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## The *Marò* case: a challenge for international law?

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## List of abbreviations

BMP	Best Management Practices
CGPCS	Contact Group on Piracy off the Coast of Somalia
CMF	Combined Maritime Forces
EEZ	Exclusive Economic Zone
EJIL	European Journal of International Law
EU	European Union
EUNAVFOR	European Union Naval Force
ICC-CCS	International Chamber of Commerce – Commercial Crime Services
ICJ	International Court of Justice
ILC	International Law Commission
IMB	International Maritime Bureau
IMO	International Maritime Organization
IRTC	International Recommended Transit Corridor
MIO	Maritime Interception/Interdiction Operations
MSC	Maritime Safety Committee
MSCHOA	Maritime Security Centre Horn of Africa
NATO	North Atlantic Treaty Organization
NIA	National Investigation Agency
PCASP	Privately Contracted Armed Security Personnel
PCIJ	Permanent Court of International Justice
ReCAAP	Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia
SISMI	Servizio Informazione e Sicurezza Militare (Information and Security Military Service)
SOFAs	Status of Forces Agreements
SUA	Convention for the suppression of unlawful acts of violence against the safety of maritime navigations
TFG	Transitional Federal Government
UKMTO	United Kingdom Maritime Trade Operations
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
VPDs	Vessel Protection Detachments

## ABSTRACT

Il 15 febbraio 2012 al largo delle coste dell'India meridionale, nello Stato del Kerala, la petroliera italiana "Enrica Lexie" e il peschereccio indiano "St. Antony" furono protagonisti di un incidente che avrebbe dato vita ad uno dei casi internazionali più complessi che coinvolge e solleva dubbi su di una vasta serie di argomenti di diritto internazionale. Il caso dei Marò, che prende vita dagli avvenimenti di quel 15 febbraio, riguarda un errore di valutazione da parte di membri della Marina Militare italiana a bordo della petroliera "Enrica Lexie" i quali sono accusati dallo Stato indiano di omicidio per aver sparato e ucciso due pescatori a bordo del peschereccio "St. Antony". I fatti avvennero tra le 20,5 e le 22,5 miglia marine al largo delle coste dello Stato del Kerala in un'area che rientra in una zona ad alto rischio di pirateria internazionalmente riconosciuta.

I fatti possono essere riassunti brevemente così. La nave battente bandiera italiana stava navigando verso l'Egitto trasportando un carico di petrolio. Per proteggere la nave, l'equipaggio e il carico da possibili attacchi pirata che si registrano in tutto l'Oceano Indiano, era presente a bordo della petroliera un Nucleo Militare di Protezione (NMP) formato da sei soldati della Marina Militare italiana appartenenti al Regimento San Marco. Al largo delle coste del Kerala, i membri di questo NMP scorsero un peschereccio in avvicinamento e con una rotta che avrebbe portato alla collisione dei due battelli. Questi elementi portarono a pensare ad un possibile attacco pirata e, di conseguenza, i membri del nucleo militare iniziarono ad applicare le norme di sicurezza internazionali delineate nel BMP, in particolare l'uso di contatti luminosi e un aumento della velocità. Non avendo ricevuto nessuna risposta, e con la piccola imbarcazione ormai a ridosso della petroliera, si decise di usare segnali acustici e raffiche di avvertimento sparate in acqua al termine delle quali il peschereccio cambiò rotta di navigazione. La petroliera italiana fu contattata più tardi lo stesso giorno dalla Guardia Costiera indiana la quale richiedeva un cambio di rotta per dirigersi al porto di Kochi. Dopo alcuni dubbi iniziali e un parere discordante tra il comandante della nave e il comandante del NMP, la nave italiana si diresse verso il porto indiano. Una volta attraccato, i membri dell' "Enrica Lexie" furono informati che era in corso un'indagine per la morte di due pescatori indiani (Ajesh Binki, 25 anni e Selestian Valentine, 45 anni) e, quattro giorni dopo, il Secondo Capo Scelto Massimiliano Latorre e il Sergente Salvatore Girone furono arrestati dalla polizia indiana con l'accusa di omicidio e tentato

omicidio. Da allora, a quasi due anni di distanza, i due Marò sono ancora in territorio indiano in attesa di giudizio.

A questo punto ci sarebbe da chiedersi il perché della presenza di un team di militari membri della Marina dello Stato italiano a bordo di una nave privata impegnata a svolgere le proprie attività commerciali. Ci sarebbe da chiedersi anche se la distanza dalla costa indiana faccia escludere la giurisdizione dei tribunali di Nuova Delhi. In altre parole ci sarebbe da chiedersi se la localizzazione dell'evento in acque che non sono quelle territoriali escluda la competenza della Corte Suprema indiana o di altre corti interne a favore del Tribunale di Roma. Ci sarebbe da chiedersi, inoltre, se lo *status* di militari dei due Marò non sia sufficiente per escludere ogni azione da parte di ogni Stato che non sia quello d'invio. Infine, ci sarebbe da chiedersi se non ci siano altri mezzi pacifici, oltre ai negoziati bilaterali intrapresi nel corso di questi due anni, per risolvere questa situazione tanto tesa quanto unica nel suo genere. Questo lavoro cercherà di dare una risposta a tutti questi quesiti partendo da un'analisi del fenomeno della pirateria al largo delle coste della Somalia e nell'Oceano Indiano in generale.

La pirateria rappresenta una delle più grandi sfide del mondo attuale per i suoi costi economici diretti ed indiretti che hanno un impatto a livello globale. Il costo diretto più intuibile è dato dal pagamento dei riscatti richiesti dai pirati per rilasciare la nave. Nonostante la media dei riscatti abbia toccato punte di oltre 5 milioni di dollari per imbarcazione, questa cifra è niente se paragonata ai costi indiretti della pirateria su scala mondiale. La Banca Mondiale stima questa perdita in 18 miliardi di dollari, perdita che è data da un aumento delle assicurazioni delle navi e dei membri dell'equipaggio, dai costi per un cambiamento di rotte commerciali e dai costi indiretti determinati dal mancato uso delle navi sequestrate per il commercio. La pirateria nell'Oceano Indiano non è solo un problema economico e un rischio per la navigazione, ma è anche un pericolo per la sicurezza energetica per molti Paesi che vedono transitare le proprie scorte energetiche per uno snodo fondamentale dei traffici commerciali soggetto ad attacchi di pirateria: il Golfo di Aden. La messa in sicurezza di queste acque è di vitale importanza non solo per abbassare i costi dei traffici commerciali che transitano per l'Area ad Alto Rischio, ma soprattutto per evitare un clima di insicurezza energetica e per mantenere sicuri alcuni dei punti nevralgici per il commercio mondiale.

