FOCUS ON PIRACY

THE *ENRICA LEXIE* INCIDENT: LAW OF THE SEA AND IMMUNITY OF STATE OFFICIALS ISSUES

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Abstract

This article examines the case of the Enrica Lexie*, a commercial ship having on board military personnel engaging in anti-piracy duties who was involved in an incident with persons on a fishing vessel off the Indian coast. It takes into consideration India's claim to exercise its criminal jurisdiction over the Italian marines indicted of having killed two Indian fishermen, the judgments passed by India's courts and the multiple aspects of the ensuing controversy between India and Italy. It is argued that the two marines enjoy functional immunity, even if it is admitted that India has jurisdiction over the case. The article concludes that new conventional law is needed for incidents like that of the* Enrica Lexie *paralleling Article 97 UNCLOS on collisions on the high seas.*

Keywords: piracy; jurisdiction on the high seas; functional immunities.

1. INTRODUCTION

The case of the *Enrica Lexie*, a ship flying an Italian flag which was diverted to India, raises a number of issues, from the law of the sea and anti-piracy action by personnel on board commercial shipping vessels to immunity from jurisdiction, also touching upon the law of diplomatic immunities. The incident was occasioned by an action aimed at defending a ship against pirates carried out by military personnel on board a commercial shipping vessel. It has strained the relations between Italy and India.

The facts are as follows. On the night of the 15 February 2012 the *Enrica Lexie*, while en route from Singapore to Djibouti, was approached by a vessel off the coast of Kerala, India, 22.5 nautical miles from the coast. The ship, a tanker belonging to an Italian corporation and flying an Italian flag, had on board a team of six Italian marines who, according to Italian Law, may serve in protecting vessels with Italian flags from attacks by pirates. The Italian team flashed signals to the approaching vessel asking for its identification and for it to divert from its route. This notwithstanding, the approaching ship continued on its original route. At that moment the Italian marines, following their rules of engagement, fired shots in order to intimidate the ship. According to the marines' version, the shots were fired into the water and not directed

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against the approaching ship: nobody was hit and the *Enrica Lexie* continued its voyage. As was later discovered, the approaching ship had not been a piratical craft but only an innocent fishing trawler, the *St Antony*. Two fishermen had been shot dead. From the *Enrica Lexie* nobody perceived that deadly force had been used. During that night, other ships were cruising in the vicinity, including Sri Lanka's coastal guard vessels which were controlling the Sri Lanka EEZ and preventing illegal fishing.

The Indian coastguard contacted the *Enrica Lexie* asking the crew to divert from its route and to head to the port of Kochi in order to identify some pirates who had been captured on the night of incident. There were no pirates on shore and the call from the coastguard was only a stratagem (a deception according to Italy, a smart move according to India) to divert the *Enrica Lexie* to the Port of Kochi. The order to divert from the ship's normal route was given by the master of the *Enrica Lexie* in consultation with the ship-owner. According to Italian Law No. 130/2011, allowing the embarkation of armed military personnel on board vessels flying an Italian flag for protection from piratical assaults, the ship is under the order of the master, while the responsibility for recourse to forceful action and the rules of engagement lies with the military personnel and with the Ministry of Defence. It seems that the Italian defence authorities were informed of the master's decision to divert the *Enrica Lexie* from its route and that no objection was raised. The team, usually six persons, is made up of uniformed personnel who keep their military status and act under the orders of the Ministry of Defence, i.e. under the orders of the Italian State, even though the ship-owner pays a fee to the Ministry of Defence for the services provided. Military personnel dispatched on board commercial shipping vessels are subject to the military criminal code of peace.

On 17 February, the Indian authorities ordered the ship to stay in port and not to leave. Two days later, a team of 30 armed Indian men boarded the *Enrica Lexie*, captured two Italian marines – Salvatore Girone and Massimiliano Latorre – who had been identified as those responsible for the shooting by the Indian authorities, and seized all the guns belonging to the military team and in the ownership of the Italian State and thus public property. The Italian Consul in Mumbai and the Italian military attaché were present. According to the Indian authorities, the seizure of weapons was necessary in order to check whether the shots had been fired by the Italian marines. The investigation was conducted by Indian experts and the Italian presence was admitted. However this was not a formal or independent inquiry conducted according to a common procedure aimed at incontrovertibly establishing fact. It was merely a one-sided probe with the presence of the Italian authorities.

1.1. The Proceedings before the High Court of Kerala

In order to secure the release of the military personnel as well as the ship, Italy pursued a dual strategy: a judicial strategy before the Indian Courts and a diplomatic strategy at bilateral and multilateral levels aiming to obtain the backing of its

allies and of States and international organizations engaged in anti-piracy efforts. Only the former is discussed here. The latter has been the object of an article published elsewhere.[1]

The two Italian marines, after being held in Kochi police station, were jailed in Thiruvananthapuram pending the criminal proceedings against them. In effect they were accused of murder. Italy filed a complaint before the High Court of Kerala alleging the absence of Indian jurisdiction over the ship and, in the meantime, sought the liberation on parole of the two military personnel. This second action was successful. The two marines were freed on parole and after that were given bail. They were restricted from moving outside Kochi, their passports were seized and they were ordered to sign every day at the police station in Kochi.

The complaint before the High Court of Kerala was grounded in two main motivations. The first was that the two marines enjoyed functional immunity. Even if they admitted that they were responsible for the death of the two fishermen, they were acting under the order of the Italian State and the act was thus not attributable to them, but to Italy. The marines had the status of police officers and carried out a public function by being involved in an anti-piracy mission. The second ground was that the incident happened on the high seas and in such cases the jurisdiction belongs to the flag of the ship responsible for the incident, according to Article 97 of the United Nations Convention on the Law of the Sea (UNCLOS), which states that in cases of collision or "other incident of navigation", penal proceedings against the responsible person may be instituted only by the flag State or by the State of which the person is a national. Another important provision is contained in the last paragraph of Article 97, which affirms that "[n]o arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag State". Moreover it was submitted that the *Enrica Lexie* was lured into the port of Kochi with a stratagem, since the master was invited to divert from its route in order to identify a pirate ship which was alleged to have been captured by the Indian coastguard in the proximity of the place where the incident happened.

