

Considerations of humanity in the *Enrica Lexie* Case

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1. *Introduction*

The Order by the International Tribunal for the Law of the Sea (ITLOS or Tribunal) in the *Enrica Lexie* case¹ has provided the first opportunity for judicial scrutiny of the dispute that has involved India and Italy over the past four years. The order was rendered following a request for the prescription of provisional measures by Italy, in accordance with Article 290(5) United Nations Convention on the Law of the Sea (UNCLOS) pending the constitution of an arbitral tribunal. In its Order, the ITLOS ordered both Italy and India to suspend all court proceeding and refrain from initiating new ones pending the decision of the arbitral tribunal.

In general terms, the order seems to be well balanced and to generally follow the approach adopted in previous orders on provisional measures by both the ITLOS and the International Court of Justice. Novel aspects include its combination of the law of the sea with concepts from other areas of international law, including human rights law, but also, in practical terms, by the fundamental disagreement of the parties as to the facts underlying the case. It is therefore not surprising that it has generated much debate in the Tribunal, which is well testified by the numerous and varied individual opinions attached to the Order.² This is indeed a signal of the vitality of the ITLOS, since it shows the engagement of its judges with the various issues raised by the

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¹ *The 'Enrica Lexie' Incident (Italy v India)* (Provisional Measures, Order of 24 August 2015), at <www.itlos.org/fileadmin/itlos/documents/cases/case_no.24_prov_meas/C24_Order_24.08.2015_orig_Eng.pdf>.

² The order was approved by 15 votes to 6, with 10 judges (half the Tribunal) attaching declarations, separate opinions or dissenting opinions.



parties, but also its ability to mediate different views and produce an order that is widely accepted and takes a balanced approach to controversial issues.

While relatively concise, as all similar orders have been, the ITLOS order contains the seed of many issues, which are hinted at, if not developed, by the Tribunal. One of these is the role of the so-called ‘considerations of humanity’ in the formulation, interpretation and application of law of the sea rules.

This contribution will set out to examine such issues. It will first contextualise the Order by looking at the origin of the phrase ‘considerations of humanity’ in relation to events happening at sea and the recent case law of other international judicial bodies established under the UNCLOS. It will then look at the *Enrica Lexie* case and how the order deals with ‘considerations of humanity’ in the present case. In its conclusion, it will discuss the role of ‘considerations of humanity’ in the case law of law of the sea tribunals, submitting that the *Enrica Lexie* case constitutes a test for such concept and an occasion for the further humanisation of the law of the sea.

2. *Considerations of humanity in the ICJ*

The first mention of ‘considerations of humanity’ in a law of the sea case dates back to the *Corfu Channel* Judgment by the International Court of Justice (ICJ or Court).³ In this case, the Court had been called upon to assess whether Albania was internationally responsible for the damage caused to British warships by a minefield laid in the Corfu Channel waters. The Court and the parties all recognised the existence of the obligation of the coastal State to give warning to ships transiting through its territorial waters of any minefield existing therein. In the absence of any applicable treaty, the Court grounded this legal obligation

‘on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every

³ *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 4 (‘Corfu Channel’).



State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States'.⁴

The first principle, 'elementary considerations of humanity' is what interests us here. The ICJ was in fact faced with a paradoxical situation, where the laws of war were in fact more protective of persons than the laws of peace. While the former included a treaty that imposed obligations on States laying minefields, the latter did not contain any such provision or any other provision aiming at the protection of persons from harm.⁵ The Court avoided the illogical conclusion that people are more protected during wartime than during peacetime through reference to 'considerations of humanity' as a principle that should guide the determination and application of more specific obligations pending on States. With this statement, the ICJ re-established the natural order and recognised that there does exist a legal obligation, pending on States during peacetime, to take measures to protect persons from harm that may occur to them at sea, as well as on land.⁶

The *Corfu Channel* Judgment is particularly significant for two reasons. On the one hand, it can be considered as giving expression to concerns underlying early treaties regulating human activities at sea, namely the creation of a safe and secure environment for people. On the other, it can be considered as the first expression of a more generalised intent of the international community to elaborate normative standards that would flesh out specific duties pending on States as far as the protection of persons is concerned. At a time when the UN Charter had just entered into force and human rights treaties did not exist, 'considerations of humanity' were 'related to human values already protected by positive legal principles which, taken together, reveal certain criteria of public policy and invite the use of analogy'.⁷

⁴ *Corfu Channel* (n 3) 22.

