, it provides that the purpose of the contract or transaction may be taken into account if the parties so agree or if in the practice of the State of the forum it is relevant. In 2001, Italy informed the ILC that “Italy considers the ‘nature test’ to be in principle the sole criterion for determining the commercial character of a contract or transaction”;⁸⁵ in its Counter-Memorial in the *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Italy stated that in Belgium and Italy, “the distinction between private and public acts has since the beginning been established on the basis of the nature of the act and not its purpose”.⁸⁶ The nature test is, therefore, opposable to Italy. The relevant law of the United States provides “[t]he commercial character of an activity shall be determined by

⁸³ 11 U.S. (7 Cranch) 116 (1812).

⁸⁴ In paragraph 4.17 of its Counter-Memorial in the *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Italy, referring to the pioneering role played by Belgium and itself in the evolution of the private-acts exception to immunity, stated “Belgium and Italian case-law did not long remain isolated. The distinction between *acta jure imperii* and *jure gestionis* was immediately appreciated by scholars, and well before the Second World War the principle of restrictive immunity was being applied, and still is applied, by the municipal courts of an increasing number of European countries.” Judgment, I.C.J. Reports 2012, p. 99. Italy then went on to give examples of the application of the restrictive approach in decisions in the Courts of Austria, Switzerland and Greece.

⁸⁵ UN doc. A/56/291/Add. 1, p. 3 para. 7.

⁸⁶ Counter-Memorial of Italy, p. 46-47, para. 4.16.

reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose”.⁸⁷ In a case cited by Italy and the Majority, *Airport Ilc v. United States*,⁸⁸ the Supreme Court of Austria held that “international practice no longer refers to the object or purpose of a State’s act (functional approach) but to the nature of the act itself (irrespective of the object or purpose)” (paragraph 3). The reason for the use of the criterion of the nature of the activity and not its motive or purpose is fairly obvious: the criterion of purpose serves to render almost pointless the distinction between commercial and sovereign acts, since once the government of a State is involved in a transaction, it is almost inevitable that one will be able to detect some kind of sovereign, governmental purpose in that transaction. Therefore, in determining whether the transaction carried out by the Government of Italy with the shipowners was commercial or sovereign, the fact that its purpose was the protection of Italian vessels on the High Seas is not decisive. What is decisive is the nature of the transaction, not its purpose.

63. The following factors demonstrate the essentially commercial nature of the transaction that led to the marines being placed on the vessel to provide their services; they show that the public purpose of the transaction was completely engulfed by its essentially commercial nature:

- (i) To begin with, it is to be noted that Article 5 of the Law Decree of 12 July 2011 enables the Ministry of Defence of Italy to enter into framework agreements with shipowners for the protection of ships flying the Italian flag. It is also significant that in order for a shipowner to benefit from the protection of its vessel through the emplacement of marines on the vessel, the shipowner was obliged to make a specific application for the services of the marines. Those services were only provided to the shipowners who applied and were prepared to accept the onerous obligations imposed by Italy for its provision of the services of the marines. There was therefore, a very peculiar, direct and specific contractual relationship between the Italian Government and the shipowners of the “Enrica Lexie”.
- (ii) On 11 October 2011, the Ministry of Defence of Italy and the shipowners concluded a Memorandum of Understanding. Its preambular paragraph indicates that the purpose of its adoption was the supply of services to shipowners. On the same day, 11 October 2011, there was also concluded an Agreement between the Ministry of Defence of Italy and the shipowners intending to avail themselves of the services of the marines. Article 2.1 provides that there is available to applicant shipowners the services of the marines for protection of vessels from piracy and armed robbery. The Article also refers to “service supply” in the form of VPDs “made up of armed military personnel equipped with

⁸⁷ Section 1603, Foreign Sovereign Immunities Act, 1976.