All these claims were rebutted by India. It was submitted that the *Enrica Lexie* was neither a warship nor a government ship operated for non-commercial purposes, but only a merchant vessel. It could thus not enjoy any immunity from detention or arrest. Furthermore, the marines on board performed a function which could not be labelled as a public service, since they were acting on behalf of the shipowner, as proven by the fact that he paid for their services. Therefore they could not enjoy any immunity from arrest or penal jurisdiction. Moreover, the incident took place outside India's territorial waters, but still within India's contiguous zone (CZ), which extends for 12 miles beyond the outer limit of the territorial sea. Those

[1] RONZITTI, "Il caso della Enrica Lexie e i rapporti Italia-India" in COLOMBO and GRECO (eds.), *La politica estera dell'Italia*, 2013, Bologna, 2013, p. 113 ff., where a narration of the incident may be found together with quotation of relevant sources.

waters also fall within the EEZ proclaimed by India. Therefore Article 97 could not be taken into consideration since it applies on the high seas *stricto sensu*.

Italy also granted substantial compensation to the victims' families, making clear that the compensation was not legally due but that it was given *ex gratia*. The practice of compensation of victims before the conclusion of criminal proceedings is normally followed in Italy in order to remove the victims from the proceedings. However public opinion in Kerala was very critical of this move, seen as an expedient to render the victims silent.

After the High Court of Kerala delayed its judgment, Italy introduced a claim before the Supreme Court of India in order to obtain a decision that could meet its claim.

1.2. The Release of the Enrica Lexie

As stated above, the Indian authorities ordered the *Enrica Lexie* not to leave the port of Kochi. The ship had on board its master and the four Italian marines who had not been arrested. A claim was presented by the ship-owner seeking the release of the ship. The claim was upheld by a lower court, but was subsequently rejected by the High Court of Kerala, which prevented the ship's departure. Going against the High Court judgment, a claim was filed before the Supreme Court of India which annulled the judgment of the Kerala Court, thus allowing the release of the vessel and its departure.[2] The judgment of the Supreme Court, dated 29 March 2012, submitted the ship's release to very strict conditions, which may be summarized as follows: (i) the four marines, who are expressly named, should appear before any Indian court or public authorities if summoned; Italy should ensure that the order of the Indian authorities be abided by; (ii) the master of the ship, the commercial director of the shipping company and the maritime agent commit to ensure the presence of six members of the crew, including the master, to appear before the summoning authorities within six weeks of the injunction; (iii) the shipping company is asked to guarantee with a sum of 30 million rupees the commitment made on the appearance of the crew members.

1.3. The Judgment of the High Court of Kerala

On 29 May 2012, the High Court of Kerala rejected the claim filed by the Italian Government and by the two Italian marines on India's lack of jurisdiction.[3]

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[2] *M.T. Enrica Lexie & ANR. v. Doramma & Ors.*, Civil Appeal No. 4167 of 2012, available at: <http://www.advocatekhoj.com/library/judgments/announcement.php?WID=2059>.

[3] *Massimilano Latorre v. Union of India*, WP(C) No. 4542 of 2012, available at: <http://www.lawker.in/2012/05/massimiliano-latorre-vs-union-of-india.html>.

On the narration of the incident, the Court stated that no piratical attack had occurred in the sea zone where the incident had happened. The two Italian marines had opened fire without consulting the master.

The main arguments presented by Italy on India's lack of jurisdiction were not upheld for the following reasons:

a) On the claim on exclusive Italian jurisdiction on the high seas, Article 97 UNCLOS, according to which in cases of collision or other incidents of navigation the jurisdiction belongs to the flag State, cannot be applied to the *Enrica Lexie* incident. As a matter of fact, the incident can be considered as neither a collision nor another incident of navigation. Moreover, Article 97 applies on the high seas, while the *Enrica Lexie* incident took place in waters falling under India's EEZ. India may claim its jurisdiction under a number of headings: the victims had Indian nationality; the fire was directed against an Indian ship; the incident had great repercussions on land.

b) Having established its jurisdiction, the Court also rejected the claim of functional immunity. It stated that the two marines were not on board a warship, but a commercial ship. In effect, they were acting on behalf of the ship-owner and performed no public function. They had opened fire without any order from the master or from a superior officer of the Italian navy.

Having lost the case, the claimants were obliged to refund the litigation costs. The High Court of Kerala judgment was a bitter disappointment to Italy, which decided to submit a claim to the Supreme Court of India. The appeal was admitted on 23 April.

1.4. The Judgment of the Supreme Court of India

The Supreme Court of India in New Delhi delivered its judgment on 18 January 2013.[4] Again the Italian claim was rejected for reasons similar to those submitted by the High Court of Kerala, although in a more detailed fashion. The following arguments were introduced:

a) The two Italian marines cannot invoke any immunity from local jurisdiction. Indian policy is not to give any immunity from criminal jurisdiction to armed personnel on board commercial shipping vessels. Not only this, but the Indian Government stipulates no Status of Forces Agreement (SOFA) granting immunity from jurisdic-

[4] *Republic of Italy & Ors. v. Union of India & Ors.*, Writ Petition (Civil) No. 135 of 2012 and *Massimiliano Latorre & Ors. v. Union of India & Ors.*, Special Leave Petition (Civil) No. 20370 of 2012, available at: <http://www.sidi-isil.org/?page_id=5384>.

tion to foreign military soldiers. The very fact of having acted for the Italian navy does not encompass any functional immunity. Moreover, the acts of the two Italian marines are not covered by the principles of sovereign immunity of States.[5]

b) The Italian State cannot claim the application of Article 97 UNCLOS, according to which in cases of collision or other incident of navigation only the flag State may start criminal proceedings or disciplinary action against the master or other members of the crew (leaving aside the meaning of the term "other incident of navigation" and that the case under judgment cannot be held as a case of collision). Article 97 applies only to bodies of water considered *stricto sensu* high seas and UNCLOS Part VII includes neither the CZ nor the EEZ.