⁵ This was due to the existence of a treaty posing obligations concerning the laying of minefields during war (Hague Convention VIII).

⁶ It is worth noting that the existence of a legal obligation was also well accepted by both parties to the dispute. Note, in particular, that Counsel for Albania stated that 'if Albania had been informed of the operation [of laying the minefield] before the incidents of October 22nd, and in time to warn the British vessels and shipping in general of the existence of mines in the Corfu Channel, her responsibility would be involved' (*Corfu Channel* (n 3) 22).

⁷ I Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 27.



3. *Considerations of humanity in the ITLOS and other law of the sea tribunals*

The term coined by the ICJ was taken up some decades later by the ITLOS in deciding its first case on the merits. In the *Saiga n. 2* case, the Tribunal had been called upon to assess, among other things, the lawfulness of the enforcement measures carried out by Guinea against the *M/V Saiga*, an oil tanker flying the flag of Saint Vincent and the Grenadines.⁸ In a rightly famous passage, the Tribunal, engaged in the finding of rules that apply to the use of force in law enforcement activities at sea, concluded by referring to the general obligation to take into account considerations of humanity:

‘In considering the force used by Guinea in the arrest of the *Saiga*, the Tribunal must take into account the circumstances of the arrest in the context of the applicable rules of international law. Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law.’⁹

What the Tribunal does not clarify, is what exactly those ‘considerations of humanity’ are and what consequences flow from them. For some judges, the expression seemed to point towards human rights law,¹⁰ thus possibly introducing into the picture specific norms that regulate the duties of States towards persons. Others seemed to consider it a pre-legal factor, which should serve to adapt the existing rules towards a more human-oriented content from a *lex ferenda* perspective, without however having any practical consequences on the *lex lata*.¹¹

⁸ *The M/V ‘SAIGA’ (No. 2) Case (Saint Vincent and the Grenadines v Guinea)* (Judgment of 1 July 1999) [1999] ITLOS (‘*Saiga*’).

⁹ *Saiga* (n 8) para 155.

¹⁰ *Saiga* (n 8) *Separate Opinion of President Mensab*, para 20.

¹¹ *Saiga* (n 8) *Dissenting Opinion of Judge Ndiaye*, para 90, according to whom ‘humanitarian considerations may inspire rules of law ... are not, however, rules of law in themselves’.



The trend towards a general reference to ‘considerations of humanity’ by individual judges or the Tribunal was consolidated in the subsequent cases, in particular those considering prompt release claims and those involving the arrest or other forcible acts against persons.¹²

The ITLOS however also referred to different, yet similar, concepts. In the *Tomimaru* case, for example, it considered that the confiscation of a vessel should not ‘be taken through proceedings inconsistent with international standards of due process of law’.¹³ In the *Louisa* case, the ITLOS went further than ever before when it affirmed that ‘States are required to fulfil their obligations under international law, in particular human rights law, and that considerations of due process of law must be applied in all circumstances’.¹⁴

The statement in the *Louisa* case is all the more impressive considering it was not required in the logic of the judgment and shows the concern of the ITLOS to keep in mind the bigger picture, and not just the specific UNCLOS provisions it is called upon to apply from time to time. The ITLOS had in fact just declared that it did not have jurisdiction to decide the case. Notwithstanding this conclusion, it also considered that ‘it cannot but take note of the issues of human rights’ raised and thus went on to make the statement just reported.

Somewhat surprisingly, ‘considerations of humanity’ were not expressly mentioned by the ITLOS in its Order in the *Arctic Sunrise* case. The surprise is due to the fact that the case was greatly concerned with the arrest and detention of the crew of a vessel, the *Arctic Sunrise*. The Netherlands claimed that the arrest and detention were in violation of both law of the sea and human rights law standards, the latter point also argued extensively, and that the vessel and crew should be released upon posting of a bond.¹⁵ The case was therefore very similar to the

¹² *The ‘Juno Trader’ Case (Saint Vincent and the Grenadines v Guinea-Bissau)* (Prompt Release, Judgment of 18 December 2004) [2004] ITLOS (‘Juno Trader’) para 77. See also *Separate Opinion of Judge Treves*, para 1; *Joint Separate Opinion of Judges Mensah and Wolfrum*, paras 3-4.