⁸⁸ *Airport LLC GmbH v. United States*, 28 August 2003, 2 Ob 156/O3k, ILDC 3 (AT 2003).

individual and team weapons”. It is therefore clear that the transaction between the Government of Italy through its Ministry of Defence and the shipowners was carried out on the basis of what in many jurisdictions would be an ordinary contract for services. This is a commercial transaction, that is, an act *jure gestionis*, not attracting immunity. The fact that the contract between the Government of Italy and the shipowners had an ostensibly public purpose of providing protection for vessels from piracy is irrelevant in determining whether it had the character of a commercial or sovereign transaction. What is decisive is the essentially commercial nature of the Agreement between the Government of Italy and the shipowners. For that reason, a contract between a government and a private entity to purchase equipment for its armed forces is a transaction *jure gestionis* that would not attract immunity.

- (iii) The essence of a commercial transaction is the exchange of goods and services between persons or entities. That element of exchange is very strong in the Agreement between the Ministry of Defence and the shipowners. Essentially, under the Agreement, the Ministry of Defence undertakes to supply the services of the VPDs in exchange for commitments on the part of the shipowner set out in Article 2.2. This subparagraph identifies seven commitments on the part of the shipowners. Any one would suffice to illustrate the commercial character of the transaction between the Ministry of Defence and the shipowners. All of them are characteristic of the give and take or *quid pro quo* that are at the heart of a commercial transaction. But two provisions are particularly striking in that they indicate the extent to which the Government of Italy went to protect itself. First, subparagraph (c) of Article 2.2 obliges the shipowner to maintain suitable insurance contracts for third party liability, more specifically in relation to damage incurred by the VPDs for fault-based liability of the shipowner or his subordinates. It would not have been unreasonable to expect the Government of Italy to take out insurance contracts for the marines who, after all, are on the vessels in the service of their country. Nonetheless, the Italian Government was able to secure an Agreement in which the shipowner bears the burden of entering into insurance contracts for third party liability in respect of damage from acts carried out by the VPDs. This is by no means an inconsequential commitment. The shipowner would incur the expense for insurance in respect of a VPD which consists of at least six persons. Second, subparagraph (d) of Article 2.2 obliges the shipowner to waive compensation claims for contractual liabilities incurred by the shipowner due to a deviation from the trade course to allow the embarkation and disembarkation of VPDs, as well as detention and disembarkation requirements as regards individuals possibly arrested or subject to provisional arrest. Both subparagraphs (c) and (d) are the kind of provisions

one finds in a commercial transaction between two private persons, one of whom is bent on protecting himself/herself, and who has the negotiating strength to do so. The risk of damage resulting from acts of the VPDs has been placed on the shipowners in a manner that almost suggests that the VPDs have become employees of the shipowner. In any event, the entire set of commitments in Article 2.2, in particular subparagraphs (c) and (d), highlight the extent to which the Government of Italy went to ensure that, if something went amiss in the performance by the VPDs of their functions, it would be protected. The shipowners undoubtedly paid a significant price for the services of the VPDs provided by the Government of Italy. There is, of course, nothing wrong with that, but it needs to be acknowledged that the transaction that led to the marines being placed on the “Enrica Lexie” was an essentially commercial one.

- (iv) However, the most striking feature of the transaction illustrating the element of the exchange of goods and services that characterizes a commercial transaction is Article 6 of the Agreement. Under that Article, the shipowner is obliged to “repay costs incurred for the employment of the VPD”. These costs are set out in Article 2 of the Addendum to the Agreement, which shows that for a total amount for daily service onboard, the shipowner must pay the sum of 467 euros to repay the costs linked to the employment of the VPDs. Three comments may be made. First, the sum of 467 euros per person per day amounts to 14,010 euros for 30 days of service, 170,455 euros for 365 days of service, a sum that appears to be much higher than the average salary of a member of a VPD. Regardless of whether the sum is considered high or low, it does illustrate the commercial character of the transaction. In assessing the commercial character of the transaction, it is irrelevant that the repayment is for costs incurred by the Italian Government in providing the services, because, given that the criterion is the nature and not the purpose of the transaction, it is immaterial whether the Italian Government was prompted by a profit motive. Second, the Majority states that “this reimbursement to the Italian Government, as opposed to a direct payment of salary by the shipowners is a standard and common practice designed to simply compensate the Ministry of Defence for the costs incurred by the VPDs when stationed onboard a vessel”.⁸⁹ It matters not whether the practice is standard or not; what is decisive is that, at any rate, in the case of Italy, it is a practice that is part of what is an essentially commercial transaction. Third, there is another problem in Article 6, which speaks of “repay[ing] costs linked to the employment of VPDs”. The word “employment” in English (the official language of the Arbitration) strongly suggests that the VPDs were in the