The Court stated that the Indian criminal code and the Indian code of criminal procedure apply beyond the national territory and territorial waters and encompass the CZ and the EEZ. However the State of Kerala does not have jurisdiction over such zones, its jurisdiction being limited to India's territorial waters, i.e. until 12 miles from the baseline, while the incident took place 20.5 miles from the coast. Beyond the territorial sea, the jurisdiction belongs to the Union of India and not to its federal States. The Court therefore affirmed that the criminal proceedings being held before the Tribunal of Kollam (belonging to the State of Kerala) should terminate and that the Indian Union, in consultation with the Chief Justice, should institute a special tribunal where the criminal case should be heard. The Court added that both the Italian State and the marines were entitled to raise again the issue of jurisdiction before such a tribunal. The Court also made reference to Article 100 UNCLOS, opening the way for the possibility of concurrent jurisdiction of India and Italy for the incident. Article 100 does not regulate issues of jurisdiction, but makes reference to the duty of States to co-operate in order to fight piracy.

2. The SUA Convention and Its Implementing Legislation

India, like Italy, is a party to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA) of 1988. Under the Convention, State Parties are obliged to establish their jurisdiction over the offences therein enumerated and to enact penalties for offenders. They are very severely punished by the Indian criminal code and for the most serious offences, the death penalty is established. The Convention applies to ships navigating beyond the outer limits of territorial waters or along the outer limits of the territorial sea with adjacent States.

[5] Note that India and Italy concluded an agreement on defense co-operation (signed in 2003 and entered into force in 2008) which regulates the division of jurisdiction between the sending and the host State as far as personnel of the two countries is concerned (Article 8). This agreement does not cover the case of *Enrica Lexie*.

A State party may establish its own jurisdiction over offences against or on board a ship flying its flag (Article 6(1)(a)). The offences listed include acts of violence against a person on board a ship if that act is likely to endanger the safe navigation of the ship or to cause injuries or death to any person in connection with the commission of an offence set out under the Convention.

It is doubtful whether the SUA is applicable to the case under consideration. The drafting history of the Convention and its Preamble make very clear that the SUA was drafted in order to combat international terrorism. The SUA, which originated from the *Achille Lauro* hijacking in 1985, is a sectorial convention framed for sea areas which parallels those drafted to combat "air terrorism". It was very clear to the drafters that the Convention was not meant to regulate piracy or actions aiming to combat that old crime.

Independently of whether the SUA applies to offences committed while acting against piracy, the other issue is whether the Convention also covers acts committed by government officials. This was the object of a harsh debate during the Drafting Conference and Kuwait, which wanted to hinder the Iranian policy in the Gulf during the Iran-Iraq war, submitted an amendment aimed at substituting the words "any person" which qualifies the offender with the expression "any person, even if acting on behalf of a government". However the Kuwaiti proposal was rejected. It has been submitted that while it was not possible to conclude that acts committed on behalf of governments are included in the Convention, it seems reasonable to hold the view that they were not excluded.[6] Be that as it may, the interpretation according to which acts of government officials belonging to military forces are not covered by the SUA is now endorsed by Article 3 of the 2005 Protocol Additional to the SUA Convention which states that the SUA provisions do 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".

3. The Treaty Between Italy and India on the Transfer of Sentenced Persons: A Possible Way Out?

On 26 October 2012, Italy and India concluded a treaty on the transfer of sentenced persons.[7] This kind of treaty is a common device between nations to alleviate conditions for prisoners. Most of them are bilateral treaties but there are also multilateral conventions, such as the one concluded within the Council of Europe. There are 18 Italian prisoners in Indian jails and 108 Indian prisoners in Italian

[6] Treves, "The Rome Convention for the Suppression of Unlawful Acts against the Safety of Maritime Terrorism", in Ronzitti (ed.), *Maritime Terrorism and International Law*, Dordrecht/Boston/London, 1990, p. 85 ff.

[7] See *Gazette of India* of 17 December 2012; and Law No. 183 of 26 October 2012 (*Gazzetta Ufficiale* (Italy) No. 253 of 29 October 2102).

ones. The stipulation of the treaty was accelerated by the fear that the two Italian marines were to be condemned by the Indian courts. The treaty would have offered an opportunity for their return to Italy. In the debate before the Parliament, which according to Italian law should authorize treaty ratification, it was clearly stated that the treaty constituted a kind of insurance policy against the condemnation of the marines.[8] The treaty entered into force on 1 April 2013.

The treaty allows for the transfer of a sentenced person to his country of origin, provided that he/she does not oppose. The receiving State should ensure the continuation of the penalty inflicted by the transferring State, but it may parameter the penalty to one provided for the same offence by its own legal order. Article 11 allows acts of clemency, since contracting parties may concede pardon or other similar acts. The transfer of a prisoner may take place only if the judgment condemning him is final (Article 4). Therefore if an appeal is submitted by him or by the prosecutor, the transfer cannot be executed. A convicted person cannot be transferred pending a judgment against him.

4. The Injunction to the Italian Ambassador Not To Leave the Country and the Law of Diplomatic Immunity

On 22 February 2013 the two marines, who had been allowed to go to Italy for Christmas, obtained new leave to go to Italy in order to cast their vote in the general election for the Italian Parliament. Italian law allows military personnel abroad to vote in their country of temporary residence, without the need to come back to Italy. Somebody speculated that the leave was granted in the hope that the Italian Government decided not to send the marines back to India. In effect, this is what Italy did, justifying its conduct citing India's refusal to cooperate in solving the controversy, even since the judgment of the Supreme Court which quoted UNCLOS's Article 100 and the duty to cooperate to fight piracy. The Indian authorities granted the leave on condition that the Italian Ambassador delivered a sworn affidavit that the marines would return to India after the expiration of the leave. On 14 March, the Supreme Court issued an injunction ordering the Italian Ambassador not to leave the country.[9] There was also speculation that the ambassador could face trial for contempt of the Court having breached his undertaking. However, before the leave period had expired, the Italian Government changed its mind and allowed the two marines to return to India (21 March). It was a dramatic decision that compelled the Italian Minister of Foreign Affairs to resign on 26 March.