¹³ *The ‘Tomimaru’ Case (Japan v Russian Federation)* (Prompt Release, Judgment of 6 August 2007) [2007] ITLOS para 76.

¹⁴ *The M/V ‘Louisa’ Case (Saint Vincent and the Grenadines v Kingdom of Spain)* (Judgment of 28 May 2013) [2013] ITLOS para 155.

¹⁵ *The Arctic Sunrise Case (Kingdom of the Netherlands v Russian Federation)* (Provisional Measures, Order of 22 November 2013) [2013] ITLOS (‘Arctic Sunrise’) para 33.



prompt release cases in which the Tribunal had used reference to ‘considerations of humanity’ to remind the parties of their duties beyond those in the UNCLOS. There are however two differences that may have warranted a different treatment of the issue. The first one is that here the Tribunal was requested to prescribe only provisional measures pending the constitution of the arbitral Tribunal and that it had therefore adopted a very strict approach to its jurisdiction.¹⁶ The second is that the ITLOS eventually ordered the immediate release of the persons involved, thereby making it superfluous for it to indicate how these persons had to be treated, since they were to be set immediately free.¹⁷

Considerations of humanity have been invoked not only by the ITLOS but also by other arbitral tribunals ruling on the basis of the UNCLOS (Annex VII Tribunals). In the *Guyana/Suriname* case, the arbitral Tribunal recalled the statement in the ITLOS *Saiga no. 2* decision, although it did not elaborate on it.¹⁸ In the *Arctic Sunrise* case, the Arbitral Tribunal similarly recalled the *Saiga no. 2* statement in discussing the applicability of human rights law.¹⁹ In both cases, the passage was cited in the context of ascertaining the rules regulating law enforcement activities at sea, in particular the use of force and, in the *Arctic Sunrise* case, deprivation of personal liberty. Thus, reference to ‘considerations of humanity’ served the purpose of protecting the weak party, that is the persons against whom force had been used or threatened.

4. *The Enrica Lexie Case*

In analysing how ‘considerations of humanity’ were used in the *Enrica Lexie* case before the ITLOS, it seems useful to recall that this case is just one among a number of cases which see Italy and India opposed with respect to the killing of two Indian fishermen and the detention of

¹⁶ *Arctic Sunrise* (n 15) *Joint Separate Opinion of Judges Wolfrum and Kelly*, para 2.

¹⁷ Similar considerations may also have prevented any mention of ‘considerations of humanity’ in the *Ara Libertad* case, which was also concerned with provisional measures pending the constitution of an Annex VII Tribunal.

¹⁸ *Guyana v Suriname* (Award of 17 September 2007) [2007] PCA para 405.

¹⁹ *The Arctic Sunrise Arbitration (Netherlands v Russia)* (Award of 14 August 2015) [2015] PCA para 191.



two Italian marines. Before examining the ITLOS case, it should be mentioned that there are a number of disputes arising from these events, which are forming the object of proceedings in front of national and international judges.

The parties are at variance, in the first instance, with respect to the facts of the case. India claims that the two fishermen were killed by the Italian marines, who were engaged in anti-piracy protection on board the Italian-flagged vessel *Enrica Lexie*. Italy objects and claims that the two fishermen were not killed by the two marines. Proceedings have been initiated in both States, creating a further disagreement as to which one has jurisdiction over the case and whether Italy has exclusive jurisdiction, as the State claims. With the arrest of the two marines by India and their detention, a further dispute arose concerning the lawfulness of such arrest and detention.²⁰ The dispute on the exercise of jurisdiction and the lawfulness of detention are now submitted by Italy to an arbitral tribunal constituted in accordance with Part XV UNCLOS.²¹

Within this context, it is evident that ‘considerations of humanity’ could be invoked with respect to a number of issues, both procedural and substantial. Turning back to the *Enrica Lexie* case before the ITLOS, ‘humanitarian’ considerations were invoked by Italy to justify the necessity of the required provisional measures, in particular the second measure requested, according to which Italy asked for the lifting of any restrictive measures on the personal freedom of the two marines.²² Their use is therefore procedural, to justify the urgency of the requested measure, rather than substantial, which would ask for an evaluation of the applicable substantial standards to the detention of the two marines.

²⁰ Measures against the two marines were subsequently relaxed and one of them is presently in Italy on medical grounds, while the other is still in India.