⁸⁹ Paragraph 854 of the Award.

employment of the shipowners. It would be entirely reasonable to read the phrase this way: “repay costs linked to the employment of VPDs by the shipowner”. It warrants comment that no explanation has been offered for the use of this word, which, if given its ordinary meaning in English, would mean that the VPDs as employees of the shipowners would certainly not be entitled to immunity for their acts.

- (v) A question that deserves consideration is whether the act of the marines firing the shots that killed the two Indian fishermen can be isolated and severed from the commercial transaction that led to their emplacement on the “Enrica Lexie”. In other words, can the shooting be isolated and severed as a sovereign, governmental act attracting immunity? Can it stand on its own? Those questions must be answered in the negative. The presence of the marines on the vessel is so intertwined with the essentially commercial transaction between the Italian Government and the shipowners that it is not possible to separate the one from the other. After all, absent that transaction, they would not have been on the vessel. Even though it is argued that the marines acted in accordance with the Ministry of Defence’s terms of engagement, it is not possible to separate their conduct from the context in which they were placed onboard the “Enrica Lexie”. When they fired the shots, they did so against the background and on the basis of a commercial transaction in which (a) the Government of Italy received from the shipowners the sum of 467 euros per person per day, amounting to 14,010 euros for 30 days of service and (b) the shipowners were obliged to accept onerous obligations in order to protect the Government of Italy from claims arising from the conduct of the marines. Although in accordance with the Agreement the sum paid by the shipowners was to “repay the costs incurred for the employment of the VPDs”, it is not unreasonable to see that sum as being in effect a payment by the shipowners for the services of the marines. While the provision of security by a government for its citizens is usually seen as a sovereign, governmental act, it need not necessarily have that character. In some countries today, the provision of security has a commercial component. In this case, the commercial component is such that it completely nullifies the public purpose that is usually associated with the provision of security by a government. The shooting that led to the death of the two Indian fishermen was by its nature a commercial act carried out in defence of the interests of the shipowners. It is as though the Agreement between the Italian Government and the shipowners was in effect a contract for the employment of the marines by the shipowners. The services provided by the marines to the shipowners cannot attract immunity in the circumstances of this case.

B. DISTINGUISHING THE PECULIAR CIRCUMSTANCES OF THIS CASE FROM OTHER SITUATIONS IN WHICH THE ISSUE OF THE IMMUNITY OF STATE OFFICIALS ARISES