[8] *Senato, Legislatura XVI, Resoconto stenografico della seduta*, 25 October 2012, p. 64 ff.
[9] The Supreme Court Order is available at: <http://www.sidi-isil.org/?page_id=5384>.

Independently from the violation of the affidavit, was the Indian injunction legitimate or was it a violation of diplomatic immunity and of the Vienna Convention on Diplomatic Relations?

The Supreme Court injunction was a clear violation of the Vienna Convention on Diplomatic Relations of 1961, to which both Italy and India are parties, and of customary international law. The diplomatic envoy, according to Article 29 of the Vienna Convention, enjoys an absolute immunity from any act of coercion and the injunction not to leave the territory of the State where he is credited is a violation of his dignity. The threat to try Ambassador Mancini with contempt to the Court, for non-compliance with the affidavit in case of non-return of the two marines, is another violation of the law of diplomatic immunity. By way of justifying the injunction not to leave India, Indian authorities claimed that it was a reaction to the violation of the affidavit embodying the engagement of the return of the two marines and that Italy's ambassador, in signing the affidavit and swearing it, renounced his immunity from jurisdiction and voluntarily submitted himself to the jurisdiction of India's courts. However, these two justifications have no grounding in the law of diplomatic immunity and are not supported by diplomatic practice. The Draft Articles on Responsibility of States for Internationally Wrongful Acts very clearly state that the inviolability of the diplomatic agent cannot be the object of any countermeasure (Article 50). The precedent to be quoted is that of US Diplomatic and Consular Staff in Tehran. The ICJ held that the law of diplomatic immunity is a self-contained regime and the system provides its own remedy in case of abuse of diplomatic immunity. The only measure that the territorial State can take is to declare the diplomatic agent a *persona non-grata* and oblige him to leave the country within the time allowed to him.[10] Moreover, India may not claim that the Italian ambassador, in signing the affidavit, renounced the right to immunity from jurisdiction. On this point the Vienna Convention allows no doubt. Article 32 affirms that the holder of immunity is the State of envoy, which alone is empowered to waive immunity. Moreover, paragraph 2 of the same provision affirms that the "waiver must always be express". Even the European Union, the official position of which was that the controversy between Italy and India was a bilateral affair, made a declaration stating its concern for the violation of the provisions on diplomatic immunities by India.[11]

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[10] *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, Judgment of 24 May 1980, ICJ Reports, 1980, p. 3, para. 86.

[11] ADN Kronos English "EU: Ashton Warns India over Italian Ambassador Immunities and Marines Row", 18 March 2013.

5. The Italian Proposal to Settle the Dispute through Judicial or Arbitral Means

Soon after the Supreme Court Judgment of 18 January 2013, Italy was confident of entering into a dialogue with India in order to end the case of the two marines through diplomatic efforts and good will. This did not happen, and on 11 March Italy affirmed that the two marines should not return to India. The Italian Ministry of Foreign Affairs released the following communiqué:

> "Italy has consistently considered the conduct of the Indian authorities a violation of the obligations imposed by international law to which India is subject by virtue of customary international laws and treaties, in particular the principle of immunity from the jurisdiction of the bodies of any foreign State, and the rules of the United Nations Convention on the Law of the Sea (UNCLOS) of 1982. Immediately following the Indian Supreme Court's 18 January 2012 ruling, Italy formally proposed to the Government of New Delhi a bilateral dialogue by which to seek a diplomatic solution to the case, as the Court itself had recommended when it cited counter-piracy cooperation between States in pursuance of UNCLOS provisions. In light of India's lack of response to the request advanced by Italy to activate such forms of cooperation, the Italian Government acknowledges a dispute with India over the rules contained in the above-mentioned Convention and the general principles of international law applicable to the case. For these reasons, by means of the *note verbale* delivered today by Ambassador Mancini, Italy formally conveys its willingness to the Indian Government to reach an agreement on a solution to the dispute, even through international arbitration or legal ruling, and requests that India initiate the consultations envisaged in the UNCLOS convention. Italy takes this opportunity to inform the Indian Government that, given the formal acknowledgement of an international dispute between the two States, Massimiliano Latorre and Salvatore Girone will not be returning to India upon expiration of the leave granted them".[12]

As previously stated, India reacted to the Italian move by ordering to the Italian ambassador not to leave the country.

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[12] Ministry of Foreign Affairs, "Terzi: Marines Remain in Italy; International Dispute", available at: <http://www.esteri.it/MAE/EN/Sala_Stampa/ArchivioNotizie/Comunicati/2013/03/20130311_Maro_restano_in_Italia.htm>.

Leaving aside the question of whether the initiative to explore a judicial settlement of the dispute was a good move at that stage of the dispute, let us consider which means of judicial settlement are available.

As regards the violation of the Vienna Convention on Diplomatic Relations by India, an optional Protocol to the Convention, to which both India and Italy are parties, foresees the possibility to unilaterally activate the ICJ, through a *requête* to the Court, unless, by common agreement, they decide to settle the controversy by recourse to an arbitral tribunal. They may also decide by common agreement to activate a conciliation procedure before submitting the case to the ICJ.

The proper means for settling the controversy over the two marines is more complicated since it concerns issues both of the law of the sea and of general international law, as affirmed in the Italian *note verbale*.

Should the case be brought before ICJ, the competence of the Court depends on the content of the "compromise" stipulated by the two States. However, India does not seem willing to activate the ICJ. Italy has not yet submitted a declaration under Article 36(2) of the ICJ Statute for the compulsory acceptance of the competence of the Court, notwithstanding that it manifested its intention to do so during its intervention of the 67th session of the General Assembly. India has submitted a declaration under Article 36(2) of the ICJ Statute, which is watered down by the 12 reservations appended to it.