Per far ciò, gran parte dei membri della comunità internazionale si sono impegnati ed hanno messo a disposizione risorse e mezzi per fronteggiare e sconfiggere il fenomeno della pirateria nell'Oceano Indiano. Le azioni a livello internazionale sono numerose e

guidate spesso da organizzazioni internazionali come, ad esempio, l'operazione militare Ocean Shield della NATO e l'operazione Atalanta dell'Unione Europea. Anche le Nazioni Unite e l'IMO hanno contribuito con le loro azioni a ridurre fortemente il fenomeno della pirateria nelle acque dell'Oceano Indiano. Il ruolo principale di queste organizzazioni internazionali è stato quello di creare il quadro d'azione per permettere agli Stati coinvolti nelle diverse operazioni di intervenire con tutte le misure necessarie. Infatti, grazie al Consiglio di Sicurezza delle Nazioni Unite i membri della comunità internazionale coinvolti in operazioni militari per contrastare la pirateria possono entrare nelle acque territoriali dello Stato della Somalia per reprimere eventuali atti criminosi. Per quanto riguarda l'apporto dell'IMO, va ricordata soprattutto la guida per le azioni e i comportamenti da tenere per scongiurare un attacco di pirateria.

Nonostante l'impegno di molti membri della comunità internazionale per pattugliare l'Oceano Indiano, i continui attacchi hanno spinto diversi Stati ad adottare misure più incisive come lo spiegamento di nuclei armati a bordo di navi private. Dopo i primi commenti negativi riguardanti questa soluzione per paura di un escalation della violenza, l'IMO chiaramente indica i nuclei militari appartenenti alle forze armate di uno Stato come la soluzione migliore in tema di personale armato. La soluzione italiana di impiegare NMP appartenenti alla Marina Militare trova riscontro nella pratica internazionale e trova supporto dagli ultimi dati riguardanti i rapimenti di navi in seguito ad un attacco pirata nell'Oceano Indiano. Questi dati, infatti, sono in forte diminuzione da quanto la pratica dei nuclei militari è entrata in vigore. Ciononostante, questo non ha impedito l'incidente del 15 febbraio che ancora oggi ruota attorno a due grandi quesiti che riguardano la giurisdizione degli Stati sul caso in questione secondo il luogo in cui l'incidente è avvenuto e l'applicazione, o meno, dell'immunità *ratione materiae* per i due soldati italiani.

Per quanto riguarda il primo argomento, questo verrà trattato analizzando le posizioni di entrambi gli Stati coinvolti in questa situazione considerando le loro motivazione per una competenza esclusiva sul caso in questione. Quest'analisi verrà fatta tenendo conto delle norme di diritto internazionale che regolano la zona economica esclusiva, luogo dove è avvenuto l'incidente che ha dato origine al caso dei Marò. Per quanto riguarda, invece, l'applicazione dell'immunità funzionale, si cercherà di individuare gli organi di uno Stato che hanno diritto a questo istituto giuridico a livello internazionale e, inoltre, si cercherà di capire se ci sono limiti nell'applicazione di questo tipo di immunità. Quest'analisi verrà condotta sulla base di recenti studi condotti dalla Commissione di

Diritto Internazionale e verrà supportata da alcuni casi di giurisprudenza internazionale che riconoscono l'immunità *ratione materiae* ai rappresentanti delle forze armate di uno Stato.

Riassumendo, l'obiettivo di questo lavoro è quello di capire quali principi e quali norme di diritto internazionale vanno applicate al caso dei due Marò per una sua rapida e giusta soluzione. Si cercherà soprattutto di capire la situazione giuridica dello Stato costiero e degli Stati terzi nella zona economica esclusiva così come è stabilito dalla Convenzione Internazionale per il Diritto del Mare. Infine, una serie di metodi pacifici per la soluzione di questa situazione verranno presentati sulla base della loro possibile applicazione al caso.

Il caso dei Marò è un evento unico per la sua complessità e per il gran numero di quesiti fondamentali che esso solleva. Infatti, questo caso può rappresentare una grande sfida per il consolidamento di alcuni tra i più importanti principi di diritto internazionale, dalla divisione delle diverse aree di competenza degli Stati al principio dell'immunità funzionale, passando per l'uguaglianza degli Stati. Tutti questi quesiti vengono sollevati dal caso dei Marò e l'unico modo per proteggere e rafforzare allo stesso tempo questi principi messi in dubbio è una soluzione a livello internazionale che non sia influenzata dalla legislazione interna degli Stati coinvolti in questa situazione.

## 1. INTRODUCTION

The events at the centre of the entire situation presented and analyzed in this work, the *Marò* case, took place on 15<sup>th</sup> February 2012 between 20.5 and 22.5 nautical miles from the Indian coast of the State of Kerala in an area that is internationally recognized for being a risky zone due to piracy activities. In fact, notwithstanding the fact that Somali waters are among the most affected in the last years, especially after 2008, by the phenomenon of piracy, a great portion of the Indian Ocean suffers from this crime. In order to counter it, the members of international community adopted escalating measures, starting from the recognition of an High Risk Area to the authorization to deploy armed forces on board of commercial vessels, passing through the use of warships to patrol specific areas of the sea, such as the IRTC. Several international organizations are involved in countering and reducing the phenomenon of piracy in the High Risk Area. In particular, two organizations should be named: the United Nations and the IMO.

The involvement of the former institution is well represented by the activities of the Security Council which adopted several measures, even binding measures, in order to prevent and suppress the phenomenon of piracy. Resolution 1816 of 2008 might be considered the starting point for a serious involvement of the UN in solving the problem of piracy in the Indian Ocean and, in particular, off the coast of Somalia. In fact, in this resolution the Security Council decided that the State members of the international community cooperating with the TFG in the fight against the crime of piracy might enter Somali territorial waters with the aim to repress pirates' activities in the same manner they are contrasted in the high seas. The Security Council authorized the adoption of all necessary means to repress acts of piracy and armed robbery because it considers this type of crime a threat to international peace and security.<sup>1</sup>

It seems worth considering that the resolution gave the authorization to take actions in the territorial waters of the State of Somalia, thus implying that the same actions would have been lawful in any other part of the sea. In other words, because the territorial waters are the only portions of the sea considered as part of a State territory, any actions adopted by third States in those waters need the authorization of the coastal State in order to avoid any violation to territorial sovereignty. In contrasting piracy in

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<sup>1</sup> Resolution S/RES/1816(2008), adopted by the Security Council at its 5902<sup>nd</sup> meeting on 2<sup>nd</sup> June 2008;

the High Risk Area, this authorization came directly from the UN because the TFG has no effective control over its territory. What is important to highlight, and that is implied in UN Security Council resolutions to counter piracy, is that a coastal State has full sovereignty only on its territorial waters. Therefore, any other area of the sea, such as the contiguous zone or the EEZ, does not form part of State territory and its framework is established by the UNCLOS which is widely recognized as reproducing international customary law.