64. The peculiar circumstances of this case are that the marines as State officials carrying out their duties under the Agreement, shot and killed two Indian fishermen; in respect of that act, as has been discussed earlier, the State has no immunity under customary international law by reason of the commercial character of the transaction authorizing it. This case therefore concerns both the immunity of a State official and the immunity of a State itself.
65. The circumstances described above (see paragraph 64) are different from the usual situation in which the issue of immunity of a State official arises in relation to the acts of officials carried out in an official capacity. It is different because in those situations, the official acts are usually performed against the background of the immunity of the State for the very same acts, whereas in the instant case, the State has no immunity in respect of those acts. In the usual situation the immunity of a State official will, more often than not, be coterminous with the immunity of the State for the same act. Thus, as noted before, the ICJ held in *Certain Questions of Mutual Assistance in Criminal Matters*: “such a claim is in essence a claim of immunity for the Djibouti State, from which the Procureur de la Republique would be said to benefit”. Here, the ICJ sees an organic relationship between the immunity of a State official for an act and the immunity of the State itself for the very same act, a relationship in which the immunity of the State for that act flows to the State official. Thus, the immunity of the State official is contingent on the immunity of the State for the same act. Absent the immunity of the State in respect of the acts of its official, there is no immunity from which the marines can benefit, that is, there is no immunity of the State to flow to its official.
66. The circumstances described above (paragraph 64 above) are different from the situation in which the issue of the immunity of a State official arises for acts that are *ultra vires* his mandate from the sending State.⁹⁰ Here, it is agreed that the official enjoys immunity. But here again, the immunity of the State official proceeds on the basis that the State will usually enjoy immunity in respect of the same act, whereas in the instant case the State does not have immunity in respect of the acts carried out by its officials. The immunity of a State official for acts that are *ultra vires* is merely an illustration of the truism that a State official’s immunity is for the most part a reflection of the immunity of the State. For the immunity of a State under customary international law cannot and does not depend on whether its acts are *intra* or *ultra vires* its laws or anything else. Its immunity

⁹⁰ See paragraphs 860-62 of the Award and Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction, ILC, Sixty Second Session, 2010, para. 29.

simply depends on its sovereignty and so long as what is in issue is a sovereign and not a commercial act it will have immunity.

67. What must now be considered is whether the circumstances described above (paragraph 64) are different from those in which the issue of the immunity of a State official arises in respect of his acts that are *jure gestionis*.
68. To begin with, both the ILC Commentary⁹¹ and the Memorandum by the Secretariat⁹² (hereinafter the “Secretariat Paper”) make clear that there is a doctrinal controversy concerning the immunity of the State official in respect of acts *jure gestionis* – so much for the Majority’s reference to the ILC’s “uncontroversial premise that the acts of State officials performed in an official capacity are subject to immunity”.⁹³ The Secretariat Paper states that “the distinction between acts *jure imperii* and acts *jure gestionis*, which appears to be relevant in the context of State immunity, also applies in the context of immunity *ratione materiae* of State officials”.⁹⁴ The Paper concludes that “there would seem to be reasonable grounds for considering that a State organ performing an act *jure gestionis* which is attributable to the State is indeed acting in his or her official capacity and would therefore enjoy immunity in respect of that act”.⁹⁵ The ILC appears to follow this tentative conclusion of the Secretariat Paper but provides no authority for it. The idea that a State official will always enjoy immunity once he acts in an official capacity has at least one undesirable implication in that it contributes to the position adopted by some that a State official enjoys immunity even for acts constituting crimes that breach a peremptory norm of *jus cogens*, provided the State official was acting in an official capacity. Doctrine and practice should combine to prevent such an outcome.
69. In any event, the situation covered by that conclusion is wholly distinct from the circumstances of this case: in that situation the immunity of the official is principally driven by his own conduct,

⁹¹ Paragraph 28 of the ILC Commentary in the 2010 ILC Report on Immunity, International Law Commission, Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction, 2010, paragraph 28.

⁹² UN Doc. A/CN.4/596 Memorandum by Secretariat Immunity of State Officials from Foreign Criminal Jurisdiction, paragraph 161. The Secretariat Paper was a study prepared at the request of the International Law Commission which was intended to provide a background to the ILC’s consideration of the topic “Immunity of State Officials from foreign criminal jurisdiction.” The study was intended to consider the main legal issues that arise with regard to the topic under consideration, taking into account traditional and contemporary developments in international criminal law which impact on the topic (UN Doc. A/CN.4/596, p. 1). See also paragraph 161: “though infrequently and only cursorily addressed, this question has given rise to conflicting opinions in the legal literature.”

⁹³ Paragraph 845 of the Award.

⁹⁴ UN Doc. A/CN.4/596 Memorandum by Secretariat Immunity of State Officials from Foreign Criminal Jurisdiction, paragraph 161.

