THE FIGHT AGAINST PIRACY AND THE ENRICA LEXIE CASE

by

Angela Del Vecchio *

SUMMARY: 1. The current problems encountered by the international community in the fight against piracy. 2. Legal aspects of the dispute between Italy and India in connection with the *Enrica Lexie* incident. Conflict of jurisdiction between Italy and India. 3. The applicability of piracy law to the *Enrica Lexie* case. 4. Checking the applicability of the theory of sovereign functional immunity. 5. Some reflections on India's violation of the international rules on diplomatic immunity. 6. The compulsory dispute resolution means that can be used to settle the dispute between Italy and India concerning the law of the sea. Compulsory arbitration under Annex VII of UNCLOS. 7. Examination of the possibility of recourse to the International Court of Justice to resolve the dispute on the applicability of sovereign functional immunity to the two Italian marines. Final considerations.

1. The current problems encountered by the international community in the fight against piracy.

The resumption of new forms of piracy, which appeared to have been totally defeated and relegated to the past, is a direct consequence of crises that have engulfed some costal States, in particular Somalia, considered by the international community as belonging to

the category of so-called "failed States", in other words, States that are unable to control their own territory and population and hence to also prevent acts of robbery at sea ([1]).

In the wake of the strengthening of international patrols off the coast of Somalia, the phenomenon of Somali piracy has gradually found itself pushed further out on to the high seas beyond the Horn of Africa, reaching as far as south of the Seychelles and east of India ([2]). It has also developed in other geographic areas, for example the Gulf of Guinea, mainly because of the enormous financial flows that the pirates are guaranteed from the payment of ransoms. It is clear that combating piracy is of interest not only to States but also to ship owners, charterers, traders, brokers, freight forwarders, investors, ship builders, financial institutions and insurers, in short, all those who have a stake in the security of maritime navigation. They, like the States and perhaps even more so than the States, have their interests hurt by piracy and in the event of a dispute breaking out, the issue arises as to what solutions are most appropriate to rapidly resolving it in a manner that is also fair and impartial.

In this regard one can observe a trend that tends to favour recourse to arbitration or an international court or tribunal to resolve issues that diplomatic means fail to settle. Certainly, non-compulsory methods of dispute resolution like negotiation, mediation etc. appear at times to private operators to be more concerned with protecting the interests of the States rather than those of other subjects and actors involved in the international community. That said, the decision to seek judicial settlement is frequently preferred to other means because increasingly often the protection of the rights of non-State actors, individuals and legal persons ([3]) is guaranteed in numerous international treaties through

---

[1] See, amongst others, O.C. IHEDURU, *Globalization, state failure and maritime insecurity in West Africa*, in *Ocean Yearbook*, 2007, pp. 475-504; P. PUSTORINO, *Failed States and International Law: The Impact of UN Practice on Somalia in Respect of Fundamental Rules of International Law*, in *German Yearbook of International Law*, 2010, pp. 727-752.

[2] On the extension of the areas at risk from piracy, see "*BMP4 Best Management Practices for Protection against Somalia Based Piracy*" (Version 4 – August 2011), a document drawn up on the basis of IMO recommendations and available online at http://www.mschoa.org/bmp3/Documents/BMP4%20low%20resolution%20(3).pdf.

[3] See *ex plurimis: Non-State Actors and Authority in the Global System*, R.A. HIGGOT, G.R.D. UNDERHILL, A. BIELER (eds), London, 1999; A. CLAPHAM, *Human Rights Obligations of Non-State Actors*, Oxford, 2006; A. DEL VECCHIO, *International Courts and Tribunals between Globalisation and Localism*, The Hague, 2013, p. 5 and 119 ss.

recognition of rights of access to the most recently established international courts and tribunals.

At times however, even in traditional disputes between States, recourse to arbitration or an international court or tribunal currently seems to be the tool best suited to resolving complex conflicts of interest in which feelings of public opinion run high in the States concerned and for the settlement of which diplomatic means appear to be ineffective.

2. Legal aspects of the dispute between Italy and India in connection with the Enrica Lexie *incident. Conflict of jurisdiction between Italy and India.*

A demonstration of the suitability if not the necessity of resorting to arbitration or to an international court to settle disputes that are complex from a political standpoint is afforded by precisely the one that has arisen between Italy and India in the aftermath of the incident that occurred on 15 February 2012 off the coast of the Indian State of Kerala. Following the incident two Italian Navy marines, Massimiliano Latorre and Salvatore Girone, on duty aboard the oil tanker *Enrica Lexie* as an anti-piracy measure, were charged with having caused the death of two Indian fishermen, who had been mistaken for pirates. To date diplomatic means to resolve the matter have not borne fruit and are not likely to despite the length of time that has passed, due also the strength of public feeling about the case. Accordingly, recourse to a compulsory means of dispute resolution would appear worthy of particular consideration.

In reality, the facts of the dispute pose some legal questions of significant complexity, chief among which is what State has jurisdiction to adjudicate in relation to the criminal act, whether Italy or India, on the basis of the area of the sea that the incident occurred in and how the incident is to be legally classified. Another delicate issue concerns the applicability or not of the sovereign functional immunity of the Italian marines as organs of the State.

In the search for the solution to the many issues raised by the incident and hence, first and foremost, which State has jurisdiction in the matter, it is necessary to consider the facts at the origin of the dispute, which as aforesaid arose following what was thought to be a pirate attack in waters off the coast of the Indian State of Kerala. It is important to

stress that there is agreement between the parties on the point: in fact, in this regard in paragraph 20 of its judgment no. 4542 of 29 May 2012 ([4]) the Court of Kerala states that "*it can be safely concluded that the incident alleged in Ext. P2 is within the CZ/EEZ*" ([5]).

That the incident occurred in that particular location is confirmed in the Indian Supreme Court judgment of 18 January 2013 ([6]), and this dual and repeated finding by the Indian courts is of particular importance because ruling out that the incident happened in Indian territorial waters means that the rules of the international law of the sea become applicable to resolving the case, in particular those set forth in the 1982 United Nations Convention on the Law of the Sea (UNCLOS). That convention is the cornerstone of international maritime law and also largely reflects customary law in the matter.

As regards the case in point, one must consider firstly article 33 UNCLOS, which provides that in a zone contiguous to its territorial sea the coastal State may exercise the control necessary to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea ([7]). The charges in India that the two Italian marines, Massimiliano Latorre and Salvatore Girone, are facing do not in any way concern an infringement of fiscal, immigration or sanitary law committed within India's territory or territorial sea but criminal liability for acts committed on board a ship flying the Italian flag in waters subject to the rules on navigation on the high seas.

---

[4] See High Court of Kerala, judgment n. 4542 of 29th May 2012, paragraph 20 at http://highcourtofkerala.nic.in

[5] In paragraph 18 of its judgment the Court of Kerala carefully examined the waters in which the incident occurred, commencing from the premise that "*From the pleadings, it is clear that in addition to the dispute regarding the exercise of jurisdiction over the petitioners 1 and 2, there is some dispute regarding the place of incident as well*" and the Court adds that "*the place of occurrence would be within the Contiguous Zone of India (hereinafter referred to as CZ) which overlaps with the Exclusive Economic Zone (hereinafter referred to as EEZ)*".