²¹ Regrettably, the proceedings of the Tribunal are not public and no documents have been posted on the dedicated webpage of the Permanent Court of Arbitration, at <www.pccases.com/web/view/117>. No reasons are given for this choice, nor can it be inferred, from the material published in the ITLOS webpage of the case, that an appropriate decision as to information that should not be disclosed would not be sufficient to render the majority of the information public.

²² ‘India shall take all measures necessary to ensure that restrictions on the liberty, security and movement of the Marines be immediately lifted to enable Sergeant Girone to travel to and remain in Italy and Sergeant Latorre to remain in Italy throughout the duration of the proceedings before the Annex VII Tribunal’, *Request under article 290, paragraph 5, of the Convention, submitted by Italy on 21 July 2015* (‘Request by Italy’), para 57(b).



After recalling that the ‘rights of liberty and movement [of the two marines] have been restricted, notwithstanding the absence of any formal charges, for nearly three-and-a-half years’,²³ Italy in fact evokes the *Saiga no. 2* judgment and the *Arctic Sunrise* order. The Italian argument seems to put particular weight on the ‘risk of severe and irreversible prejudice to the Marines, and therefore to Italy’s rights’ due to the prolonged restriction on personal liberty, which would provide the basis for the request of provisional measures.

It is in this context that Italy mentions ‘considerations of humanity’ and recalls the *Saiga no. 2* passage and the one in the Corfu Channel judgment and links them with the situation of the two marines:

‘The duration and circumstances of the custody and bail conditions imposed on the Marines already amount to a breach of their fundamental rights guaranteed, inter alia, under Articles 9 and 14 of the International Covenant on Civil and Political Rights, to which both Italy and India are parties. Despite nearly three-and-a-half years since the Marines were first arrested, they have not yet been informed of the charges against them — an inexcusable breach of their fundamental rights and a situation so deplorable that it was criticised by the Chief Justice of the Indian Supreme Court at a hearing on 16 December 2014’.²⁴

This passage shows that Italy deems ‘considerations of humanity’ as a shorthand for human rights law, which is not only deemed applicable under the circumstances, but also as a matter that can be submitted to law of the sea judges for adjudication. The argument is expanded upon in the oral pleadings, where Italy considered that restrictions on the liberty and movement of the marines ‘are contrary to international standards of due process applicable under the law of the sea’²⁵ and argued on the basis of human rights instruments and case law from international human rights bodies.²⁶

²³ Request by Italy (n 22) para 45.

²⁴ Ibid para 49.

²⁵ Verbatim Record of the public sitting, doc ITLOS/PV.15/C24/1, at 31.

²⁶ It could be mentioned that human rights standards are linked with the law of the sea in a somewhat convoluted way. Italy maintains that ‘we are faced here with a special category of unlawful detention, namely detention which the law of the sea specifically characterises as unlawful, in this particular case by virtue of the fact that the detention is



What is new in the *Enrica Lexie* case, however, is the fact that India, the other party to the dispute, not only objected to the invocation of considerations of humanity by Italy arguing that it had treated the marines humanely,²⁷ but raised similar issues with respect to people involved in the case from the Indian side, namely the families of the fishermen killed:

‘Italy has referred to circumstances of a medical and humanitarian nature in the case. In this context, I would request the Tribunal to recall the greater loss, trauma and suffering of the families of the two Indian fishermen who have been killed. Their loss, Mr President, is permanent and irreversible. They are still waiting for the justice that has been delayed by Italy’s intransigence.’²⁸

‘It cannot be said that Italy has shown the same compassion towards the victims and their families, who are the forgotten ones in Italy’s written submissions. The Notification and the Request, not to mention the oral argument this morning, endeavour to move you to pity the fate of the two accused, but there is no mention of the victims.’²⁹

In this case, India, without referring directly to ‘considerations of humanity’ and the law of the sea tribunals case law, uses the ‘humanitarian’ argument not to invoke any specific human right, but rather to contextualise the facts of the case recalling their social and economic con-

not premised on a permissible exercise of jurisdiction and violates immunity’ and that the ‘restrictions on the liberty and movement of the marines further breach the law of the sea because they violate international standards of due process which, as this Tribunal has held on several occasions, must inform the operation of the law of the sea’. The first argument seems to conflate the unlawfulness of an arrest that has taken place at sea, and which has formed the object of the cases mentioned by Italy, and an arrest that has happened on land, as in the case of the two Italian marines, although in relation to events that have happened at sea. The second argument does not clarify what ‘inform’ should mean, ie whether it has an impact on the interpretation and application of rules contained in law of the sea instruments or whether it could also introduce rules from instruments belonging to other fields of law, such as human rights law. Furthermore, the arguments advanced by Italy seem better suited to argue the merits of the case, rather than the necessity for provisional measures.