⁹⁵ UN Doc. A/CN.4/596 Memorandum by Secretariat Immunity of State Officials from Foreign Criminal Jurisdiction, paragraph 161.

while in the circumstances of this case, the immunity of the official is principally driven by the conduct of the State. Thus, the statement in the ILC Commentary – that “it is irrelevant ... that the conduct of a State organ may be classified as commercial ...”⁹⁶ – is itself irrelevant to the instant case in which immunity is principally driven not by the conduct of a State organ, the marines, but rather by the conduct of the State. As has been shown, the acts of the Italian State on the basis of which the marines performed their function amounted to a commercial transaction, leaving Italy bereft of immunity for that conduct; therefore the marines chosen by that country to implement the commercial transaction cannot be protected by an immunity that the Italian State itself does not have. The fact that the marines acted in an official capacity is immaterial. Acting in an official capacity cannot by itself endow a State official with immunity if its State is not entitled to immunity in respect of his actions. State officials do not generate their own immunity by their acts; the source of their immunity is the State itself; if the State lacks immunity, as Italy does in this case, then it has no immunity to transmit to its officials or, in the language of the ICJ, it has no immunity from which the officials would benefit. Therefore the circumstances of the instant case (in paragraph 64) are wholly different from the situation dealt with in the cases set out by the Majority to illustrate the argument of Italy that “even if the interests at issue were commercial”, the distinction between acts *jure imperii* and acts *jure gestionis* is irrelevant to the immunity of State officials from foreign criminal jurisdiction “as long as the acts at issue were performed in an official capacity”.⁹⁷ These cases are again cited by the Majority.⁹⁸ However, none of them addresses the peculiar circumstances of this case: a situation in which Italy has no State immunity from which the marines as State officials could benefit because it carried out a commercial transaction in order to emplace the marines onboard the “Enrica Lexie”. The instant case concerns both the immunity of a State official and the immunity of the State. None of the cases cited addresses the issue of the immunity of a State official. They are confined to the issue of State immunity.

70. Both the Secretariat Paper and the 2010 Report on Immunity of State Officials proceed on the assumption that once an official acts in an official capacity he or she has immunity in respect of those acts. The Majority followed this approach.⁹⁹ This is a questionable premise. Just as questionable is the link that is made between the law of immunity and the law of State responsibility,

⁹⁶ See paragraph 28.

⁹⁷ See paragraph 820 and footnote 1478 of the Award citing *John Doe I and Ors v. UNOCAL Corporation and Ors*, 25 March 1997, 963 F. Supp. 880 (9th Cir. 2002), p. 14230; *Airport L*, p. 4; *Littrell v. U.S.A. (No. 2)*, [1995] 1 WLR 82, p. 95.

⁹⁸ See footnote 1550 of the Award citing *See also John Doe I and Ors v. UNOCAL Corporation and Ors*, 25 March 1997, 963 F. Supp. 880 (9th Cir. 2002), p. 14230; *Airport L, LLC GmbH v. United States*, 28 August 2003, 2 Ob 156/O3k, ILDC 3 (AT 2003), p. 4; *Littrell v. U.S.A. (No. 2)*, [1995] 1 WLR 82, p. 95.

⁹⁹ Paragraphs 843-62 of the Award.

whereby immunity necessarily follows from the attribution of an act of a State official to his State.¹⁰⁰ The facile manner in which the link is made leaves unanswered many questions concerning the relationship between the two regimes. The ILC Commentary on its 2010 Report on the Immunity of State Officials cites with approval¹⁰¹ the Commission's statement¹⁰² that, "it is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as 'commercial' or as acts *jure gestionis*". While the ILC stressed that its draft Articles on State Responsibility only served the purpose of determining the responsibility of a State and said nothing about the "legality or otherwise of that conduct",¹⁰³ one commentator observed that "the law of state immunity is concerned with the exercise of public powers in mediating the interest of the forum and foreign state".¹⁰⁴ There is a danger in eliding the law of the immunity of State officials with the principle of attribution in the law of State responsibility. It should not be taken for granted that once an act of an official is attributable to a State, that official will always enjoy immunity in respect of that act.