The involvement of the IMO and its Maritime Safety Committee (MSC) might be seen in the adoption of numerous resolutions with recommendations and guidance for transiting the High Risk Area. One of the solutions adopted by the members of the international community to contrast piracy attacks is the deployment of military personnel on board of commercial vessel which might be either privately contracted armed security personnel (contractors) or official members of the flag State Army (VPDs). The IMO initially opposed the use of armed personnel on board of private ships because of the possibility of an escalation of violence. However, in the BMP, the most important document adopted by the IMO as a guidance for countering piracy, the international organization clearly expressed its preference for the VPDs by stating that these teams are “the recommended option when considering armed guards”.<sup>2</sup> Despite recommendations and codes of conduct adopted by international organizations have no binding power and are usually described as soft law, they seem to have increasing impact in domestic legal systems.<sup>3</sup>

A VPD was present on board of the Italian crude oil tanker “Enrica Lexie” while transiting the High Risk Area on 15<sup>th</sup> February 2012 in order to protect the vessel, the crew and the cargo. The six members of the military team were part of the Italian Navy, more precisely, they were part of the San Marco Regiment. When the Chief Master Sergeant of this VPD, Massimiliano Latorre, saw a small ship flying no flags approaching the Italian vessel, he started implementing the procedures established by the BMP, such as the increase of speed and the use of light signals to communicate with the other ship. After having no answer from the small trawler, the Chief Master

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<sup>2</sup> MSC/Circ. 1405/Rev. 1 on *Revised interim guidance to shipowners, ship operators, and shipmasters on the use of privately contracted armed security personnel on board ships in the High Risk Area*, 16<sup>th</sup> September 2011;

<sup>3</sup> D. N. SHELTON, *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion*, Oxford University Press, New York, 2011, p. 1;

Sergeant thought of a possible pirate attack and he decided to use the fog horn and the general alarm to deter the other ship from any criminal intent. As the last recourse, the VPD on board of the “Enrica Lexie” fired warning shots in the water.<sup>4</sup> At that point, the trawler, that later would be identified as the “St. Antony”, changed its course of navigation and it docked at the port of Kochi where its captain reported the fact to the local police because in this event two Indian fishermen, Ajesh Binki, 25 years and Selestian Valentine, 45 years, lost their lives on board of the “St. Antony”. The Indian Coast Guard, contacted the “Enrica Lexie” and asked the master of the vessel to change the course of navigation of the vessel and to dock at the port of Kochi. Notwithstanding some doubts that cover this point, which would be presented later in this work, the Italian oil tanker docked at the Indian port of Kochi later that day.

At this point the crew of the “Enrica Lexie” and the members of the VPD were informed that they were under investigation from part of the Police of Kerala for the death of the two Indian fishermen. Four days later, on 19<sup>th</sup> February, the Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone were arrested and charged with murder, attempt to murder, mischief and common intent. Since then the two members of the Italian Navy are waiting for a judgment that does not have to establish whether they are guilty, but it has to establish which State between Italy and India has competent and exclusive jurisdiction for a trial. The events presented above are at the basis of one of the most complicated and tense international cases which involves international law.

The phenomenon of piracy represents one of the biggest and most difficult challenges to face in the global system. It represents a great danger not only for the economy of a country or a region, but also it might involve high risks for what is called energy security. In a crucial area for the trade and the transit of oil such as the Gulf of Aden, a widespread and well-organized criminal activity like piracy clearly constitutes a danger which is multiple. First of all, it envisages direct risks for the hijacked vessels and their crews. Secondly, it involves a direct economic loss produced by the payment of the ransoms for the release of the vessel. Thirdly, it has also indirect costs which hit both the economic sphere and the energy security aspect. For the former sphere the costs are represented by increasing insurance premiums, increasing costs for rerouting

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<sup>4</sup> As it would be better explained later in this work, on this point there are two different versions: the Italian version maintains that the warning shots were directed into the water, while the Indian version affirms that the members of the VPD fired at the trawler without provocation.

vessels and the loss represented by the impossibility to use a ship for trading. On the other hand, in an area where the 20-30% of the world oil is transported, the danger of losing the cargo represents a serious risk for any State that imports oil. Securing an area such as the Gulf of Aden would mean to secure the almost one-third of international oil trade and, in a world where this fossil fuel is crucial, it would mean to safeguard energy security.<sup>5</sup>

After more than 23 months since that 15<sup>th</sup> February 2012, there is still no solution to this unique and complex situation. The relations between the Governments of Rome and New Delhi became more tense after the decision of the former Italian Minister of Foreign Affairs not to send back to India the two *Marò* after the end of the second licence. This represented the basis for another dispute in the already complex framework of the *Marò* case which involves two main issues. First of all, this case regards the concept of State jurisdiction and its limits over its territory. In the case analyzed in this work the meaning of territory is extended to the status of State vessels and to the division of the sea. In fact, one of the most relevant aspects considered in this work concerns the division of the different areas of the sea. It would be questioned that, a part from territorial waters, are there any other part of the sea which might be considered as part of the territory of the coastal State? Following Indian domestic legislation the answer seems to be positive. Nevertheless, in a case where two sovereign States are involved, international law and not domestic law has to find application. In particular, the UNCLOS would find application between Italy and India not only because it widely reproduces international customary law on the matter, but also because both countries ratified this convention and, as such, both of them are bound to its provisions. The practice to extend domestic laws out of the limit of the territorial waters is not unusual. However, this practice is rejected by the vast majority of the members of international community, including the UN.<sup>6</sup>

The second fundamental matter considered in the *Marò* case concerns the grant of immunity *ratione materiae* to the members of armed forces and, in the case in point, to the members of the Italian VPD. The institution of immunity is one of the most important pillars not only for international law, but for international relations in general.

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<sup>5</sup> A. COLLINS, *Contemporary Security Studies*, 3<sup>rd</sup> ed., Oxford University Press, Oxford, 2013, p. 307;

<sup>6</sup> T. TREVES, *Piracy, Law of the Sea, and the Use of Force: Developments off the Coast of Somalia*, in *The European Journal of International Law*, vol. 20, n° 2, 2009, pp. 407-408;

Immunities permit to a State to fulfil some important functions and actions out of its territory through its organs, both civil and military. Granting immunity to the armed forces allows to guarantee and safeguard the numerous operations of peacekeeping that are conducted through the UN, thus these involve troops of different countries. Without immunity, every State would face more challenges and more difficulties in conducting its actions abroad, for example through its Embassies, and international peacekeeping missions would find less support because the military members which participate in them would be less safeguarded. For this reason immunity exists. Any act conducted by a State organ in discharge of its official functions should be considered as an act of the State and any responsibility that derives from that act should be imputable to the State.

The *Marò* case is a unique event for its complexity and for the great number of important questions that it raises. In fact, it might represent a challenge for several basic principles of international law which constitute its pillars. As an example, the case analyzed in this work might weaken the concept of the fixed limits of the different areas of the sea as they are clearly established by the UNCLOS which is widely accepted as reproducing international customary law. Moreover, all the efforts of the international community to prevent and suppress the phenomenon of piracy off the coast of Somalia and in the Indian Ocean may be ruined and the States involved in the High Risk Area might be no more willing to contrast piracy. Furthermore, the principle of immunity and its concept might be questioned, thus representing a risk for other international missions that involve armed forces. Even the concept of diplomatic immunity can be endangered in this situation.