Therefore the solution should be found within the provisions of the UNCLOS and its Part XV, Section 2, on Compulsory Procedures Entailing Binding Decisions, as has been put forward by Italy. This Section applies, provided that no settlement has been reached by having recourse to Section 1, which envisages the general provisions on settlement of disputes, and that no limitation or exception be raised by India under Section 3 of the same Part. The parties are free to choose between the ITLOS, the ICJ and an arbitral tribunal constituted in accordance with Annex VII. Since India, unlike Italy, has made no choice on the forum for dispute-settlement, the Arbitral Tribunal might be the most suitable option, according to Article 287(3) UNCLOS. Note that India ratified UNCLOS with the following understanding: India "reserves the right to make at the appropriate time the declarations provided in Articles 287 and 298, concerning the settlement of disputes". This complicates the issue of jurisdiction, since Article 298 encompasses the optional exceptions to the applicability of Section 2. A further complication, from the Italian perspective, is that while the issue of jurisdiction over the *Enrica Lexie* falls squarely under the law of the sea and the competence of the arbitral tribunal constituted under Annex VII, the issue of functional immunity of the two Italian marines does not (according to Article 288, a court or tribunal referred to in Article 287 has jurisdiction over disputes concerning the interpretation or application of UNCLOS).

The controversy between Italy and India started when the case was brought before the Indian Courts and not at the very moment at which the Italian Government decided to propose to settle the dispute by recourse to arbitral/judicial means. Therefore the critical date is that immediately after the detention of the *Enrica*

Lexie and the arrest of the two Italian marines. Italy contested the jurisdiction of Indian courts and may not be deemed to have acquiesced to India's jurisdiction, even though it preferred to challenge India's claim before the Indian courts instead of immediately trying to submit a claim before an international tribunal. The previous exhaustion of local remedies would not have been required to bring the case before an international court, since direct damage to Italy could be envisaged.[13]

6. Jurisdiction on the High Seas

From the standpoint of international law, the two main issues involved, which deserve comment, are the question of jurisdiction and that of functional immunity. They will be dealt with in separate paragraphs.

The issue of jurisdiction on the high seas is regulated by the UNCLOS which has been ratified by both India and Italy. The relevant provisions, which are in part repetitive of the 1958 Geneva Convention on the High Seas, are mostly regarded as declaratory of customary international law and therefore deserve to be applied by domestic courts as conventional or customary international law, if a State wants to avoid committing a wrongful international act. Both Italy and India may claim jurisdiction over the incident: Italy, since the *Enrica Lexie* was flying the Italian flag and the persons accused of committing the murder have Italian nationality; India, since the shots were directed at an Indian ship and the victims had Indian nationality. The issue is thus how to prioritize the concurrent jurisdiction. The analysis will be carried out in accordance with international law, leaving aside any reference to India's criminal code.

a) The main relevant provision in our case is Article 92(1) UNCLOS, which affirms that "[s]hips shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in the Convention, shall be subject to its exclusive jurisdiction on the high seas". Exclusive jurisdiction is meant to cover both enforcing and prescriptive jurisdiction. The exceptions (piracy, slave trade, unauthorized broadcasting, ships without nationality, false flags) are strictly determined by UNCLOS and cannot be extended by analogy. Customary international law may provide other exceptions. They, however, belong to security and law of armed conflict. A new conventional exception is constituted by SUA. As already stated, SUA is connected with acts of terrorism and cannot be applied in the present case. Be that as it may, SUA does not allow the boarding of vessels without the consent of the flag State and only obliges to enact and enforce criminal legislation for the criminal acts therein listed. The opinion may be advanced that Article 92 UNCLOS provides sufficient argument to affirm that the *Enrica Lexie*

[13] Milano, "Il caso 'Marò': alcune considerazioni sull'utilizzo di strumenti internazionali di risoluzione delle controversie", 3 April 2013, available at: <http://www.sidi-isil.org/sidiblog/?p=271>.

and the persons on board were under exclusive Italian jurisdiction and that India cannot assert its own.

b) Another argument has been raised to affirm the exclusive Italian jurisdiction, i.e. Article 97(1) UNCLOS. According to that provision:

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

This provision, which repeats verbatim Article 11 of the Geneva Convention on the High Seas, was inserted in order to exclude the doctrine of the *Lotus* case, decided by the Permanent Court of International Justice (PCIJ) in 1927, which affirmed Turkish jurisdiction in a collision between a French and a Turkish ship, stating that the effect of the collision involved Turkish nationals in Turkish territory (the ship).[14] The principle according to which in case of collision the jurisdiction belongs to the flag State responsible for the collision had already been endorsed by the 1952 Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collision or other Incidents of Navigation. Strictly speaking, the insertion of Article 97 into UNCLOS was not necessary since the exclusive jurisdiction of the flag State is already contained in Article 92. However the provision was inserted to restate a principle already contained in the previous codification and to make sure that the *Lotus* jurisprudence could not again be applied. Note that the *Lotus* judgment was adopted with votes equally divided (six to six) and with the President casting the majority vote. It is a moot point as to whether Article 97 could be applied to the *Enrica Lexie* incident or whether it might be covered by the wording "other incident of navigation", since the case in question is not a case of collision. While a number of authors affirm that "other incident of navigation" should be read in connection with the word collision and thus exclude incidents like the *Enrica Lexie* case, others share the contrary view.[15] In effect, the *Lotus*

[14] PCIJ, 1927, Series. A No 10, p. 4 ff.