[6] See paragraph 84 of the Indian Supreme Court's judgment (at http://supremecourtofindia.nic.in), stating as follows: "*Admittedly, the incident took place at a distance of about 20.5 nautical miles from the coastline of the State of Kerala, a unit within the Indian Union. The incident, therefore, occurred not within the territorial waters of the coastline of the State of Kerala, but within the Contiguous Zone, over which the State Police of the State of Kerala ordinarily has no jurisdiction*".

[7] On the powers of the coastal State in its contiguous zone according to the literature, see amongst others D.P. O'CONNELL, *The International Law of the Sea*, Oxford, 1984, p. 745 ss.; H. PAZARCI, *Le concept de zone contiguë dans la Convention sur le droit de la mer de 1982,* in *Revue belge de droit international, 1984-85*, p. 249 ss.*;* I. BROWNLIE, *Principles of Public International Law*, IV ed., Oxford, 2003, p. 192 ss.; B. CONFORTI, *Diritto internazionale*, IX ed., Napoli, 2013, p. 285 ss.; N. RONZITTI, *Introduzione al diritto internazionale*, 4th ed., Turin, 2013, p. 115 ss.

Therefore, it would not appear that the powers that a coastal State can exercise in the contiguous zone under international law are relevant in the present case.

Accordingly, one must refer to the rules governing exclusive economic zones (EEZ) in as much as India, exercising the rights granted to coastal States under UNCLOS, has established a 200-mile EEZ off its coast. Consequently, the rules on contiguous zones and those on exclusive economic zones overlap in the waters where the *Enrica Lexie* incident occurred, as moreover acknowledged by the Court of Kerala in its judgment.

Therefore, one must apply article 56 UNCLOS, which provides that in its EEZ the coastal State has sovereign rights for the purpose of exploiting and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil ([8]) and other rights not relevant in the present case. Nonetheless, pursuant to the subsequent article 58, in that same zone alongside the rights enjoyed by a coastal State, the other States continue to be guaranteed the fundamental freedoms of the highs seas including in particular freedom of navigation. Should a conflict arise between the interests of the coastal State and those of any other State, article 59 UNCLOS provides that the conflict is to be resolved on the basis of equity and hence not automatically in favour of the coastal State's jurisdiction but in light of all the relevant circumstances and taking into account the respective importance of the interests involved to the parties.

Both Italy ([9]) and India ([10]) are duty bound to observe those provisions following their ratification of UNCLOS despite the fact that in the course of the dispute under consideration here India has declared that its domestic Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritimes Zones Act 1976 provides for other and additional rights of the coastal State in the CZ or EEZ and that consequently in its own domestic legal system it is the provisions of that Act and not the above mentioned

[8] The Court of Kerala went on to hold that as the incident had involved two Indians who had been fishing in the EEZ, the exclusive jurisdiction of the coastal State under article 56 UNCLOS was applicable because "*The coastal state is entitled to enact any law which is not incompatible with the provisions of the Convention for maintaining law and order, and for exercising and protecting the rights including the lives of the persons employed/engaged in exercise of the above rights*" . See paragraph 33 of the Court of Kerala's judgment W.P.(C). No 4542 of 2012.

[9] Italy ratified UNCLOS on 13 January 1995.

[10] India ratified UNCLOS on 29 June 1995.

international rules that are to apply. It should also be noted that when implementing that Act, in Statutory Order No. 67/E of 27 August 1981 India extended the reach of its Penal Code and Criminal Procedure Code to the CZ, the EEZ and the continental shelf, equating them with its territory as regards the law applicable therein ([11]).

That position contrasts with the international obligations that India contracted through ratification of UNCLOS vis-à-vis the other States Parties. And in particular as against Italy. In reality, to comply with its convention obligations India should have amended the previously applicable domestic law and hence the rules contained in the 1976 Act and, even more so, should not have introduced new conflicting legislation. For their part, all organs of the Indian State, including the judiciary, should have respected and must respect the provisions of UNCLOS, also in view of the fact that the Indian legal system itself recognises a duty to interpret its own domestic law in a manner consistent with the international obligation that the country contracts. In this regard there is also a line of well established Indian Supreme Court caselaw, which the judgment of 18 January 2013 makes no reference to, according to which principles enshrined in a codifying convention that reproduce customary law constitute "*part of the common law of India*" and as such are to be respected by the internal organs of the State ([12]).

Furthermore, again on the topic of performance of treaties, the stance adopted by India would also appear to go against general international law, which provides that a State Party to a treaty can under no circumstances in its relations with other States Parties demand compliance with its domestic law that does not take account of the international obligations assumed. Such an approach is a breach of both customary law, especially *pacta sunt servanda*, and treaty law including the rules set forth in the Vienna Convention on the Law of Treaties, article 27 of which provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. Against this background, it is truly surprising that in the *Enrica Lexie* case the Indian

[11] In the Court of Kerala's judgment one can read as follows in paragraph 22: "[…] *in relation to an incident that occurs in the CZ/EEZ of India, the provisions of ICP and CrPc would be applicable, as if it occurred within the territory of India".*

[12] See, for example, Indian Supreme Court judgment *M.V. Elisabeth & Others v. Harwan Investment and Trading Pvt. Ltd,* 1993, at http://indiankanoon.org/doc/1515069/.

Supreme Court continues to insist that India's domestic law takes precedence over international law ([13]).

Moving on from the above indispensable premises in order to find a solution to the first issue, i.e. which State, Italy or India, has the right to try the marines for what happened off the coast of Kerala, one cannot escape from UNCLOS since both parties have acknowledged that the incident took place in the CZ/EEZ, which is an area subject to the law of the high seas, leaving aside India's demand that its own domestic law be applied in those waters. In particular, one must examine the provisions of article 58 UNCLOS as well as those of article 86 in Part VII dealing with the high seas, acknowledging that the articles in question does not entail any abridgement of the freedoms enjoyed by all States in exclusive economic zones, including freedom of navigation.

Again in that Part VII, of particular importance for the present case is the general rule enshrined in article 92 that grants exclusive jurisdiction over ships on the high seas to the flag State. That general rule is reaffirmed and expanded upon in the subsequent articles, especially in article 97, which provides that in the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, the State with jurisdiction to institute penal or disciplinary proceedings against such a person is either the flag State or the State of which such person is a national. Bolstering the jurisdiction of the flag State is another provision of paragraph 3 of that same article clarifying that an arrest or detention of the ship, even as a measure of investigation, can be ordered solely by authorities of the flag State, thereby further confirming the sole jurisdiction of the flag State over the ship.

Moreover, on the specific applicability of article 97 to the case under consideration here, it should be noted that different opinions have been expressed based on whether the incident between the *Enrica Lexie* and the Indian fishing boat, believed–wrongly or otherwise–to be a pirate vessel, can be classified as an "incident of navigation".

[13] The Indian view is that "*in case of conflict between the two, it is the municipal law which would prevail*". See paragraph 75 of the Indian Supreme Court's judgment of 18 January 2013.

In this regard the Indian Supreme Court maintains that article 97 is inapplicable because in its view the definition of incident of navigation cannot cover "*a criminal act in whatever circumstances*" ([14]) but the word incident "*literally means 'an event or happening, especially one causing trouble'. Generally it occurs unexpected or unanticipated. Thus speaking, an 'incident of navigation' would generally mean an event that has a bearing on the navigation*" ([15]). It would seem that incident entails some unexpected or unforeseen event having an impact on navigation, for example, the breaking of submarine telegraph or telephone cables, in any event damage affecting the ship itself or the installation of other States and the like ([16]).