Notwithstanding the fact that the High Court of Kerala and the Supreme Court of India passed a sentence on the *Marò* case, this event has not find an end until now. In fact, the Supreme Court in its judgment of 18<sup>th</sup> January 2013 decided that the court of the federate State of Kerala was not competent to try the two Italian soldiers. However, it did not deny the competence of India at all. As a consequence, a new proceeding was instituted by the NIA and now this judgment is still pending. What is worth considering is the fact that the two officials of the Italian Navy do not have to be defended *in* an Indian trial, but *from* an Indian trial. Any judgment taken by an Indian domestic court would be biased not because of the involvement of Indian citizens, but because of the possible application of Indian domestic legislation instead of international law. In a tense event involving two independent States the only applicable law is international law in the respect of the basic and undeniable principle of equality of States.

The necessity to solve the *Marò* case at an international level might be one of the greatest challenges ever faced by international law. The solution of the case analyzed in this work might either strengthen or weaken some fundamental principles which are at the basis not only of international law, but of the global order in general. Solving this complex situation at a domestic level may be considered as an international precedent for cases involving the same matters. Among the most important there are the fixed division of the different areas of the sea as it is established in the UNCLOS and, as a direct consequence, the rights and duties of coastal and third States in such areas. The Government of New Delhi passed a domestic notification thanks to which it extended its penal code and its code of criminal procedure up to 200 nautical miles, thus covering the contiguous zone and the EEZ. With a domestic solution that applies Indian penal code or Indian code of criminal procedure in areas of the sea where the coastal State has only sovereign rights, the Indian extension of domestic laws would appear as lawful. The fixed division of the territories and of the areas of the sea would be questioned and its position would be weakened. Furthermore, other aspects of international law would risk to be undermined by a solution through an Indian court. First of all, the principle of recognition of immunity *ratione materiae* to armed forces in discharge of their official functions abroad would find no application. In addition, the gross violation of diplomatic immunity which followed the Italian decision to hold the *Marò* in Italian territory after the second licence would be unpunished.

This work aims to present in all its seriousness and gravity the problem of piracy in the contemporary world. This phenomenon might be underrated, but it does represent a great danger for maritime security and global trade. In addition, this study will try to understand which are the areas of division of the sea established by the UNCLOS and which are the leading principles for the assignment of exclusive jurisdiction in areas of exclusive competence of a State. For the zones of the sea in particular, there would be an analysis of the area involved in the *Marò* case: the exclusive economic zone. This analysis will try to understand which are the limits of this area *sui generis* and which are the rights and duties of coastal State and third States in it. This study will be based on the UNCLOS which does not represent only the international convention regulating the matters of the law of the sea, but also it is widely considered to reproduce international customs on the law of the sea. The reasoning on the institution of immunity, in particular immunity *ratione materiae*, will try to solve some doubts related to the possible extension of functional immunity to members of armed forces. The final

objective of this work is to try to give some possible solutions of the *Marò* case based on the different instruments of international law. In exposing the viable paths to settle this situation, the *Lotus* case will be taken into consideration and analyzed in order to understand whether it can be considered as a starting point for the solution of the *Marò* case.

In the first part of this work I will introduce the phenomenon of piracy off the coast of Somalia and in the Indian Ocean in general. Then, I will present the response given at an international level by the members of the international community to prevent and suppress this crime and, after this, I will analyze the Italian solutions to counter the phenomenon of piracy. To conclude the first part, I will expose the events that characterize the *Marò* case: from the incident of 15<sup>th</sup> February 2012 to the decision of the Supreme Court of India to limit the freedom of movement of the Italian Ambassador Mancini. In this part I will try to present the positions both of the State of Italy and the Union of India concerning the incident between the “Enrica Lexie” and the “St. Antony” and I will try to answer some important doubts related to specific aspects of the *Marò* case, such as the possibility of an unlawful hot pursuit from part of the Indian Coast Guard.

In the second part of this work I will present the ongoing situation between the State of Italy and the Union of India in its main aspects: the conflict of jurisdiction and the problems regarding the recognition of immunity *ratione materiae*. Regarding the former, I will present the position for the exclusive jurisdiction advanced by both States and I will analyze the relation between domestic and international law in events involving sovereign States and the impact of the Indian notification on the case in point. Then, a brief reasoning will be conducted on the use of the expression “incident of navigation” which is referred to the application of article 97 of the UNCLOS. To conclude the part concerning the conflicting jurisdiction between Italy and India, I will consider the differences between reservations and interpretative declarations and which impact they might have in solving some doubts of the *Marò* case.

For what concerns the problems regarding the recognition of immunity *ratione materiae*, I will present the importance of the extension of this type of immunity to the members of armed forces which is one of the most relevant principles of international law since its origin in the *McLeod* case. Then, I will present a study on the main aspects of the institution of immunity that includes the consideration of which acts are covered by immunity and whether there are limits for the recognition of immunity. Some cases

of international jurisprudence will be presented as further evidence of the importance and the necessity of the recognition of immunity *ratione materiae* to the members of armed forces. Finally, functional immunity will be presented under the light of the recent development on the matter conducted mainly by the International Law Commission.

The second part is completed by a comparison between the *Marò* case and another similar case which has been recalled many times as a possible starting point for the solution of this situation. This similar event is known as the *Lotus* case. The judgment of the PCIJ on this case was also recalled by the Indian Supreme Court in its sentence of 18<sup>th</sup> January 2013 and, as such, it is important to understand the possible application of the principles expressed in the *Lotus* case to the events involving the two Italian marines.

In the third and last part of this work, I will consider two aspects which are fundamental to solve the case in question. First of all, I will try to present the framework of the area in which the events took place: the EEZ. This critical analysis is based on the provisions of the UNCLOS and on personal consideration on the articles which regulate the rights and duties of coastal and third States in the EEZ. Then, this work will continue with a study of the different means adopted to solve this situation which are predominantly based on negotiations between the States involved. The last section of this part is focused on the other viable solutions which might be adopted to adjust this situation. These means include both binding and non-binding methods that might be activated either through an agreement or unilaterally.

In the conclusions of this work I will try to summarize the main aspects of this unique and complex case and I will give my personal opinion on the most important issues analyzed in this study. What is worth recalling is that the *Marò* case might constitute an international precedent for other similar cases in future. As such, the solution of this situation at an international level has a paramount importance for the preservation and the protection of some of the most basic principles of international law and of international relations in general.