²⁷ *Written observations submitted by India on 6 August 2015* (‘Observations by India’) 54.

²⁸ Verbatim Record of the public sitting, doc ITLOS/PV.15/C24/2, at 43.

²⁹ *Ibid.*

sequences. The proposed solution would be a balancing of humanitarian considerations on the two sides, since the ‘well-being and humanitarian considerations in favour of persons accused of a serious crime have to be balanced with that of the victims of the crime’, the latter considered as prevailing in case of conflict.³⁰

India’s use of humanitarian considerations also leaves some uncertainties as to its purpose and extent. Rather than a basis for claiming a specific right, were it the right of the victims’ families for redress, a right that is also protected under human rights law, India appears to use humanitarian considerations as an emotional call to counter-balance the call for a more ‘humane’ approach towards the two marines, advocated by Italy, and to justify its treatment of them.

Faced with these two calls for ‘humanity’, the ITLOS seems to pay attention to both uses of ‘humanitarian considerations’. As a matter of principle, it reaffirms that ‘considerations of humanity must apply in the law of the sea as they do in other areas of international law’.³¹ This is however a neutral statement and the Tribunal proceeds to apply it to the people involved on both sides of the dispute. On one hand the Tribunal ‘is aware of the grief and suffering of the families of the two Indian fishermen who were killed’³² and on the other it ‘is also aware of the consequences that the lengthy restrictions on liberty entail for the two Marines and their families’.³³

One can only guess as to the reasons for this equanimity. On one hand, it might derive from an effort to accommodate the divergent opinions of judges.³⁴ A part of the judges seems convinced by the human rights argument advanced by Italy,³⁵ whilst other judges seem to agree with the Indian position and object to what Vice-President Bouguetaia refers to as a ‘selective reference to humanity’.³⁶ On the oth-

³⁰ Observations by India (n 27) 5, para 1.15.

³¹ *Enrica Lexie* (n 1) para 133.

³² *Ibid* para 134.

³³ *Ibid* para 135.

³⁴ As hinted in the *Enrica Lexie* (n 1) *Dissenting Opinion of Vice-President Bouguetaia*, para 1.

³⁵ *Enrica Lexie* (n 1) *Declaration of Judge Kelly*, para 6; *Separate Opinion of Judge Jesus*, paras 10-11.

³⁶ *Enrica Lexie* (n 1) *Dissenting Opinion of Vice-President Bouguetaia*, para 26, see also para 32. In similar terms *Declaration of Judge Paik*, paras 6-8; *Dissenting Opinion of*



er hand, it might also be the result of a generalised consideration that all the people involved in a case, whatever their role and the party to whom they refer, deserve to be treated with humanity.

Under a different reading, recalling the general principle and then declining it for both parties might also be seen as a way of dismissing both the procedural argument advanced by Italy and the emotional claim submitted by India. The test for granting provisional measures, according to the Tribunal, is that there should be ‘a real and imminent risk that irreparable prejudice could be caused to the rights of the parties’. Italy had tried to argue that the continuing restrictions on their liberty affected irremediably the rights of the marines and therefore those of Italy. The Tribunal, however, does not appear to have taken this into account, as it eventually did not grant the measure requested, ‘because that touches upon issues related to the merits of the case’.³⁷

5. A test for ‘considerations of humanity’ in the law of the sea

Following from a number of cases where the ITLOS and other law of the sea tribunals have consolidated the role of ‘considerations of humanity’ and human rights law in law of the sea disputes, the *Enrica Lexie* case, and the ITLOS Order, may be seen as a natural evolution and at the same time a test for the concept.