As against that restrictive interpretation adopted by the Indian Supreme Court, there is a broader interpretation of article 97 according to which "*any other incident of navigation*" would cover all cases of maritime casualty, an interpretation that finds support also in article 221.2 UNCLOS. Although in the context of measures to avoid pollution arising from maritime casualties, maritime casualty is defined as "*a collision of vessels, stranding or other incident of navigation, or other occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo*".

That broad interpretation has been adopted also by the IMO, in particular in the Code for the Investigation of Maritime Casualties and Incidents, which provides that "*marine casualty*" covers any event or sequence of events that has resulted in, amongst others, the death of or serious injury to a person ([17]). In consideration thereof, the expression "*other*

---

[14] *Idem*, paragraphs 94-95.

[15] See paragraph 26 of the Court of Kerala's judgment W.P.(C). No 4542 of 2012, stating as follows: " *This is a case of firing against fishermen. Such action cannot be justified as an "incident of navigation", so as to attract Article 97 read with Article 58 (2) of the UNCLOS. Therefore, this is a case which is not covered by Article 97 of UNCLOS*".

[16] See M. H. NORDQUIST (ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. III, Dordrecht, 1995, p. 168; B. CONFORTI, *In tema di giurisdizione penale per fatti commessi in acque internazionali*, available at www.sidi-isil.org. p. 6.

[17] See the IMO Code for the Investigation of Maritime Casualties and Incidents (resolution A.849(20) as amended by resolution A.884(21), article 4 of which defines "marine casualty" "*an event that has resulted in any of the following:*

.1 the death of, or serious injury to, a person that is caused by, or in connection with, the operations of a ship; or

.2 the loss of a person from a ship that is caused by, or in connection with, the operations of a ship; or

.3 the loss, presumed loss or abandonment of a ship; or

incident of navigation" should be viewed as an open-ended one capable of encompassing anything that happens in the course of navigation, including therefore also collisions on the high seas and action taken in self defence against real or suspected piracy attacks.

As further support for the above interpretation, on the basis of which the flag State enjoys exclusive jurisdiction, one can also cite article 94 UNCLOS, paragraph 7 of which includes among the obligations of the flag State that of causing an inquiry to be held into every marine casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State or serious damage to ships or installations of another State or to the marine environment. The above is without prejudice to the final sentence of paragraph 7, which states that the "*flag State and the other State shall cooperate in the conduct of any inquiry held by that other State into any such marine casualty or incident of navigation*". Regarding that provision, in reality appearing at the very end of article 94 dedicated entirely to the duties of the flag State, it should be stressed that it deals only with "cooperation" with inquiries and certainly not recognition of the exercise of criminal jurisdiction by the other State involved and that the opening of any inquiries is a matter solely for the flag State. Article 94 does not make any provision for jurisdiction of the State whose citizens have been killed or seriously injured.

The combined provisions of articles 94 and 221 UNCLOS must be appropriately taken into account in order to arrive at an interpretation – more widely shared in the international community – of the word incident in article 97 according to which in the case of a collision or *any other incident of navigation on the high seas* involving the penal responsibility of the master or of any other person in the service of the ship, the State with jurisdiction to institute penal or disciplinary proceedings against such a person is solely the flag State.

That said, even if one were to insist on the inapplicability of article 97 to the case under consideration, it would be difficult to dispute the application of the general rule contained

---

.4 material damage to a ship; or

.5 the stranding or disabling of a ship, or the involvement of a ship in a collision; or

.6 material damage being caused by, or in connection with, the operation of a ship; or

.7 damage to the environment brought about by the damage of a ship or ships being caused by, or in connection with, the operations of a ship or ships.".

in article 92, which, as highlighted above, states: "*Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas*". That provision, in the absence of specific treaties between Italy and India, may in reality be considered as sufficient by itself to preclude the application of the principle of passive nationality in contrast to what India claims ([18]). On the basis of that principle a State has the right to protect its own citizens abroad and "*if the territorial State of the locus delicti, neglects or is unable to punish the person causing the injury, the State of which the victim is a national is entitled to do so if the persons responsible come into his power*" ([19]). Ever apart from the fact that the principle of passive nation would not seem to be generally embraced by the international community, in any event it is surprising that the Court of Kerala would hold it to be applicable in the *Enrica Lexie* case. This is because Indian criminal legislation contains no provision in this regard ([20]) and even more so because the Court itself acknowledged that criminal proceedings had been instituted in Italy against the two marines in relation to the acts they had been charged with ([21]). Therefore, it is recognised that Italy is ready to proceed and is also fully capable of adjudicating on the crime.

Neither would the Indian Supreme Court's reference to the 1927 judgment of the Permanent Court of International Justice (PJIC) in the *Lotus* case ([22]) be sufficient to

---

[18] See paragraph 34 of the Court of Kerala's judgment W.P.(C). No 4542. See also J. W. DAVIDS, *India v. Italy: The Indian Supreme Court Decides*, in *The (New) International Law, 31.1.2013* http://thenewinternationallaw.wordpress.com/2013/01/30/india-v-italy-the-indian-supreme-court-decides/.

[19] The Court of Kerala defines the principle of passive nationality in the previously mentioned paragraph 34 of the judgment.

[20] In fact, the article 4 of the Indian Penal Code states only: "*The provisions of this code shall apply also to any offence committed …2) by any person on any ship or aircraft registered in India, wherever it may be"*. See also article 188 of the Indian Code of Criminal Procedure.

[21] See paragraph 30 of the judgment of the Court of Kerala W. P. (C). No 4542.

[22] See *The Case of the S.S. Lotus*, (French Republic v. Turkish Republic), judgment of 7 September 1927, PCIJ, Series A No 10, in which the following was stated in light of the general principles of international law in force at the time: " *It must therefore be held that there is no principle of international law, within the meaning of Article 15 of the Convention of Lausanne of July 24th, 1923, which precludes the institution of the criminal proceedings under consideration. Consequently, Turkey, by instituting, in virtue of the discretion which international law leaves to every sovereign State, the criminal proceedings in question, has not, in the absence of such principles, acted in a manner contrary to the principles of international law within the meaning of the special agreement*".

It might be worth remembering that the case arose out of a collision on the high seas between the French ship *Lotus* and the Turkish ship *Boz-Kourt*, resulting in the death of eight Turkish citizens who were on the Turkish ship. The Turkish authorities had tried and convicted the French lieutenant Demons for

exclude the application of article 97 and hence also the jurisdiction of the flag State over the incident under consideration here. That dispute arose between France and Turkey following a collision that occurred on the high seas in 1926 and in resolving it the PCIJ applied international treaty provisions that have by now been superseded ([23]) and rendered ineffective by subsequent caselaw and especially UNCLOS. According to a widely held view among legal scholars ([24]), article 97 was included in UNCLOS precisely to avoid a repetition in the future of cases similar to that of the Lotus, in which the proper jurisdiction had not been adequately ascertained.