[15] For instance, Samir Soran and Samya Chatterjee (respectively Vice-President and Research assistant at the Observer Research Foundation) wrote the following in "Who governs the high seas?", *The Hindu*, 26 June 2012: "The jurisdiction of criminal courts in India is governed by the provisions of the Criminal Procedure Code as well as the IPC which, inter alia, define the territory of India. The IPC has to be read with the international obligations of India in UNCLOS. Article 97 read with Article 58 (2) states that the courts in Italy have the sole and exclusive jurisdiction in the matter. Article 97 of the UNCLOS clearly states that penal jurisdiction in matters of collision or any other incident of navigation involving penal or disciplinary responsibility lies either with the flag state or the state of which such person is a national. Furthermore, the Act [The

judgment cannot be held as a precedent to build a doctrine concerning jurisdiction on the high seas. As Armin von Bogdandy and Markus Rau put it, "[a]s to the particular question of criminal jurisdiction over persons responsible for collisions on the high seas, practice did not follow the approach taken by the PCIJ" in the *Lotus* case".[16]

c) One more issue deserves to be taken into consideration in relation to the exclusion of Indian jurisdiction over the case under examination, i.e. the theory of effects, reminiscent of the *Lotus* judgment. It is held that the Indian jurisdiction may be affirmed taking into consideration the fact that the effects of the supposed shooting had taken place on Indian territory, since the fishermen hit were on a Indian boat and the boat is assimilated to the territory of the flag State. This line of reasoning can be challenged for the simple reason that the *St Antony* was not registered and was thus a kind of ship without nationality (it was at least registered under Tamil Nadu's Fishing Laws and not under the Indian Merchant Shipping act, which would have allowed it to navigate beyond India's territorial waters). One could argue that the *St Antony*, while on the high seas, may be equated to a stateless vessel. Stateless vessels cannot be assimilated to the territory of any State and it does not matter if the persons on board had Indian nationality. Stateless vessels are not protected under international law. The effect theory cannot be invoked to ground Indian jurisdiction.

d) The UNCLOS provisions, quoted above, may help in solving a case of concurrent jurisdiction, prioritizing the law of the flag. Another argumentation might be brought in, this time in favour of India's jurisdiction. The first is the special jurisdiction which the coastal State enjoys in its EEZ, including the contiguous zone. India's Supreme Court judgment pointed out that a State has special rights and jurisdiction to defend its rights, such as fisheries. Since the two men killed were fishermen, the Indian Courts had the right to judge those who had failed to implement such rights. The second is the presence of the two marines in India's territory. Once the ship was within India's internal waters, India could claim its jurisdiction even though the ship was lured with a stratagem and the arrest was made in violation of international law. The principle *male captus bene detentus* has been constantly upheld by courts of common law. Even though the two Italian marines were captured in contravention of international law, they were present in Indian territory when they were arrested and thus Indian Courts are competent to try them.

Territorial Waters Act] specifically states that no arrest or detention of the ship even in the course of an investigation can be ordered by any authority other than that of the flag state. The Republic of Italy will have jurisdiction under both the above-mentioned provisions".

[16] VON BOGDANDY and RAU, "Lotus, The", in WOLFRUM (ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford, 2008, online edition (available at: <http://www.mpepil.com>), para. 20.

7. The Functional Immunity of the Italian Armed Team on the *Enrica Lexie*

Supposing that India has jurisdiction over the incident, may the competence of India's tribunals to try the two marines be challenged by the principle of functional immunity? Let us first illustrate the rationale of functional immunity and the state of international law on the matter, since the Supreme Court Judgment of 18 January confused the issue of personal/diplomatic immunity and functional immunity, as proved by the reference to the Vienna Convention on Diplomatic Relations and to the *Pinochet* case.[17]

The distinction between immunity *ratione personae* (or personal immunity) and immunity *ratione materiae* (or functional immunity) is a settled issue in international law. The former belongs to a special category of persons, usually Heads of State, Heads of Government, and Ministers of Foreign Affairs (the S.C. Troika). It is disputed as to whether personal immunity extends to other categories of persons, for instance high ranking members of government. Another category of persons enjoying personal immunity are the heads of diplomatic missions. Personal immunity covers acts performed in the personal capacity of the officials and only lasts for the period during which an official holds office. On the contrary, functional immunity stems from the fact that the acts performed by an official are attributed to the State to which he belongs. Disregarding functional immunity means an infringement of the sovereignty and independence of the foreign State. If an act performed by a State official amounts to an internationally wrongful act, his State bears sole responsibility, not the individual official. The issue of functional immunity has been the object of a resolution of the *Institut de droit international* (IDI). The Resolution affirms that "[i]mmunities are conferred to ensure an orderly allocation and exercise of jurisdiction in accordance with international law in proceedings concerning States, to respect the sovereign equality of States and to permit the effective performance of the functions of persons who act on behalf of States" (Article II(1)).[18]

The question might arise in connection with the determination of State organ as to whose conduct is attributed to the State. Article 4 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission in 2001 and widely regarded as declaratory of customary international law, after having attributed to the State the conduct of its organs (paragraph 1), affirms in paragraph 2 that "[a]n organ includes any person or entity which has that status in accordance with the internal law of the State". It is thus undisputed that the status of organ is determined by the internal law of the

[17] SC 18 January 2013, *cit*. *supra* note 4, paras. 66-70.

[18] Institut de Droit International, *Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes*, Naples, 10 September 2009, Annuaire de l'Institut de Droit International, Vol. 73, 2009, p. 227 ff.

State. In the commentary to Article 4, paragraph 2, the ILC says that "[w]here the law of a State characterizes an entity as an organ, no difficulty will arise".[19]

Functional immunity cannot be invoked if the State organ commits an international crime, i.e. genocide, crime against humanity or crime of war. This principle has been restated by the IDI resolution quoted above and is in keeping with customary international law. The principle of functional immunity protects a State organ from both the civil and criminal jurisdiction of a foreign State. For our purposes, the question of immunity from criminal jurisdiction is taken into consideration.