C. CONCLUSION

71. If the Arbitral Tribunal has jurisdiction over the question of the immunity of the marines from the exercise of Indian criminal jurisdiction, *quod non*, the marines do not enjoy immunity from that jurisdiction for the following reasons:

- (i) Italy bears the burden of establishing to the satisfaction of the Arbitral Tribunal that the marines are entitled to immunity from the exercise by India of its criminal jurisdiction over them.
- (ii) The act of Italy that resulted in the emplacement of the marines on the "Enrica Lexie" was by its nature commercial and not sovereign; therefore, notwithstanding that the emplacement of the marines on the vessel served the public purpose of protecting the ship from piratical attacks, Italy does not enjoy immunity under customary international law; the shooting by the marines is not severable from the commercial transaction that led to the embarkation of the marines on the "Enrica Lexie"; it was by nature a commercial, and not a sovereign, act.

¹⁰⁰ Paragraph 24 of the 2010 ILC Report on Immunity of State Officials.

¹⁰¹ Paragraph 28.

¹⁰² Paragraph 6 of its Commentary on Article 4 of its Draft Articles on State Responsibility.

¹⁰³ International Law Commission, "Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries" in *Yearbook of the International Law Commission*, Vol. II (Part 2), p. 39 at para. 4 Article 3 (2001).

¹⁰⁴ Zachary Douglas, State Immunity for the Acts of State Officials, *BYIL British Yearbook of International Law*, Volume 82, Issue 1, 2012, pages 281–348.

- (iii) Since the immunity of the marines is for the most part a reflection of the immunity of the State of Italy, the absence of Italian immunity for the acts leading to the shooting of the two Indian fishermen means that there is no immunity from which the marines can benefit as State officials; the marines cannot generate their own immunity and it is not decisive that they were acting in an official capacity.
- (iv) In order for the marines to enjoy immunity, Italy has the burden of establishing that in their service on the ship they remained in the employment of the Italian Government and did not become employees of the shipowners. The following factors raise serious questions as to whether the marines were not in the employment of the shipowners. First, the sum paid by the shipowners for “repay[ing] costs linked to the employment of VPDs” is of such an amount that it is not unreasonable to see it as a payment by the shipowners for the services of the VPDs. Second, the language in Article 6 – “repay[ing] costs linked to the employment of VPDs” suggests that the marines were in the employment of the shipowners; in English, it would be reasonable to read the sentence as meaning, “repaying costs linked to the employment of VPDs by shipowners”; if the marines were so employed their actions would not attract immunity because the possibility of immunity only arises if they were performing sovereign functions on behalf of the Italian Government. Third, the nature of the very onerous obligations imposed by the Agreement on the shipowners also raises doubt as to whether as a result of the Agreement the marines did not become employees of the shipowners.
- (v) In light of the foregoing, Italy has failed to discharge its burden of establishing that the marines are entitled to immunity *ratione materiae*.

V. WHETHER THE MARINES ARE ENTITLED TO IMMUNITY FROM THE CRIMINAL JURISDICTION OF INDIA IN THE ABSENCE OF AN AGREEMENT BETWEEN ITALY AND INDIA: THE ASSIMILATION OF THE MARINES TO THE STATUS OF VISITING FORCES

72. This Part offers an alternative foundation for the conclusion in the last Part that the marines are not entitled to immunity *ratione materiae*. It argues that the marines can be assimilated to the status of visiting forces, which generally, do not enjoy immunity under customary international law for their acts. The immunity of visiting forces usually depends on agreements concluded between the sending and receiving States.
73. The Agreement between the Ministry of Defence and the shipowners envisaged the embarkation and disembarkation of VPDs at ports in various countries. Thus, Article 2.1 provides that “embarkation and disembarkation of vessel protection detachments takes place based on existing

agreements with coastal States in the High-Risk Area, in ports listed in the Addendum”. That document identifies Djibouti as the main port for embarkation and disembarkation of VPDs. It also identifies nine ports in other countries for that purpose. Moreover, Article 2.1 provides that vessel protection will be available “even in cases where for the technical and operational reasons, VPDs may embark and disembark in traffic areas laying outside the areas identified by the Ministry of Defence by means of a specific decree”.