**PART I**  
**PRESENTATION OF THE CASE AND GENERAL**  
**INTRODUCTION TO THE PROBLEM OF PIRACY**

**2. THE PROBLEM OF PIRACY AND THE RESPONSE OF THE**  
**INTERNATIONAL COMMUNITY**

SUMMARY: 1. Introduction – 2. The legal framework of piracy – 3. The present situation of piracy

**1. Introduction**

The problem of piracy has always represented a danger for the ships sailing the seas. Since the age of the ancient Greeks and Romans, the attacks of pirates are an ever-present menace for the maritime trade which has always been the most bustling commercial way. The periods of the greatest expansion of piracy were the XVII and XVIII centuries. Then, during the XIX century, this phenomenon was reduced by the growing stability and control of States in their territorial waters. In the history of piracy, this phenomenon has changed and developed numerous characteristics in order to adapt itself to the different historical periods and even nowadays the same problem is affecting the security and the safety of international trade in one of the most important areas for the world commerce: the Gulf of Aden.

It is fundamental not to confuse the illegal actions of piracy with other similar issues such as the actions of privateers. These were private people who were authorised by their governments through letters of marques to attack foreign ships in order to weaken the trade of the enemies. This type of war, which had the aim to conquer the supremacy of the seas, was abolished by the Paris Declaration Respecting Maritime Law of 16<sup>th</sup> April 1856. Furthermore, it is important to distinguish the acts of piracy from the ones of terrorism. In fact, while the former are violent acts implemented for private ends, the latter fulfil political aims.

In order to give an exhaustive definition of the crime of piracy it is necessary to analyse the different elements that constitute this phenomenon:

- a) the acts that compose the material element of the wrongful act;

- b) the subjects of the wrongful act;
- c) the aim of the wrongful act;
- d) the place where the wrongful act is committed.<sup>7</sup>

The acts that can be the material element of piracy are easily identifiable. In fact, these are violence, detention and depredation (that includes acts of plundering and armed robbery). The subjects of the wrongful act can be members of the crew of the ship or passengers. It is worth considering that an act of piracy is usually committed on private vessels. The same acts can be committed on a warship only after the mutiny of the crew of that warship.<sup>8</sup> Analysing the third point we can say that the acts of violence, detention or depredation have to be perpetrated for private ends in general. This suggests that the *animus furandi*, that is implied in the wrongful act of robbery, is not necessary to identify the act of piracy in international law. Considering the last point of this analysis, an act of piracy can be committed in the high seas or in any place that is not subject to the exclusive jurisdiction of any State. This excludes the territorial sea which is considered part of the territory of the coastal State and on which that State enjoys full sovereignty. As a result of this consideration, every coastal State has the duty to prevent and suppress any act of piracy in its territorial waters. In addition, it has the exclusive jurisdiction to try any pirate captured in this part of the sea.<sup>9</sup>

## 2. The legal framework of piracy

A general accepted definition of piracy, that forms part of international customary law, is given in article 101 of the United Nations Convention on the Law of the Sea (UNCLOS) which stated that:

“Piracy consists of any of the following acts:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
  - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

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<sup>7</sup> N. RONZITTI, voce *Pirateria (dir. vigente)*, in in *Enc. dir.*, vol. XXXIII, Milano, 1983, p. 915;

<sup>8</sup> United Nations Convention on the Law of the Sea, adopted on 10<sup>th</sup> December 1982 in Montego Bay, entered into force on 16<sup>th</sup> November 1994, art. 102;

<sup>9</sup> N. RONZITTI, voce *Pirateria (dir. vigente)*, in in *Enc. dir.*, vol. XXXIII, Milano, 1983, pp. 915-918;

- (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).<sup>10</sup>

It is possible to declare the existence of a consolidated rule of international customary law that permits the repression of piracy as a crime *iuris gentium* by all the subjects of the international community. The rationale of this principle is fixed. Because piracy is an activity conducted in the high seas, where there is no State control, each State has the power to suppress any wrongful activity in order to protect the international maritime trade and the basic principle of freedom in the high seas.

It has been far from easy to identify rules of international law which regulate all the aspects of piracy from its definition to its suppression. This can be understood if we think that until the Paris Declaration Respecting Maritime Law of 1856, piracy and the actions of privateers were usually confused. Due to this reason and because each State acted in different ways to contrast pirate attacks, it was difficult to develop uniform international customary laws for the suppression of piracy. The legal framework of piracy is regulated by rules of international customary law that were codified in the United Nations convention on the law of the sea (UNCLOS) which widely reproduce the Geneva convention on the high seas of 1958. Both conventions call for the fullest possible extent of the cooperation in the repression of piracy in the high seas or in any other place outside the jurisdiction of any State.<sup>11</sup> In order to do so, every State may seize a pirate ship, or a ship taken by piracy and under the control of pirates, and arrest the people and seize the property on board.<sup>12</sup> Nevertheless, a seizure on account of piracy can be carried out only by warships.<sup>13</sup> The main difference between the two international treaties is the definition of the high seas, that is crucial to define an act of piracy.

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<sup>10</sup> United Nations Convention on the Law of the Sea, art. 101;

<sup>11</sup> Convention on the High Seas, adopted on 29<sup>th</sup> April 1958 in Geneva, entered into force on 30<sup>th</sup> September 1962, art. 15; United Nations Convention on the Law of the Sea, art. 100;

<sup>12</sup> Convention on the High Seas, art. 19; United Nations Convention on the Law of the Sea, art. 105;

<sup>13</sup> Convention on the High Seas, art. 21; United Nations Convention on the Law of the Sea, art. 107;

As a matter of fact, in the Geneva convention the “term «high seas» means all parts of the sea that are not included in the territorial sea or in the internal waters of a State”<sup>14</sup>, while in the UNCLOS this definition is partially modified. In article 86 of the said convention there is the introduction of a maritime area *sui generis*: the exclusive economic zone. This zone is no more considered part of the high seas. Nonetheless it is considered part of the territorial waters. In fact, this area enjoys a different jurisdiction that is established in the same convention. Some norms of the UNCLOS ruling the high seas and other pertinent rules of international law apply to the exclusive economic zone (EEZ), including the part of the repression of piracy. Due to this, all States are entitled to take appropriate measures to suppress pirate actions, even through the seizure of the suspected ships. Not only are the rules for the repression of piracy binding the States that ratified the UNCLOS, but they bind all the States of the international community because they codify international customary law.

### **3. The present situation of piracy**

Since 2008 the problem characterised by acts of piracy has been qualified as one of the biggest concerns by the international community. The most delicate area is the one of the Gulf of Aden that is a crucial point for international trade. In fact, we can easily understand its importance if we consider the fact that the 20-30% of the world oil trade passes through this Gulf to enter in the Mediterranean Sea through the Suez Canal.<sup>15</sup> Due to its relevance, this area has been subject to numerous piracy attacks from the coast of Somalia in the last years. As a matter of fact, this State represents a fertile ground for the development of illegal activities, including piracy, because there is no central government able to maintain its sovereignty over the territory since the collapse of the dictatorship of Siad Barre in 1991. Since then, the State of Somalia is considered a “failed State”. The result of this lack of control over the territory by a governmental authority has led to the development of illegal activities as the main source of income.