The issue of immunity of State officials from criminal jurisdiction is now being studied by the ILC. In the Memorandum prepared by the Secretariat[20] and in the three reports released to date by the Special Rapporteur (Mr. Roman A. Kolodkin and later, Ms. Conception Escobar Hernandez) the distinction between personal immunity and functional immunity is well established. The Memorandum quotes a number of international and domestic decisions in support of the opinion that State officials enjoy immunity from criminal jurisdiction.[21]

In his preliminary Report on Immunity of State officials from criminal jurisdiction, Mr. Kolodkin illustrates the point according to which State officials enjoy immunity from foreign criminal jurisdiction for acts performed by them in their official capacity. He corroborates his findings with a number of court rulings[22] and scholarly

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[19] UN Doc. A/56/10, p. 90.

[20] UN Doc. A/CN.4/596, 31 March 2008.

[21] *Ibid*. See paras. 167-169 and in particular the quotation by Memorandum of para. 38 of the ICTY in *Prosecutor v. Blaskic*.

[22] *Preliminary Report on Immunity of State Officials from Foreign Criminal Jurisdiction*, UN Doc. A/CN.4/601 (2008). For instance, Lord Brown-Wilkinson in the *Pinochet No. 3* case affirmed that "[i]mmunity *ratione materiae* applies not only to ex-heads of state and ex-ambassadors but to all state officials who have been involved in carrying out the functions of state. Such immunity is necessary in order to prevent state immunity being circumvented by prosecuting or suing the official who, for example, actually carried out the torture when a claim against the head of state would be precluded by the doctrine of immunity" (para. 107). He also quoted the cases of *Belhas et al. v. Moshe Ya'alon*, decided by the US Court for the District of Columbia in 2006 (para. 106) and one case decided by the French Court of Cassation in 2004 concerning the immunity from criminal jurisdiction of the head of the Malta ship Registry (para.107). The case law also included *Propend Finance Pty Ltd. v. Sing*, High Court, Queen's Bench Division, 14 March 1996 (para. 107, footnote 208) and *Jones No. 1, per Lord Philipps* (para. 107, footnote 208). One may add the *Lozano* case, which concerned a US soldier that killed an Italian officer in Iraq. The Italian Court of Cassation held that Lozano could not be tried in Italy, since he enjoyed functional immunity having performed an act during his official functions (*Corte di Cassazione, Sez. I penale*, 24 July 2008, No. 31171, RDI, 2008, p. 1223 ff., and IYIL, Vol. 18, 2008, p. 346 ff., comment by Serra). *Contra* see *Corte di Cassazione*, *Sez. V penale*, 29 November 2012, No. 46340, RDI, 2013, p. 272 ff., and Judicial Decisions, *infra* in this volume, comment by Serra, para. 23.7, which in the case of extraordinary rendition of Abu Omar denied the existence of the principle of functional immunity in international law. However the judgment seems to disregard the body of judicial precedents and to neglect that covert activities, such as those performed in carrying out extraordinary renditions, do not fall within the principle of functional immunity.

opinions.[23] As for the definition of "State officials", Mr. Kolodkin, having recognized the lack of a definition of the concept of State official in international law, hints at the definition in the ILC Draft Articles on State Responsibility quoted above.[24]

The distinction between personal immunity and functional immunity has been widely endorsed by the Background Paper on "Immunity of State Officials from Foreign Criminal Jurisdiction" presented at the Inter-sessional meeting of Legal Experts to Discuss Matters Relating to International Law Commission held on 10 April 2012 at AALCO (Asian-African Legal Consultative Organization) Secretariat, New Delhi.[25] The Reports states:

> "Unlike immunity *ratione personae* dealt with in the previous pages, immunity *ratione materiae* covers only official acts, that is, conduct adopted by a State official in the discharge of his or her functions. This limitation to the scope of immunity *ratione materiae* appears to be undisputed in the legal literature and has been confirmed by domestic courts. In its recent judgment in the *Djibouti v. France* case, the International Court of Justice referred in this context to acts within the scope of [the] duties [of the officials concerned] as organs of State. A critical issue to be addressed in determining the legal regime of immunity *ratione materiae* relates to the identification of the criteria for distinguishing between a State organ's official and private conduct. The articles on responsibility of States for internationally wrongful acts do not explicitly provide the criteria for determining whether the conduct of a State organ is to be considered as performed in the discharge of the official functions of that organ. A related question is whether acts performed *ultra vires* by State officials are covered by immunity *ratione materiae*. Domestic courts have adopted conflicting positions on the general issue of immunity in connection with *ultra vires* acts. While the plea of immunity has sometimes been rejected in such cases, it has also been held that immunity of State officials in respect of acts performed in the discharge of their functions does not depend on the lawfulness or unlawfulness of such acts".[26]

The Report adds:

> "However, the categories of officials who are to be accorded immunity from foreign criminal jurisdiction has not been clear apart from the

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[23] *Ibid*., para. 107, footnote 208. *Adde* WUERTH, "*Pinochet*'s Legacy Reassessed", AJIL, 2012, p. 731 ff., pp. 742-746, with a superb quotation of scholarly opinions and case law.

[24] UN Doc. A/CN. 4/601 (2008), *cit. supra* note 22, para. 108.

[25] See at: <www.aalco.int/Background%20Paper%20ILC%>.

[26] *Ibid*. p. 13.

> fact that the Heads of State, Heads of Governments and the Minister of Foreign Affairs, who are entitled to such immunity not only by virtue of customary international law but also Conventional law as accepted by the ICJ. Moreover, the kind of acts that are covered under the principle of sovereign immunity are also ambiguous, though in general, all activities of an official nature and completed on behalf of the home-state with its recognition whilst performing public functions are covered by immunity *ratione materiae*".[27]

Last but not least, the *Djibouti v. France* case should be quoted. The ICJ did not uphold the claim that France had infringed the principle of functional immunity of the Djibouti Public Prosecutor and of the Head of National Security by summoning the two officials before a French tribunal simply because the immunity was not claimed at the proper time, i.e. when the two officials were summoned before the French courts.[28]