74. Thus, according to the Agreement, VPDs could embark, disembark, and enter ten States for the purposes of their services. In the instant case, the “Enrica Lexie” was sailing from Galle, Sri Lanka to Port Said, Egypt. The question arises whether VPDs are immune from the jurisdiction of those receiving States in respect of acts that fall under their jurisdiction.

75. When the two marines were arrested by the Indian Coast Guard, one of them, Sergeant Latorre, gave the Coast Guard a written Statement that included an assertion that they were entitled under international law to the immunity of “forces in transit”. Although VPDs are obviously on the move, embarking and disembarking at ports in various countries, it is not entirely clear what is meant by the immunity of “forces in transit”. To the extent that the phrase refers to the principle of the “law of the flag”, this harkens back to the doctrine of absolute immunity, derived from the decision in *Schooner Exchange v. McFadden*.¹⁰⁵ The law of the flag, which provided the basis for absolute immunity of visiting forces, is as outmoded as the doctrine of absolute immunity, which was replaced some one hundred year ago by the doctrine of restrictive immunity. In this Part, it is argued that when VPDs disembark and commit a crime in a receiving State or when they commit a crime that takes effect on a vessel that falls within the jurisdiction of the receiving State they are assimilated to the status of visiting forces under customary international law. The Arbitral Tribunal found that India had jurisdiction in respect of the crimes committed on the “St. Antony” on two bases: first, as the flag State, over the offence that commenced on the “Enrica Lexie” and was completed on its vessel, the “St. Antony”; second, on the basis of the principle of objective territoriality.¹⁰⁶ It found that India had the right to assert its jurisdiction over the offence that was allegedly completed onboard its vessel.¹⁰⁷

76. It is generally accepted that notwithstanding the number of Status of Forces Agreements (hereinafter “SOFA”) granting visiting forces certain immunities in a receiving State, there is no rule of customary international law that visiting forces enjoy immunities in a receiving State. Their

¹⁰⁵ 11 U.S. (7 Cranch) 116 (1812).

¹⁰⁶ Paragraphs 366-70 of the Award.

¹⁰⁷ It made a companion finding in respect of Italy relating to the Enrica Lexie.

immunities depend on agreement between the State of the visiting forces and the receiving State. These immunities are usually found in SOFAs. One commentator expressed the view that:

Even though NATO has generated substantial relevant practice and the NATO SOFA is often used as a precedent, there is no consensus about the existence of a corresponding rule of customary international law. Indeed the contents of modern SOFA tend to vary by the circumstances.¹⁰⁸

77. Regrettably, the agreements concluded by Italy (described as existing agreements) with the ten States identified in the Addendum to the Agreement were not available for examination. Nonetheless, it is safe to assume that they include provisions, similar to those in SOFAs, granting immunity to the VPDs in circumstances when the receiving State is entitled to exercise jurisdiction over them under international law. Interestingly, the material before the Arbitral Tribunal shows that on 6 February 2012, Italy requested India to grant diplomatic clearance of a cargo vessel which had six VPDs onboard. India declined the request for an agreement on VPDs.¹⁰⁹
78. The existence of these agreements in no way detracts from the generally accepted proposition that, despite the existence of SOFAs there is no rule of customary international law that visiting forces enjoy immunities from the jurisdiction of receiving States. In fact, agreements such as SOFAs and the existing agreements between Italy and the ten States mentioned in the Addendum to the Agreement are concluded because States are not confident that there exists a customary rule granting immunities to visiting forces.
79. When the two Indian fishermen were shot and killed, they were aboard the “St. Antony”, a vessel over which, as has been stated, the Arbitral Tribunal has found that India has jurisdiction as the flag State and on the basis of the principle of objective territoriality. The assimilation of the marines to the status of visiting forces means that, absent an agreement between Italy and India for their immunities as officials of a foreign State, they do not enjoy immunity from Indian criminal