Piracy is, among all, one of the most profitable illegal activities because in the last five/six years it has increased in scale and has improved its organisation. The structure of these groups and the way they work are not simple. In fact, it is not rare that groups of pirates coordinate their activities with other criminal groups, such as gunrunners or drug traffickers which sponsor the activities of the pirates. All these groups have

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<sup>14</sup> Convention on the High Seas, art. 1;

<sup>15</sup> Information available at: [www.eia.gov](http://www.eia.gov);

effective control on the areas of the coast where they have their bases. Pirates adopt small and fast ships called “skiff” that seem normal fishing boats to approach and attack the vessels transiting the sea. At the beginning of their activities, the pirates of the Indian Ocean had a limited area of operation reduced to few miles off the coastline. Nonetheless, with the improvement of their criminal organisations, it is not unusual to register piracy attacks at more than 300 nautical miles off the coast. This is possible because some groups of pirates use a mother ship that is bigger than the normal skiffs and that can sail in the Ocean. This mother ship is used to deploy in the high seas the skiffs and to refuel them for the assaults on the commercial vessels.

The number of pirate groups in the Indian Ocean has increased since 2008 due to the growing profits generated from the hijacking of the vessels.<sup>16</sup> As a matter of fact, the shipowners paid an higher and higher ransom for the release of their ships and this led to an increasing activity that reached an amount of 327 cases of piracy actions in 2011.<sup>17</sup> The expanding incomes coming from the ransoms are divided between the pirates and the sponsors which have had available a larger and larger amount of money to invest in other illegal activities. After having analysed the impact of piracy on the global trade, on the cost of insurances and on the raising ransoms, it can be seen that the cost that the global economy is subject to is remarkably higher than the value of the profits coming from the ransoms. In fact, it is calculated that the former loss is approximately 18 billion dollars per year<sup>18</sup>, while the average of the ransoms paid to pirates in 2011 for the 22 vessels hijacked is around 5 million dollars per ship.<sup>19</sup>

This data displays the seriousness of the problem of piracy for international trade in the Indian Ocean and it is sufficient to understand the concern of the international community about this topic. As a result, numerous actions has been taken by a wide range of States and international organisations.

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<sup>16</sup> F. BILOSLAVO, P. QUERCIA, *Il Tesoro dei Pirati: sequestri, riscatti, riciclaggio. La dimensione economica della pirateria somala*, CeMiSS, 2013, pp. 11-32;

<sup>17</sup> Information available at: [www.shipping.nato.int](http://www.shipping.nato.int);

<sup>18</sup> World Bank; United Nations Office on Drugs and Crime (UNODC), Interpol, *Pirate Trails: tracking the illicit financial flows from pirate activities off the Horn of Africa*, Washington D.C., World Bank, 2013, p. 33;

<sup>19</sup> F. BILOSLAVO, P. QUERCIA, *Il Tesoro dei Pirati*, pp. 42;

## *SECTION 1 – THE INTERNATIONAL RESPONSE TO COUNTER PIRACY*

SUMMARY: 4. The response of the international community – 5. Possible solutions.

### **4. The response of the international community**

The turning point of the actions taken by the international community was the year 2008. In fact, until this year, the Somali piracy had had no hierarchical structure and it was badly organised, causing the failure of the vast majority of the attacks and, as a consequence, the non-profitability of this activity. Nevertheless, since 2008 the Somali piracy has been developing an organised criminal structure with a wide net of investors, experts in ransoms and pirates that has grown in scale both the number of attacks to vessels and the percentage of hijackings with a direct effect on the amount of the ransoms. In fact, the average payment of the ransoms drastically grew, passing from 0.57 million dollars per vessel in the years before 2008, to an average payment of 1.44 million dollars in 2008. This average amount of the ransoms grew until 2011, reaching 5.04 million dollars.<sup>20</sup>

The initial reaction of the international community was characterised by a low concern of the phenomenon and a low international commitment to tackle the problem of piracy and armed robbery. In the years before 2008 the main action taken by the States was the settlement of bilateral or multilateral agreements with other States in order to join the efforts to better contrast piracy attacks. An example of this multilateral cooperation is the Malacca Strait Singapore Coordinated Patrol signed in 2004. As a result of this treaty, the Navy of Indonesia, Malaysia and Singapore can enter in the territorial waters of another signatory State during operations to contrast acts of piracy and armed robbery.<sup>21</sup> Another important example is the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP), a multilateral agreement between 16 countries in Asia. The aim of this treaty, signed in 2004, is to prevent and suppress piracy and armed robbery against ships in Asia with the help of the creation of an Information Sharing Centre in which every member State shall share its information about pirates or piracy attacks.

However, since 2008 the international community, led by the Security Council, started facing the problem of piracy with more concern, mainly in the area off the coast

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<sup>20</sup> *Ibidem*

<sup>21</sup> Information available at: [www.mindef.gov.sg](http://www.mindef.gov.sg);

of Somalia and in the Indian Ocean. Since the firsts resolutions adopted by the Security Council in 2008, the problem of piracy in the Indian Ocean has been defined as a threat to international peace and security and, as a consequence, all the actions taken by the UN were directed to vanquish the problem of piracy and armed robbery. In order to do so, the Security Council authorised in different resolutions the possibility of the use of force to contrast pirates. The most interesting thing of these resolutions is the fact that the States involved in operations against piracy can enter in the territorial waters of Somalia<sup>22</sup>. Historically, the territorial waters of a State are considered part of the territory where the coastal State has full sovereignty. The fact that the Transitional Federal Government of Somalia (TFG) gave its authorisation to the UN seems to have only a formal value because this Government exercises no effectivity over the Somali territory.

In resolution 1816(2008), that is the first one about the problem of piracy in the Indian Ocean, the Security Council stated explicitly that the right to enter in Somali territorial waters shall not be considered as establishing customary international law. In this way, the organ of the UN affirmed both the exceptional nature of this situation and the inviolability of full sovereignty of a coastal State over its territory and its territorial waters. The denial of an initial praxis, which is one of the elements characterising the development of international customary law, is repeated in all the resolutions adopted by the Security Council to face the problem of piracy off the coast of Somalia and in the Indian Ocean.<sup>23</sup> Not only was the decision to enter into the territorial waters extended in time, but also with resolution 1851 (2008) the Security Council authorised actions on the Somali territory to tackle the pirates from their bases on the coast where they organised the attacks to the vessels.

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<sup>22</sup> “States cooperating with the TFG in the fight against piracy and armed robbery at sea off the coast of Somalia may:

(a) Enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law;

and

(b) Use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery;” in Resolution S/RES/1816(2008), adopted by the Security Council at its 5902<sup>nd</sup> meeting on 2<sup>nd</sup> June 2008;

<sup>23</sup> Security Council resolution S/RES/1838 (2008); Security Council resolution S/RES/1846 (2008); Security Council resolution S/RES/1851 (2008); Security Council resolution S/RES/1897 (2009); Security Council resolution S/RES/1950 (2010);

Along with the UN, more and more international organisations and independent States started taking actions to face the problem of piracy following the resolutions of the Security Council and the principle of cooperation among States to repress piracy as it is stated in article 100 of the UNCLOS. One of the most important responses has been the identification of a high risk area of navigation in which warships can be deployed to patrol the area and in which different protective measures can be adopted by private vessels. The area was defined by the North Atlantic Treaty Organisation (NATO) Shipping Centre and recognised by all international organisations involved in operations in the Indian Ocean. Moreover, to facilitate the patrol of the innocent passage of the commercial vessels in the Gulf of Aden it was established an International Recommended Transit Corridor (IRTC).