3. The applicability of piracy law to the Enrica Lexie *case.*

Again with the aim of identifying which State has jurisdiction to try the two Italian marines Latorre and Girone, another aspect of the dispute needs to be considered: whether in addition to the rules governing incidents that occur during the course of navigation on the high seas one must in addition take account of the rules governing the fight against piracy. In this regard, it is important to note that both judgments of the Court of Kerala and the Indian Supreme Court ([25]) recognise that the crime that the two marines are charged with in India was committed in a piracy context. Therefore, in establishing which State has jurisdiction to try the offenders, it is also necessary to specifically refer to the UNCLOS provisions on combating piracy.

Piracy, as defined in article 101 UNCLOS, implies acts of violence, detention, or depredation, committed for "private ends" by the crew or the passengers of a ship against another ship on the high seas. The definition in article 101 also lays down a series of

---

manslaughter, as he was the officer on watch duty on the Lotus at the time of the incident. In literature for a recent analysis of the case, see A. VON BOGDANDY, M. RAU, *The Lotus*, in R. WOLFRUM (Ed.), *Max-Plank Encyclopedia of Public International Law*, Oxford, 2008, available at: <http://www.mpepil.com>online edition, updated as of June 2006.

[23] The case was based on the application of the *Convention relative à l'établissement et à la compétence judiciaire*, signed in Lausanne on 24 July 1923, which in matters of jurisdiction referred to the general principles of international law governing the matter at the time. It should also be noted that the principle stated in the *Lotus* case was not incorporated into the International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collision and Other Incidents of Navigation of 10 May 1952 (articles 1 and 3), the 1958 Geneva Convention on the High Seas (article 11) or UNCLOS.

[24] A. Von BOGDANDY, M. RAU, "*Lotus, The*", cited in footnote 22, paragraph 20; N. RONZITTI, "*The Enrica Lexie Incident. Law of the Sea and Immunity of State Officials Issues*", in *Italian Yearbook of International Law*, vol. XXII, 2012, p. 15 ss.

[25] See paragraph 100 of the judgment of the Indian Supreme Court of 18 January 2013.

criteria that must be fulfilled before an act can be considered as piracy, chief among which is that the acts of violence, including attempts, must be committed by private individuals against other ships. The second important criterion is that the acts of piracy must have occurred on the high seas or in any other area of the sea that is not subject to the jurisdiction of a particular State ([26]). Article 102 UNCLOS expressly provides that piracy does not include attacks committed by warships or ships on government service unless the crew has mutinied and taken control of the ship. Also excluded in any act with a political motive, which on the contrary is an element of a terrorist attack ([27]), because the aggression must be motivated by purely "private ends" ([28]). Therefore, the motive that sets piracy apart is the private ends associated with the crime as opposed to the public-political ends of terrorist attacks. That aspect has been examined in depth by some domestic courts, for example, the Belgian Supreme Court in the 1986 *Castle John* case in which some Greenpeace militants were convicted because their actions had been "*purely in support of a personal point of view concerning a particular problem, even if they reflected a political perspective*" ([29]).

In reality, it is difficult that the acts of piracy that frequently occur in the Gulf of Aden and in the Indian Ocean, carried out by small speedy vessels against commercial shipping, especially oil tankers, can be considered as terrorist attacks. In general the

---

[26] See, in this regard, *Report of the International Law Commission to the General Assembly, 8th Session*, in *Yearbook ILC*, 1956, p. 282.

[27] The crime of terrorism is sharply different from the crime of piracy and in this regard it might be worth considering what was stated by the Appeals Chamber of the Special Tribunal for Lebanon in relation to the essential features of a customary rule concerning the crime of terrorism: "*As we shall see, a number of treaties, UN resolutions, and the legislative and judicial practice of States evince the formation of a general opinio juris in the international community, accompanied by a practice consistent with such opinio, to the effect that a customary rule of international law regarding the international crime of terrorism, at least in time of peace, has indeed emerged. This customary rule requires the following three key elements: (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element" ([27]).* See *Prosecutor v. Ayyash et al., Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11-01 (STL AC, 16 Feb. 2011)*, paragraphs 83,85.

[28] For an analysis of these elements see S. NANDAN, S. ROSENNE, *United Nations Convention on the Law of the Sea 1982, A Commentary*, vol. III, Leiden, 1995, p. 196 ss.; on the difference between piracy and terrorism, see, amongst others, H.E.J. JESUS, *Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects*, in *Int. Journ. Mar. Coast. L.*, 2003, p. 363 ss.

[29] See *Castle John and Netherlandsee Stichting Sirius v. NV Nabeco and NV Parafin*, in *ILR*, 1994, p. 537 *et seq*.

objective pursued in those cases is capturing the ship and holding the crew hostage with a view to then subsequently demanding a huge ransom for their release. The above actions are normally perpetrated for "private ends", even if at times in order to justify them the Somali pirates claim 'noble' motives like acting to defend the biological resources of Somali waters from overexploitation by fishing boats of other States or to defend the environment against the pollution caused by Western multinational companies.

In such a delicate situation, the interpretation given by the vessel protection detachment on board the *Enrica Lexie* in pirate-infested waters to the actions of the Indian vessel (which continued to head straight towards the Italian oil tanker without heeding the warnings given and evasive measures taken) would appear to have been entirely justifiable. The incident can thus be placed within the context of piracy, as moreover recognised by the Indian Supreme Court itself, because the behaviour of the Indian vessel fell within the scope of article 101 UNCLOS.

In light of the above it would thus seem possible to apply article 100 UNCLOS to the present case, an article that lays down a duty for States to cooperate (more specifically "*cooperate to the fullest extent*") in the repression of piracy on the high seas. It follows that in the case of the *Enrica Lexie* incident, leaving aside what was said before in relation to article 97, on the basis of article 100 it would have been best if Italy and India had closely cooperated with a view to establishing which of the two States had jurisdiction. However, it is a fact that India saw fit not to cooperate with Italy and right from the very beginning asserted that it had jurisdiction. Indeed, through a stratagem, it forced the Italian ship to leave EEZ waters where freedom of navigation exists and to enter Indian territorial waters ([30]).

Thus as regards the first question initially posed as to which State has jurisdiction to adjudicate on the *Enrica Lexie* incident, it would seem that Italy's demand that it be the State to try the two marines is well founded if one considers the waters that the incident

[30] In paragraph 7 of the judgment of the Court of Kerala, W. P. (C) No. 4542 of 2012, it is acknowledged that the Italian ship was forced to enter Indian territorial waters. A similar approach was taken on 12 October 2013 by the coastguard of the Indian state of Tamil Nadu against a ship owned by an American company flying the flag of Sierra Leone, what provided escort services to merchant shipping sailing in the Indian Ocean. The coastguard induced the patroller to cross the 12 nautical mile limit demarcating Indian territorial waters and then proceeded to arrest the ten crew members and twenty-five contractors, accusing them of having illegally entered Indian territorial waters with arms and munitions aboard.

occurred in, the rules on piracy, the combined provisions of the UNCLOS articles dealing with the jurisdiction enjoyed by flag States over ships on the high seas (articles 58, 94, 97) and the duty for States to cooperate in relation to crimes of piracy (article 101).

However, Italy's claim continues to be disputed by India, which on the basis of its own domestic law believes that it has exclusive jurisdiction in the matter ([31]), basing its arguments for the most part on the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA).