Until this case, in fact, the use of considerations of humanity had been univocal, though somewhat ambivalent. On one hand, considerations of humanity have been the shorthand for the introduction of human rights into law of the sea cases, in particular such fundamental civil rights as the right to life, the right not to be subject to torture, the right to personal freedom and the right to due process of law. On the other, considerations of humanity would appear to be a call for the application of extra-legal concepts, in particular a humanitarian perspective on the protection of people, which however does not necessarily find its expression in concrete legal rules. In both cases, considerations of humanity were invoked by one party only, that which was taking up the rights

Judge Chandrasekhara Rao, para 16. Interestingly, while Vice-President Bouguetaia and Judge Chandrasekhara Rao voted against, Judge Paik voted in favour of the Order.

³⁷ *Enrica Lexie* (n 1) para 132.



of its people against allegedly unlawful action exercised by the other State.

In the *Enrica Lexie* case, the situation is different, since both parties use the ‘considerations of humanity’ argument to invoke protection for their people against the acts of the other State and its organs. On one hand, Italy advances considerations of humanity to safeguard its marines from the alleged breaches of due process at the hands of the Indian authorities. On the other hand, India invokes humanitarian considerations in its effort to bring to justice the people - who Italy claims are its organs - who have allegedly killed two fishermen, violating their right to life. These are not just procedural arguments, concerned with the plausibility of provisional measures, but go to the heart of the dispute involving an evaluation of the substantial standards that should be applied. The point was finely noted by the ITLOS, which considered it to be tied closely to the merits of the case.

This double invocation shows that considerations of humanity, which have played an important role in adapting the law of the sea to the values attached to human rights,³⁸ are not a panacea and cannot by themselves provide the solution to all cases involving individuals. The issue underlying the request by Italy that any measure of restraint over the marines be lifted, is, in fact more nuanced and requires the balancing of the human rights of two groups of individuals: the Italian marines, on the one hand, and the Indian victims' families, on the other. This is what makes the *Enrica Lexie* case different from those concerning prompt release of vessels and crews and provisional measures. As Judge Paik has observed, ‘there are differences between the present

³⁸ On the interaction between human rights and the law of the sea see BH Oxman, ‘Human Rights and the United Nations Convention on the Law of the Sea’ in JI Charney, DK Anton (eds), *Politics, Values and Functions: International Law in the 21st Century: Essays in Honor of Professor Louis Henkin* (Martinus Nijhoff 1997); B Vukas, ‘Droit de la mer et droits de l’homme’ in G Cataldi (ed), *The Mediterranean and the Law of the Sea at the Dawn of the 21st Century* (Bruylant 2002); S Cacciaguidi-Fahy, ‘The Law of the Sea and Human Rights’ (2007) 19 *Sri Lanka J Intl L* 85; T Treves, ‘Human Rights and the Law of the Sea’ (2010) 28 *Berkeley J Intl L* 1; E Papastavridis, ‘European Convention on Human Rights and the Law of the Sea: The Strasbourg Court in Unchartered Waters?’ in M Fitzmaurice, P Merkouris (eds), *The Interpretation and Application of the European Convention of Human Rights* (Martinus Nijhoff 2013) 117; I Papanicolopulu, ‘Human Rights and the Law of the Sea’ in DJ Attard, M Fitzmaurice, NA Martinez (eds), *The IMLI Manual on International Maritime Law*, vol I (Oxford 2014) 509.



case and those other cases, the most critical one being the difference in terms of the gravity of the offence allegedly committed by the accused'.³⁹

The *Enrica Lexie* case has therefore shown the limits of 'considerations of humanity' in addressing law of the sea disputes. This phrase may work well in cases where there are the rights of people on one side only to consider. However, it presents drawbacks when there are the rights of two opposing sides, each of which claims considerations of humanity, to consider and balance. 'Considerations of humanity', in fact, does not by itself alone allow the judge to operate a balancing of the different 'humans' and their interests involved in the case.⁴⁰

This limit makes it more urgent that law of the sea judges go the extra mile and boldly add human rights and their lexicon to their case law. It is in fact only human rights law that not only provides for the protection of the rights of individuals, in application of the principles of humanity first recalled by the ICJ in the *Corfu Channel* case, but also allows the balancing of competing interests of humans and provides methods for deciding which prevails. It remains to be seen whether the arbitral tribunal that has been seised with the merits of the case will seize the challenge to clarify and further develop the law in this respect.

³⁹ *Enrica Lexie* (n 1) Declaration of Judge Paik, para 7.

⁴⁰ A different balancing act that the case may require would be the balancing of the rights of the victims against the immunity which, according to Italy, should be granted to the marines and would be the basis for the exclusive jurisdiction of Italy.