¹⁰⁸ Zsuzsanna Deen-Racsmany, “Exclusive” Criminal Jurisdiction over UN Peacekeepers and the UN Project(s) on Criminal Accountability: A Self-Fulfilling Prophecy? *Military Law and the Law of War Review* 53/2 (2014), p. 273. See also generally (ed. Dieter Fleck), *The Handbook of the Law of Visiting Forces*, Second Edition, Oxford Scholarly Articles on International Law, “Jurisdiction” by Paul J. Conderman and Aurel Sari at p. 209, which states:

“Over the course of the last century, it has become commonplace to regulate the exercise of jurisdiction over visiting armed forces through status-of-forces agreements. While their use predates the twentieth century,¹⁰ States began to enter into the first modern status-of-forces agreements during World War I.¹¹ Since then, international agreements have emerged as the instrument of choice for defining the legal position of Visiting Forces. Their popularity is largely due to the fact that they offer Sending States and Receiving States greater levels of legal certainty compared to the unwritten rules of customary international law”.

¹⁰⁹ Counter-Memorial of India, Vol.1, 15 April 2017, para. 5.34.

jurisdiction in respect of the shooting from the “Enrica Lexie” that resulted in the death of the fishermen.

VI. GENERAL CONCLUSIONS

80. The original error in the Award is the Majority’s mischaracterization of the dispute; the cascade of errors thereafter is traceable to that original error.

81. The case brought by Italy against India should be dismissed because:

- (i) The dispute, properly characterized, concerns the question of the exercise by India of its criminal jurisdiction over the marines in the face of their claim to immunity therefrom; the Arbitral Tribunal has no jurisdiction over the issue of the immunity of the marines because it does not concern the interpretation or application of the Convention; since that issue is a core element of the dispute, the Arbitral Tribunal should have declined jurisdiction over the dispute.
- (ii) The issue of the immunity of the marines is not an incidental question; rather it is a core element of the dispute; it is the real issue in the dispute between the Parties.
- (iii) The Arbitral Tribunal derives no help from the doctrine of the incidental question in determining whether it has jurisdiction over the issue of the immunity of the marines. The case relied on by the Majority, *Case Concerning Certain German Interests*, is not pertinent to the facts of the instant case. It is the UNCLOS Annex VII cases of *Chagos Marine Protected Area Arbitration*, *South China Sea Arbitration*, and *Ukraine v. Russia* that are pertinent. Those cases stress the need to separate a so-called incidental question from the real issue that is in dispute. In this case, the issue of the immunity of the marines is the real issue separating the Parties; since it does not concern the interpretation or application of the Convention, the Arbitral Tribunal would, in any event, be obliged to decline jurisdiction over the dispute.
- (iv) Even if the Arbitral Tribunal had jurisdiction over the issue of the immunity of the marines, the marines do not enjoy immunity either because: (a) the State of Italy engaged in an essentially commercial transaction in order to emplace the marines onboard the “Enrica Lexie” to protect the vessel from pirates; that act, *jure gestionis*, does not attract immunity for the State of Italy under customary international law; therefore the State of Italy had no immunity from which the marines could benefit in their act of firing shots from the “Enrica Lexie” that resulted in the death of two Indian fishermen aboard the “St.

Antony”; or (b) the marines can be assimilated to the status of visiting forces which do not enjoy immunity under customary international law for acts carried out in the receiving State. Since there was no agreement between Italy and India to grant immunity to the marines, the act of the marines that was completed onboard the “St. Antony”, over which India had jurisdiction as the flag State or on the basis of the principle of objective territoriality, does not attract immunity.

82. In sum, in light of the foregoing, the immunity claim fails, and the Courts of India are competent to continue to exercise criminal jurisdiction over the marines.

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