In fact, initially the Court of Kerala and subsequently, after the judgment of the Supreme Court, the Indian authorities whose task it is to draw up the charges against the two marines have made continuous and specific reference to the said 1988 SUA Convention and the SUA Act implementing it in India. That Convention, concluded after the Achille Lauro incident in order to combat terrorism, applies to ships navigating beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States ([32]) and covers acts of violence committed "*unlawfully and intentionally*" against persons on board a ship other than a warship or comparable vessel. The acts in question must have endangered safe navigation or have injured or killed a person ([33]). In such cases any States Parties to the Convention may establish their jurisdiction if the crime is committed against one of their ships or against persons on board one of their ships.

There are no express provisions in the Convention regarding military personnel on board commercial ships in the exercise of their official duties although in this regard it is worth referring to article 3 of the 2005 Protocol to the Convention, which tellingly provides that the Convention does not apply to "*the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law*".

Not considering the foregoing and in an effort to establish the jurisdiction of the domestic courts to try the two marines, the Indian authorities have continued to cite the SUA

[31] See paragraphs 99-101 of the Indian Supreme Court's judgment of 18 January 2013.
[32] See article 4 SUA Convention.
[33] See article 3 SUA Convention.

Convention despite the fact that in its judgment of 18 February 2013 the Indian Supreme Court had indicated that the *Enrica Lexie* case had to be resolved by applying solely the provisions of UNCLOS and the Indian Penal Code.

In light of the conflicting claims as to jurisdiction, there is no doubt that a dispute has arisen in that regard between Italy and India. To settle that international dispute it would be best to leave aside diplomatic solutions and establish which compulsory international dispute resolution mechanism, i.e. arbitration or an international court or tribunal, should be resorted to.

4. Checking the applicability of the theory of sovereign functional immunity.

In order to answer the second question initially posed as to whether or not the two Italian marines Latorre and Girone could have sovereign functional immunity on the basis that they are organs of the State, one must determine whether the claims that the Italian courts have jurisdiction are well founded.

In that regard it should be noted that in the judgment of the Court of Kerala it is stated that the two Italian marines were on board the *Enrica Lexie* carrying out *iure privatorum* activities, hence not ones falling with the scope of State functions since, according to the Indian judges, the military team was under the authority of the captain of the ship and the shipowner paid a fee to the Ministry of Defence in return for the service on board of the armed vessel protection detachment ([34]).

Unlike the Court of Kerala, the Indian Supreme Court in its judgment of 18 January 2013 did not rule on the point and referred the issue to the special court to be set up ([35]). However, even though the Indian Supreme Court did not examine the problem of functional immunity, the view expressed by the Court of Kerala that classified the duties carried out on board the ship as private ones must be examined in order to rebut the underlying arguments, also in light of the fact that they could well be raised again before the special court.

[34] See paragraph 10 of the judgment of the Court of Kerala W. P. (C) No. 4542 of 2012.
[35] *Idem*, paragraph 101.

First and foremost, it should be clarified that the activities carried out by the two marines on board the ship were authorised and governed by Italian Law Decree No. 107 of 12 July 2011 on international missions, converted by Parliament with amendments into Italian Law No. 130 of 2 August 2011 ([36]). This law provides that the Ministry of Defence may sign agreements ([37]) with private Italian shipowners (members of the Confitarma, Federpesca and other shipowners' associations) for the protection of ships flying the Italian flag that sail through international waters most at risk from piracy ([38]). In enacting that law Italy sought to implement what had been repeatedly requested by the UN Security Council in numerous resolutions, the IMO and the European Council within the framework of a 2008 Joint Action to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast ([39]).

Certainly, the use of military personnel aboard merchant ships sailing through areas of the sea subject to frequent pirate attacks must be clearly distinguished from the piracy prevention and repression duties assigned to warships passing through the same areas and carried out, for example, by the European Union through naval vessels belonging to the navies of the Member States. In fact, only warships and duly authorized ships clearly marked and identifiable as being on government service ([40]) can be assigned the exclusive task of hunting pirates while the task of armed teams on board a merchant ship is to protect the ship against acts of piracy.

Therefore, in conformity with this division of tasks, Italian Law No. 130/2011 provided that vessel protection detachments serving on board merchant ships to assure security of navigation must act in full compliance with international law and receive orders not from the captain of the ship but their own military commanders. In fact it was provided that the

[36] See *Official Gazette of the Italian Republic* No. 181 of 5 August 2011, p. 5 *et seq*.

[37] See article 1 of Law Decree No. 107 of 12 July 2011.

[38] Further to article 5 of Law Decree No. 107 of 12 July 2011 the Ministry of Defence subsequently issued regulations governing the use of security guards on merchant ships flying the Italian flag that pass through international waters at risk of piracy, published in *Official Gazette of the Italian Republic* No. 75 of 29 March 2013.

[39] See European Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation, in *OJEU* L. 301 of 12 November 2008.

[40] See articles 106 and 110 UNCLOS.

head of each vessel protection detachment has "exclusive responsibility for military action against piracy" ([41]).

In this framework military personnel on board merchant ships are to be considered as troops abroad and their actions, according to international law, are imputable to their State such that no coercion may be exercised against the said personnel. Therefore, any unlawful conduct that they commit gives rise to responsibility for their State ([42]), which may be called to answer internationally by the damaged State, except in cases where it is proved that the military personnel concerned acted outside the scope of their duties, in particular, breaching rules of engagement or orders received from their military superiors ([43]).

It necessarily follows that in the case of a dispute arising, establishment of a State's responsibility for the actions of its officials is not a matter for the domestic courts of another State but, in line with the fundamental legal principle of *par in parem non habet iurisdictionem*, solely for an impartial international court.

Moreover, on the subject of the functional immunity of State organs, one must bear in mind international caselaw of particular interest. In particular, it is worth dwelling on what was stated by the Appeals Chamber of the International Tribunal for the Former Yugoslavia (ITFY) in the *Prosecutor v. Blaškič* case ([44]) as follows:

"*[State] officials are mere instruments of a State and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of the State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State of whose behalf they act: they enjoy so-called 'functional immunity'. This is a well-established rule of customary international law going back to the eighteenth and nineteenth centuries, restated many times since. More recently,*

[41] See article 2 of Law Decree No. 107 of 12 July 2011.

[42] According to G. MORELLI, *Diritto processuale civile internazionale*, Milan, 1962, p. 201, the State would be "obliged internationally to consider the activities carried out by the foreign organ in that capacity as activities of the State to which the organ belongs and not as activities of the individual who materially committed the acts" (translated from Italian).

[43] See I. BROWNLIE, *Principles of Public International Law*, 6th ed., Oxford, 2003, p. 423.

[44] See ICTY, *Prosecutor v. Blaškič*, (Objection to the Issue of Subpoena DucesTecum) IT-95-14-AR108, 110 , 29.10.1997, paragraph 38.

France adopted a position based on that rule in the Rainbow Warrior case ([45]). The rule was also clearly set out by the Supreme Court of Israel in the Eichmann case ([46])".

Indian caselaw is also consistent with that line of interpretation, as evidenced by the Indian Supreme Court's citation in its judgment of 18 January 2013 of a domestic precedent, according to which: "*The doctrine of sovereign immunity is based on international law. It is one of the rules of international law that a sovereign state should not be impleaded in the courts of another sovereign state against its will. Like all rules of international law, this rule is said to arise out of the consensus of the civilized nations of the world. All nations agree upon it. So it is part of the law of nations*" ([47]).