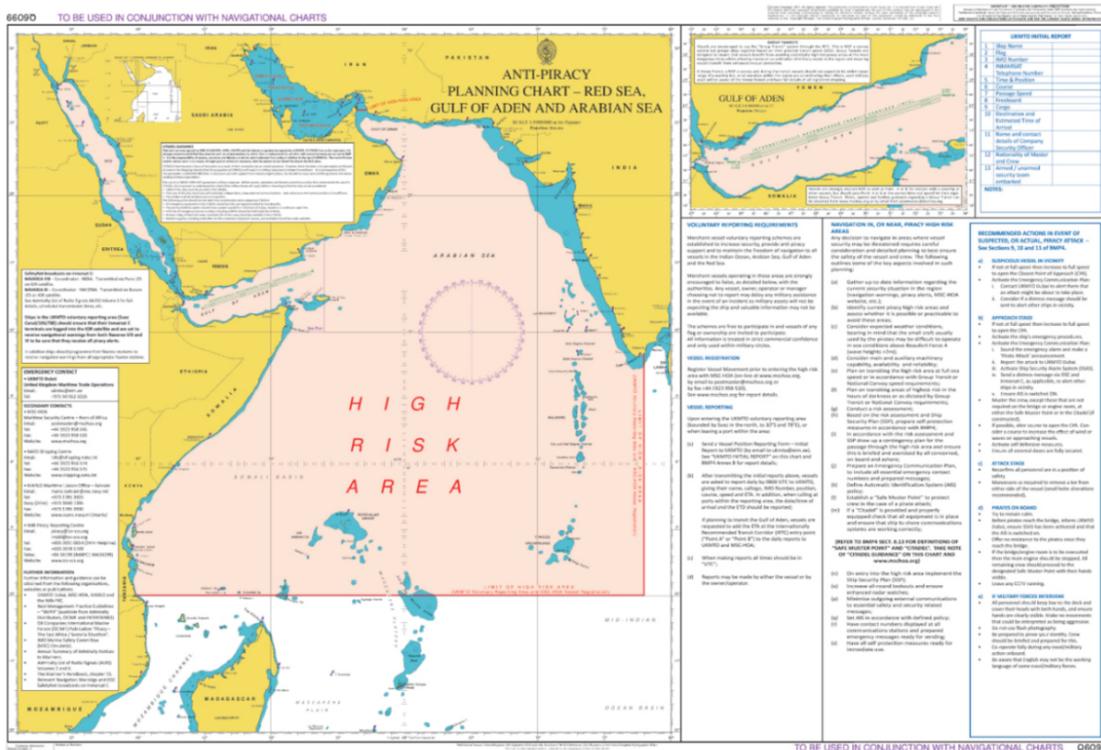


Fig. 1: Map representing the High Risk Area in the Indian Ocean.<sup>24</sup>

In this way the area exposed to the risk of piracy attacks is reduced in this portion of the Indian Ocean and the warships can assure more protection to the trade vessels. The use of naval forces to face the problem of piracy has gained more and more importance within the framework of the implementation of the sanctions imposed by the Security Council. These operations, which are called MIO (Maritime

<sup>24</sup> Information available at: [www.shipping.nato.int](http://www.shipping.nato.int);

Interception/Interdiction Operations), can be defined as an exception of the prohibition of the use of force as it is stated in article 2(4) of the UN Charter, or it can be seen as a temporary deviation from the principle of the freedom of the high seas.

Along with the UN, the other major international organisation which acts to facilitate the international cooperation among States is the International Maritime Organisation (IMO) whose main concern is to prevent and suppress piracy in the Indian Ocean. In order to do so, it adopted different resolutions which call upon all the States involved in operations in the High Risk Area to follow specific rules of navigation. The IMO has a central role for the circulation of the information regarding pirates' attacks and for the development of practices to prevent any of these aggressions. In order to spread these behaviours as widely as possible, this organisation is in contact with numerous States and other important international organisations and it provides them guidelines to implement in the High Risk Area. As a result, more and more actions have been taken by the subjects of the international community to suppress piracy and armed robbery in the Indian Ocean. For example, the International Maritime Bureau (IMB), which is part of the International Chamber of Commerce – Commercial Crime Services (ICC–CCS), is deeply involved in the repression of piracy and it provides a live piracy map in which everyone can see the range of piracy in the world.<sup>25</sup> Moreover, it provides a detailed quarterly report on all the situations involving piracy or armed robbery and its piracy reporting centre is a useful channel for acquiring information and even reporting any incident related to piracy.

However, the concrete effect of the international cooperation is visible in the initiatives taken by several States and international organisations in the High Risk Area. Most of the operations are conducted by warships that have the duty to patrol the Area. The actions taken by the NATO and the European Union (EU) are clear examples of this. The NATO was involved until 2009 with Operation Allied Protector and nowadays it is protecting the Indian Ocean with Operation Ocean Shield. Moreover, the NATO Shipping Centre provides daily update maps on the pirates' activities and the necessary guidance and advice to avoid an attack<sup>26</sup>. The EU is involved with the naval military operation EUNAVFOR – Operation “Atalanta”, adopted with the joint action 2008/851/CFSP, and it coordinates also the Maritime Security Centre for the Horn of

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<sup>25</sup> Information available at: [www.icc-ccs.org](http://www.icc-ccs.org);

<sup>26</sup> Information available at: [www.shipping.nato.int](http://www.shipping.nato.int);

Africa (MSCHOA) that registers the movements of commercial vessels in the High Risk Area and regulates the use of EU warships as an escort for private ships.<sup>27</sup>

In addition, not only does the cooperation for the repression of piracy come from international organisations, but also from independent States that organise multilateral naval forces as it is the case of the Combined Maritime Forces (CMF). The main areas of intervention of this multi-national naval partnership are defeating terrorism, preventing piracy and support regional cooperation. CMF is constituted by 29 independent member States and, at this moment, comprised of three principle task forces: CTF-150 (maritime security and counter-terrorism), CTF-151 (counter piracy) and CTF-152 (Arabian Gulf security and cooperation) in which the Navy of different member States is involved.<sup>28</sup>

It is worth considering that not all the operations have military nature. In fact, the creation of the Contact Group on Piracy off the Coast of Somalia (CGPCS) has no military aspect. This group has to be considered the main international forum to discuss and coordinate the actions among States and international organisations to prevent and suppress piracy in the Indian Ocean. The CGPCS was established in 2009, as an outcome of the UN Security Council resolution 1851 and, at this time, over 80 countries, organisations and private companies form part of this forum.<sup>29</sup>