We must now consider whether the armed team on board the *Enrica Lexie* is to be considered as a panel of State officials. As has already been pointed out, this is a determination which should be made according to the law of the foreign State.[29] The armed teams dispatched on board private shipping vessels are qualified as law enforcement officers by the Italian Law granting authorization to embark armed personnel (Law No. 130 of 2 August 2011). They answer to the Ministry of Defence and wear their military uniform. Moreover, they are subject to military discipline and to the Italian Military Penal Code of Peace. Their specific mission is to react in self-defence if attacked by pirates and to protect the safety of Italian shipping. They may only be dispatched on board vessels with Italian flags. The rules of engagement are enacted by the Ministry of Defence and the head of the military team is not subject to the directives of the ship master. The ship owner has to pay a contribution to the Ministry of Defence (and not directly to the components of the military team) for the embarkation of military personnel. Nevertheless, they are performing a public task, i.e. the protection of marine trade against pirates, and cannot be assimilated into private military security companies. It should also be pointed out that Article 100 UNCLOS sets out a duty for States to co-operate "to the fullest possible extent" in the repression of piracy on the high seas. In performing the task of defending from piracy and protecting commercial shipping, armed teams are contributing to the repression of piracy and performing a task in the interest not only of Italian vessels, but also in the interest of the international community as a whole. The Presidential Statement released at the end of the Security Council debate on piracy last November affirms:

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[27] *Ibid*. p. 19.

[28] *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment of 4 June 2008, ICJ Reports, 2008, paras. 196-197.

[29] See Article 4(1) of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts.

> "The Security Council notes the adoption by the International Maritime Organization of guidelines to assist in the investigation of the crimes of piracy and armed robbery against ships, revised interim guidance to ship owners, ship operators and shipmasters on the use of privately contracted armed security personnel (PCASP) on board ships in the high risk area, as well as the revised interim recommendations for flag States, port States and coastal States regarding the use of PCASP on board ships in the high risk area, and encourages flag States and port States to further consider the development of safety and security measures onboard vessels, including regulations for the deployment of PCASP on board ships through a consultative process, including through International Maritime Organization and International Standards Organization".[30]

Even though the Presidential Statement refers to PCASP, it may be *a fortiori* extended to military personnel.

There is another reason for holding that military personnel on board are performing public functions. A State has the right (and duty) to protect its citizens and their property. This function can be performed in multiple ways and may also involve the use of force when the nationals are endangered.

It is interesting to note that the current Rapporteur to the ILC on the immunity of State officials, in summing up the discussion held within the Commission on the subject under consideration, points out that the discussion phrased the notion of "official act" as any act committed by a public official or any act which is attributable to the national State under the law of State responsibility.[31]

Needless to say, Italy is not the only State dispatching military teams on board private shipping vessels. Other States do: France has military teams on board French trawlers fishing in dangerous areas; the Netherlands has passed a law allowing the embarkation of military personnel on commercial shipping vessels; Belgium has recently legislated in the same vein.[32] Thus the Italian marines on board the *Enrica Lexie* should be considered as State organs performing a public duty and entitled to functional immunity.

Two other issues need to be clarified. The first is connected with the entry of military personnel into foreign territory and the second is the removal of immunity from criminal proceedings. The former does not come into consideration in

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[30] UN Doc. S/PRST/2012/24.

[31] *Preliminary Report on the Immunity of State Officials from Foreign Criminal Jurisdiction*, Prepared by Ms. Conception Escobar Hernandez, Special Rapporterur, UN Doc. A/CN. 4/654, 31 May 2012, para. 35.

[32] See VAN GINKEL, VAN DER PUTTEN and MOLENAAR, "State or Private Protection against Maritime Piracy? A Dutch Perspective", Clingendael Report, available at: <http://www.clingendael.nl/sites/default/files/20130200_state_or_private_protection_web.pdf>.

the case of the *Enrica Lexie*. The ship was transiting through international waters and it was not necessary to stipulate a SOFA. Thus we do not need to inquire as to whether functional immunity may be enjoyed even in the absence of a SOFA. As far as the latter is concerned, it is recognized doctrine that functional immunity from criminal proceedings may be removed in case of commission of a crime of war. The shooting and killing of the fishermen on board the *St Antony* are still surrounded by doubts concerning which persons should be held responsible for firing upon the fishermen. However such criminal acts cannot be considered as war crimes. A war crime implies a serious violation of international humanitarian law or law of armed conflict and the fire directed against the *St Antony* may be considered only as an ordinary crime and not as a war crime.

8. Conclusion

The practice of armed personnel embarking on board commercial shipping vessels has proved to be an essential tool in combating piracy and armed robbery at sea. This crime is decreasing. It depends on the policy of each State to allow military personnel or armed contractors, or both, to embark. Military personnel or contractors on commercial shipping vessels are only allowed to react in self-defence and are not entitled to chase pirates, a task which can only be performed by navies.

The activity of armed personnel on board commercial shipping vessels is scarcely regulated at the international level or not regulated at all. An international convention would likely be the best solution, even though the difficulties in achieving a worldwide regulation cannot be underestimated. For the moment, taking stock of the *Enrica Lexie* incident and the India-Italy controversy, two issues should be clarified.

The first is the question of jurisdiction on the high seas. In case of an incident caused by armed personnel and involving an innocent vessel, the issue of competent authorities becomes a source of controversy since both flags claim the power to exercise their jurisdiction. The current UNCLOS regulation is not exempt from uncertainty. For this reason, new conventional law is needed with the drafting of a new norm paralleling Article 97 UNCLOS and stating that any incident occurring in case of exercising of the right of self-defence against piracy falls under the exclusive jurisdiction of the State of the ship having armed personnel on board.

The second is the question of functional immunity. It belongs to military personnel and not to contractors. Functional immunity stems from customary international law and in principle no new conventional law is needed. The current ILC work should produce a draft article that will become an authoritative statement of existing customary law. What is suggested is that the current Rapporteur mentions, in the commentary to the forthcoming draft articles, the case of military personnel embarking on commercial shipping vessels in order to defend the ship and the crew from piratical attacks as an example of State officials performing official acts.