This did not however prevent the Indian Supreme Court from insisting that India had jurisdiction over the two Italian marines and it did not even consider the objection as to a lack of jurisdiction submitted in this regard by Italy ([48]). The Court explained the reasons for its attitude on the basis that there is no unanimous opinion among legal scholars ([49]) and no well established caselaw on the functional immunity of military personnel.

---

[45] See *Rainbow Warrior Case (New-Zealand v. France)*, France - New-Zealand Arbitration Tribunal, 30 April 1990. France claimed that the arrest by the New Zealand police of the two French agents who had sunk the Rainbow Warrior was unwarranted "*taking into account in particular the fact that they acted under military orders and that France [was] ready to give an apology and to pay compensation to New Zealand for the damage suffered (see the Ruling of 6 July 1986 of the United Nations Secretary-General, in United Nations Reports of International Arbitral Awards, vol. XIX, p. 213)*".

[46] The Supreme Court of Israel has *inter alia* lent its support that"*The theory of 'Act of State' means that the act performed by a person as an organ of the State - whether he was head of the State or a responsible official acting on the Government's orders - must be regarded as an act of the State alone. It follows that only the latter bears responsibility therefor, and it also follows that another State has no right to punish the person who committed the act, save with the consent of the State whose mission he performed. Were it not so, the first State would be interfering in the internal affairs of the second, which is contrary to the conception of the equality of States based on their sovereignty*"; see *International Law Reports*, Vol. 36, at pp. 308-09. However, after that passage the Appeals Chamber expressed its reservations concerning the *Act of State doctrine* for the likely purposes of not applying it to war crimes and crimes against humanity.

[47] See paragraph 66 of the Indian Supreme Court judgment citing some observations of Lord Denning M. R. in *Trendtex Trading Corporation vs. Bank of Nigeria* [(1997) 1 Q .B. 529].

[48] J. W. DAVIDS, *India v. Italy: The Indian Supreme Court Decides, cit.,* stating that the point in question is "*the most unfortunate part of the Supreme Court's judgement*".

[49] Among those that support functional immunity, see F. MUNARI, *Giurisdizione degli Stati in caso di delitti compiuti al di fuori del mare territoriale: spunti di riflessione tratti dal caso* Enrica Lexie *deciso dalla Corte Suprema indiana*, in *Il Diritto Marittimo*, 2013, pp. 273-274; N. RONZITTI, *L'immunità funzionale degli organi stranieri dalla giurisdizione penale: il caso Calipari,* in *Riv. Dir. Internaz.* , 2008, pp. 1033-1045 e dello stesso autore *Gli sviluppi delle missioni antipirateria: il caso della Enrica Lexie, addendum* a F. CAFFIO, N. RONZITTI, *La pirateria: che fare per sconfiggerla?* IAI, no. 44, April 2012;, D. AKANDE, S. SHAH, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, in *European Journal of Int. Law*, 2011, pp. 825-827; P. GAETA, *Extraordinary renditions e giurisdizione italiana nei confronti degli agenti statunitensi coinvolti nel c.d. caso Abu Omar,* in *Riv. Dir. Internaz.* 2013, p. 530 ss.

In effect, confirmation of the contrasting views that exist on functional immunity can be found in the caselaw of the Italian Supreme Court, which, initially in the *Calipari-Lozano* case with reference to the immunity of an American soldier facing charges, stated as follows;

"*Every independent and sovereign State is free to establish its own internal organisation and appoint the persons authorised to act on its behalf such that once an individual is deemed to be an official and his powers determined, his conduct constitutes the exercise of a public power and is attributable to the State thereby, without undue interference from the court of another State, giving rise solely to responsibility for the possible international wrongdoing to be enforced at the level of relations between the injured State and the responsible State, in furtherance of the organisational structure of the international community and respecting the reciprocal sovereignty between States (par in parem non habet imperium/iurisdictionem)*" ([50]).

Subsequently, however, in the *Abu Omar* case the Italian Supreme Court denied the existence of a rule of customary international law that grants functional immunity to the officials of a State on the grounds that in the case before there had been a violation of the rules that protect fundamental human rights, like those of the Egyptian imam Abu Omar not to be kidnapped and to be transferred to a country, Egypt to be precise, where questioning under torture is permitted and which he was effectively subjected to. The Italian Supreme Court thus stated as follows:

"*Well, in that situation to hold that a rule of customary law exists would not appear to be correct because there is no well established caselaw, no repeated and consistent official declarations by States and no unequivocal support among legal scholars. Precisely because of the uncertainty that surrounds this delicate aspect of international relations, States normally regulate the exercise of their jurisdiction over military personnel abroad through a SOFA (Status of Forces Agreement). One can thus conclude that the irregular way in which the matter is treated is such as to exclude recognition of a general rule. In fact, removing officials posted abroad from foreign jurisdiction is provided for in specific treaties, while in the absence of such treaties functional immunity is normally not recognised by domestic courts.*" ([51]) .

However, despite the lack of a uniform view among legal scholars and well established consistent caselaw, it would seem that over time a customary rule has come to be formed

---

[50] See Italian Supreme Court (Criminal Section I) judgment no. 31171 of 24 July 2008, *Lozano*, (translated from Italian).

[51] Translated from Italian. See Italian Supreme Court (Criminal Section V) judgment no. 46340 of 29 September 2012, p. 110 and Court of Appeal of Milan judgment of 1 February 2013, p. 34. In relation to the *Abu Omar* case there is also a judgment (no 40/2012 of 22 February 2012) of the Italian Constitutional Court regarding the need to protect official secrets.

in current international law in relation to the immunity for acts committed in the exercise of State duties. A rule that has its limitations as regards certain types of wrongdoing, whose punishability by domestic courts is possible under specific treaty provisions, and the types of activities carried out by State organs within the context of unauthorised missions. Finally, as evidenced precisely by the Italian Supreme Court in its *Abu-Omar* judgment, there would seem to be a recent further limit to functional immunity if what is involved is a gross violation of human rights.

In conclusion, the overall picture of the law in this area highlights a progressive erosion of the rule on functional immunity of state organs, to a large extent stemming from the limits to the operation of the rule itself that are often invoked. Therefore, it is arguable that the basis of Italy's exclusive jurisdiction in the *Enrica Lexie* case is best found in the international law of the sea, where it stands on more solid foundations.

5. Some reflections on India's violation of the international rules on diplomatic immunity.

At a certain point in the affair of the two marines the situation got more complicated from another standpoint because the question of diplomatic immunity entered the fray.

In order to ensure that Latorre and Girone would return to India at the end of a period of leave granted to the marines by the Indian Supreme Court so as to allow them to vote in elections in Italy, the Italian ambassador to India was asked to sign an affidavit. Subsequently, however, during that period of leave, on 11 March 2013 the Italian government announced that it would not be returning the two marines to India as a result of the Indian Supreme Court's decision in its judgment of 18 January 2012 to pass the matter to a special court to be set up to rule on the conflict of jurisdiction and on the merits of the case.

The Italian government justified its stance by claiming that returning the marines would breach some provisions of the Italian Constitution. Firstly, article 26 prohibiting the extradition of an Italian citizen except in cases specifically provided for in international treaties: it was argued that sending the two marines back to India would be tantamount to a *de facto* extradition. It was also noted that on the basis of Italian constitutional caselaw

it was forbidden to extradite Italian citizens to countries in which the crime that they were charged with could be punished by death. In India capital punishment exists for the crime of homicide.

Secondly, another well founded objection was violation of the constitutional principle that no case may be removed from a predetermined court but must be heard as provided for by law ([52]).

The announcement that the two marines would not be returning to India predictably caused uproar there. The Indian Supreme Court reacted by issuing an order restricting the freedom of movement of the Italian ambassador. As the latter had not honoured the affidavit, the Court took the view that he had forfeited his diplomatic privileges and immunity. To enforce that order the Indian Ministry of the Interior alerted the border police to prevent the ambassador from leaving the country ([53]).

Regarding this issue one must above all consider the official nature of the ambassador's action when signing the affidavit: in that instance he was acting as the official representative of the Italian State and he was certainly not binding himself personally but Italy.

Bearing in mind the above the Italian Supreme Court order preventing the ambassador from leaving India appeared to have no sound legal basis because the Indian reaction to whatever infringement might have been committed should have been directed not at the ambassador but at Italy, which in any case as a subject of international law enjoys immunity from the internal jurisdiction of other States, in accordance with customary international law and the provisions of the UN Convention on Jurisdictional Immunities of States and Their Property of 2 December 2004 ([54]).

From this standpoint it is rather surprising that the Indian Supreme Court asserted that the Italian ambassador had to answer personally for acts committed in the exercise of his functions. It is well known that there is a clear distinction in international law between

[52] See article 25 of the Italian Constitution.

[53] *Airports alerted to prevent Italian envoy from leaving country*, in *The Times of India*, 15 March 2013.

[54] On a formal level the New York Convention on Jurisdictional Immunities of States and Their Property will bind States only after its entry into force. However, to the extent that the Convention reproduces the general law on the matter, it is a sure point of reference for domestic courts.

the acts committed by a diplomatic agent in the exercise of his functions and those committed as part of his private life. The sending State is responsible for the former whereas for the latter, in accordance with article 31 of the Vienna Convention on Diplomatic Relations, the diplomatic agent enjoys immunity from the criminal jurisdiction of the receiving State, because for those acts he is subject to the exclusive jurisdiction of the sending State. As a result, a failure to honour the affidavit could in no way have caused the Italian ambassador to forfeit his immunity.

The above issue has already been resolved because following the return of the two marines to India the Supreme Court is no longer pursuing the Italian ambassador.

6. The compulsory dispute resolution means that can be used to settle the dispute between Italy and India concerning the law of the sea. Compulsory arbitration under Annex VII of UNCLOS.

On the basis of the analysis conducted thus far the question of the jurisdiction to try the two marines Latorre and Girone must be resolved solely within the context of UNCLOS. As it is a case of a conflict of jurisdiction between two domestic legal systems regarding events that occurred in international waters, the rules laid down in UNCLOS must necessarily apply, rules that are binding on both of the States since they ratified the Convention in 1995. It should be borne in mind that neither of the parties have ever doubted that it is an inter-State dispute, least of all India in accordance with what is expressly acknowledged in the above mentioned Indian Supreme Court judgment of 18 January 2013, at paragraph 86.

It follows from the foregoing that when a disputes arises between States Parties to UNCLOS concerning the interpretation or application of the provisions therein contained the solution to the dispute is to be found in Part XV of UNCLOS specifically devoted to such matters. In this regard the first obligation that States must fulfil is that contained in article 283, which requires the parties to the dispute to proceed "*expeditiously*" to an "*exchange of views*" regarding its settlement by negotiation or other peaceful means. In the case under consideration here, Italy fully complied with its obligation in this regard

through negotiations that went on for a long time, as per the ample documentation on the record.

Moreover, the interpretation of the obligation to exchange views pursuant to article 283 provided by the International Tribunal for the Law of the Sea (ITLOS) is broad, such that in the *Louisa* case it was stated as follows:

"*a State Party is not obliged to pursue procedures under Part XV, section 1, of the Convention when it concludes that the possibilities of settlement have been exhausted" (Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, p. 280 at p. 295, paragraph 60), and that "a State Party is not obliged to continue with of an exchange views when it concludes that the possibilities of reaching agreement have been exhausted" (MOX Plant (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 95, at p. 107, paragraph 60)*".

Although its obligation under article 283 could be said to have been fully complied with in light of ITLOS caselaw, nonetheless on 11 March 2013 Italy sent India "Note Verbale 89/635", on 7 February 2014 "Note Verbale 56/259" and on 15 February 2014 "Note Verbale 67/319", requesting India for an exchange of views on the *Enrica Lexie* case. The negative replies that the Indian government gave to the above Notes means that for all and intents and purposes one can consider the negotiations phase to be at an end. It makes Section 2 of Part XV of UNCLOS applicable, which sets out the relevant compulsory procedures entailing binding decisions.

In fact, if a solution to a dispute has not been reached through negotiation or the other voluntary dispute resolution tools set out on Section 1 of Part XV, then article 287.1 provides that States Parties to the Convention may choose from among a number of

compulsory dispute resolution mechanisms: ITLOS ([55]), the International Court of Justice (ICJ), arbitration under Annex VII and special arbitration under Annex VIII ([56]).

Checking the declarations lodged in that regard by the parties to the dispute, it can be noted that on 26 February 1997 ([57]) Italy opted for the ICJ and ITLOS in no particular order, while for its part on 19 June 1995 India reserved the option of choosing one or more of the procedures listed in article 287.1 at a later date. To date India has not lodged any declaration.

Therefore, if the parties to a dispute have not accepted the same procedure for the settlement thereof, article 287.5 provides that the dispute may be submitted only to arbitration regulated by Annex VII of UNCLOS, unless the parties agree to resolve the specific matter through a different procedure. In fact, there is nothing in theory that would prevent the two States from concluding an agreement to resort to the ICJ or Permanent Court of Arbitration (PCA). In this latter regard it is worth noting that article 51 of the Indian Constitution provides that the State shall endeavour to "*encourage settlement of international disputes by arbitration*".

However, in the course of the long negotiation no special agreement was ever proposed to jointly choose a compulsory dispute resolution means. It is thus clear that recourse to

[55] The literature on ITLOS is vast. Among many see H. CAMINOS, *The Creation of the International Tribunal for the Law of the Sea as a Specialized Court under the United Nations Convention for the Law of the Sea*, in *Promoting Justice, Human Rights and Conflict Resolution through International Law,* Leiden, Boston, 2007, p. 823-836; Id., *The International Tribunal for the Law of the sea: an Overview of its Jurisdictional Procedure*, in *New International Tribunals and New International Proceedings*, A. DEL VECCHIO (ed.), Milan, 2006, p. 17 ss.; R. WOLFRUM, *The Settlement of Disputes before the International Tribunal for the Law of the Sea. A Progressive Development of International law or Relying on Traditional Mechanisms?*, in *Japanese Yearbook of Int. Law*, 2008, pp. 140-163.

[56] See H. CAMINOS, *Algunas consideraciones acerca de la solución de controversias en la Convención de las Naciones Unidas sobre el Derecho del Mar y del Tribunal Internacional del Derecho del Mar*, in *Cuadernos de derecho pesquero,* No. 2, 2003, pp. 23-34.

[57] The following is the text of the Italian declaration: "*In implementation of article 287 of the United Nations Convention on the Law of the Sea, the Government of Italy has the honour to declare that, for the settlement of disputes concerning the application or interpretation of the Convention and of the Agreement adopted on 28 July 1994 relating to the Implementation of Part XI, it chooses the International Tribunal for the Law of the Sea and the International Court of Justice, without specifying that one has precedence over the other.*

In making this declaration under article 287 of the Convention on the Law of the Sea, the Government of Italy is reaffirming its confidence in the existing international judicial organs. In accordance with article 287, paragraph 4, Italy considers that it has chosen "the same procedure" as any other State Party that has chosen the International Tribunal for the Law of the Sea or the International Court of Justice". See http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#Italy Declaration made after ratification.

compulsory arbitration remains the only option, bearing in mind that also militating in favour of that solution is article 287.3 UNCLOS, according to which a State Party that has not made any declaration (like India) shall be deemed to have accepted arbitration ordered in with Annex VII.

Accordingly, it would seem that the current dispute can be unilaterally submitted by Italy to the above mentioned arbitration procedure even without India's consent, since that procedure is compulsory, as expressly stated by article 286, which contains an arbitration clause to the effect that if a solution has not been reached relying on the voluntary tools set out in Section 1 of Part XV of UNCLOS, the dispute itself is to be submitted at the request of any party to the court or tribunal having jurisdiction, selected from among those listed in the aforementioned article 287. Moreover, the limitations and optional exceptions indicated in articles 297 and 298 UNCLOS cannot in any way hinder the application of articles 286 and 287, since in its declaration of 13 January 1995 Italy excluded the jurisdiction of courts and tribunals solely for disputes concerning the delimitation of its sea boundaries. As regards India, since it did not lodge any declaration, it cannot plead any limit to the application to the above rules on the compulsory resolution of disputes in connection with the law of the sea.

In light of the above it appears that the legal mechanism that can be used to settle the conflict of jurisdiction that has arisen between Italy and India is arbitration under Annex VII ([58]), the procedure for establishing which is actually very simple. In fact, the claimant (Italy in the present case) would have to serve the respondent (India in the present case) with written notification, accompanied by a statement of the claim and the grounds on which it is based and the name of the arbitrator that it wishes to appoint. The respondent would have a short period of time within which to appoint an arbitrator, who may be its national. To complete the arbitral tribunal the parties would have to jointly choose the remaining three arbitrators, who would be nationals of third States. If the parties were unable to reach agreement on the appointment of the arbitrators or the president of the arbitral tribunal, upon the request of the claimant the President of ITLOS would appoint

[58] See S. ROSENNE, *Arbitrations under Annex VII of the United Nations Convention on the Law of the Sea,* in T. M. NDIAYE E R. WOLFRUM (eds.), *Law of the sea, environmental law and settlement of disputes: Liber amicorum judge Thomas A. Mensah*, Leiden, 2007, pp. 989-1006.

the arbitrators in question. The arbitral tribunal so constituted would then determine its own procedure, unless the parties were to agree otherwise.

Furthermore, article 9 of Annex VII provides that if a State decides not to appear before an arbitral tribunal already constituted, the other party may request the tribunal to continue the proceedings in default of appearance and to make its award.

It is thus clear that UNCLOS incorporates a rapid and efficient mechanism to resolve disputes concerning the interpretation and application of the rules therein contained, for which the consent of both parties to the dispute is not required, since that consent is already deemed to have been given at the time of ratification of the Convention and its Annexes.

7. Examination of the possibility of recourse to the International Court of Justice to resolve the dispute on the applicability of sovereign functional immunity to the two Italian marines. Final considerations.

Recourse to compulsory arbitration under UNCLOS is not an option for the dispute concerning the functional immunity of the two Italian marines Latorre and Girone on the basis that they are organs of the State. The scope of compulsory arbitration jurisdiction is limited *ratione materiae* to adjudicating on the interpretation and application of the rules of the law of the sea incorporated into UNCLOS, even if in ITLOS caselaw it is possible to detect a willingness of sorts to address issues not strictly connected to the law of the sea.

In effect, in the *Guyana v. Suriname* case involving compulsory arbitration under Annex VII, for the purposes of resolving a dispute concerning the delimitation of maritime boundaries, the arbitral tribunal took into account the provisions in the UN Charter on the use of force ([59]). However, it still was an exception limited to a particular context and it would appear difficult to cite it as a precedent that Italy could use to further a claim.

[59] CPA, Arbitral Tribunal Constituted Pursuant to Article 287, and in accordance with Annex VII, of the United Nations Convention on the Law of the Sea, *Guyana v. Suriname*, 17 September 2007, paragraph 425 ss.

In reality, in order to resolve the dispute as to whether the two Italian marines have functional immunity, one would have to turn to a 'classic' international court like the ICJ, but a unilateral application thereto by Italy alone would appear to be inadmissible. Whereas India had already accepted the jurisdiction of the ICJ as compulsory *ipso facto* under article 36.2 of the Statute of the Court in its declaration of 18 September 1974, Italy had not likewise done so at the time of the events. In the absence of acceptance of the ICJ's jurisdiction as compulsory, the sole route for applying to the Court would be through agreement, i.e. an *ad hoc* treaty concluded with India. A treaty, which in view of the current difficult state of relations between the two States, would surely entail long and complicated negotiations.

In conclusion, the two distinct *Enrica Lexie* disputes that have arisen between Italy and India, one concerning a violation of the UNCLOS rules on piracy and criminal jurisdiction in the case of an incident of navigation on the high seas, and the other concerning violation of the international rules on the sovereign functional immunity of military personnel abroad, have essentially been marked by a failure to observe the fundamental principles and rules of international law that underpin international relations between States and that serve the international community for the purposes of maintaining peace and security.

But above all the analysis of the entire *Enrica Lexie* affair has revealed how fundamentally important the UNCLOS rules on combating piracy, flag State duties and the settlement of disputes by peaceful means have become in the international community. It is also clear that the correct interpretation and application of those rules would have prevented the dispute from arising between the two States in the beginning.

Thus, almost twenty years after it came into force UNCLOS has shown that it is an extremely effective instrument, potentially capable of settling all the difficulties associated with governance of the seas. That did not come about by chance but was made possible as a result of the valid choices made by the negotiators of the Convention, including Judge Caminos, who through the huge amount of drafting work that preceded the conclusion of the Convention itself were able to conceive and adopt the solutions best suited to tackling the main issues of the law of the sea.

Abstract

The *Enrica Lexie* incident has given rise to two disputes between Italy and India, one concerning a violation of the UNCLOS (United Nations Convention on the Law of the Sea) rules on piracy and criminal jurisdiction in the case of an incident of navigation on the high seas, and the other concerning violation of the international rules on the sovereign functional immunity of military personnel abroad. Regarding the first dispute there is a difference of opinion between Italy and India as to the interpretation of the UNCLOS provisions that govern the jurisdiction of domestic courts to adjudicate on the merits of the case. This has led to a conflict of jurisdiction between the two States that could be resolved by recourse to the compulsory arbitration provided for in Annex VII to the above mentioned Convention, arbitration that can be commenced even by just one of the parties. Regarding the second dispute, by contrast, as there has been a gradual erosion of the principle of sovereign functional immunity of organs of the State, it would appear quite difficult to avail of compulsory dispute resolution mechanisms in that case.