Nonetheless, all these military operations must be placed in a legal framework otherwise they would constitute a breach of the fundamental principle of freedom of the high seas. As a matter of fact, the legal framework for these actions is represented by Chapter VII of the UN Charter. It is worth recalling that the subjects of the international community involved in patrolling the High Risk Area shall take any necessary measure to prevent and suppress an act of piracy, including the use of force<sup>30</sup>. *Conditio sine qua non* for this authorisation is the recognition of the phenomenon of piracy as a “threat to the peace, breach of the peace, or act of aggression”<sup>31</sup> by the UN Security Council. One of the most important initiatives taken by the IMO was the meeting organised in Djibouti in 2009 in which the main topic was the protection of vital shipping lanes, in

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<sup>27</sup> Information available at: [www.eunavfor.eu](http://www.eunavfor.eu);

<sup>28</sup> Information available at: [combinedmaritimeforces.com](http://combinedmaritimeforces.com);

<sup>29</sup> Information available at: [www.thecgpcs.org](http://www.thecgpcs.org);

<sup>30</sup> T. TREVES, *Piracy, Law of the Sea, and the Use of Force: Developments off the Coast of Somalia*, in *The European Journal of International Law*, vol. 20, n° 2, 2009, p. 412;

<sup>31</sup> Charter of the United Nations, adopted on 26<sup>th</sup> June 1945 in San Francisco, entered into force on 24<sup>th</sup> October 1945, article 39;

particular the Gulf of Aden. At the end of this sub-regional meeting, the IMO adopted an agreement on maritime security, piracy and armed robbery against ships that is known as Djibouti Code of Conduct. According to this code of conduct :

- “each Participant to the fullest possible extent intends to co-operate in:
- a. arresting, investigating, and prosecuting persons who have committed piracy or are reasonably suspected of committing piracy;
  - b. seizing pirate ships and/or aircraft and the property on board such ships and/or aircraft; and
  - c. rescuing ships, persons, and property subject to piracy.”<sup>32</sup>

Furthermore, these action aimed to suppress piracy can be taken in all parts of the sea but the territorial waters, which remains under the exclusive sovereignty of the coastal State. Along with the Djibouti Code of Conduct, the Maritime Safety Committee (MSC) of the IMO adopted another important document which outlines active and passive measures to avoid a pirate attack. This set of pieces of advice is the Best Management Practice (BMP) that is addressed mainly to ship operators and masters of ships transiting the High Risk Area. This body of rules has been approved by the IMO and by the other international organisations operating in that area which highly recommend its adoption.

The BMP lists different passive measures to prevent a pirate attack, among which there are the registration of a vessel transiting in the High Risk Area at least with 96 hours in advance; an high speed navigation and the use of recommended routes as the IRTC. If these measures are not sufficient, the Best Management Practice advise the use of active measures, mainly the use of lighting and alarms as a first approach when a suspected boat is seen. Moreover, commercial vessels transiting the High Risk Area should have water spray and razor wire on the borders of the deck to deter the pirates from attacking the vessel. The BMP are largely accepted and implemented by all the States and international organisations involved in operation in the High Risk Area.

Nevertheless, the problem of Somali piracy is now spread over all the Indian Ocean, more than 8 million km<sup>2</sup>, and for this reason it has become difficult for naval forces involved in the numerous international operations to counter alone. This area was also designated as a war-risk zone since the phenomenon of piracy spread its attack

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<sup>32</sup> IMO Resolution C/102/14, *Protection of Vital Shipping Lanes, Sub-regional meeting to conclude agreements on maritime security, piracy and armed robbery against ships for States from the Western Indian Ocean, Gulf of Aden and Red Sea areas*;

range in 2008 thanks to mother vessels positioned in strategic areas in the high seas. As a consequence, it seemed necessary the adoption of further measures to deter and prevent a piracy attack on commercial vessels and since 2009 some flag States started to hire teams of privately contracted armed security personnel (PCASP) or contractors. The use of these teams was initially disputed by the IMO mainly because of the concern about the safety risk to ships' crews, collateral damage risk to ships, the potential to provoke escalation of violence by pirates, liability and insurance issues in the case of death or injury, and the legal complexities of employing potentially lethal force at sea.<sup>33</sup> However, in 2011 the IMO adopted a series of recommendations on the guidance on the use of private and contracted armed security personnel in which it outlined that the teams of PCASP should not be considered an alternative to the BMP or other protective measures decided by the IMO<sup>34</sup>. Moreover, it clearly stated that, even though its recommendations give the legal framework in which every flag State has to develop its own national legislation regarding the use of the PCASP, the IMO is not intended to endorse or institutionalise their use.<sup>35</sup>

Along with the praxis of the contractors for the protection of commercial vessels, there has been the development of another form of protection to private vessels: the Vessel Protection Detachments (VPDs). This consists of teams of State military personnel hired to provide security on commercial vessels. Different States (such as the Netherlands, France, Spain, Belgium and Italy) offer private shipping companies the opportunity to hire its VPDs for the protection of the ship while it is transiting the Indian Ocean. The praxis of the VPDs is largely preferred than the one of the contractors for counter-piracy missions because, due to the immunity *ratione materiae*, the former have better protection from prosecution and more certain legal status than private contractors. Moreover, national militaries have less problems to move weapons and personnel through different ports thanks to the possibility to settle bilateral or multilateral agreements. However, several problems arise from the use of VPDs. In fact,

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<sup>33</sup> J. BROWN, *Pirates and Privateers: Managing the Indian Ocean's Private Security Boom*, in *Lowy Institute for International Policy*, n. 39, 2012, p. 69;

<sup>34</sup> IMO MSC/Circ. 1405/Rev. 1 on *Revised interim guidance to shipowners, ship operators, and shipmasters on the use of privately contracted armed security personnel on board ships in the High Risk Area*, 16<sup>th</sup> September 2011;

<sup>35</sup> IMO MSC/Circ. 1406 on *Interim recommendations for flag States regarding the use of privately contracted armed security personnel on board ships in the High Risk Area*, 23<sup>rd</sup> May 2011;

“VPDs are an explicit alignment of national military power with private commercial interests. When national militaries patrol the piracy high-risk area in warships, they are patrolling for the common good and able to respond to any vessel under attack. When military personnel embark upon an individual ship as a VPD, they are only able to provide protection to that particular ship and do not contribute to the wider counter-piracy fight. Certainly, placing marines on a private ship is cheaper than escorting it with a warship.

But it makes separating state and commercial interests difficult. The use of national militaries as guards on board shipping also creates substantial ambiguity about their identity, and raises a raft of political and legal problems. [...]

When militaries hire their personnel out as VPDs, they cede a degree of authority over them to the civilian ship captain and shipping company. In effect, VPDs have their movements dictated by shipping companies rather than governments, and are under the command of the civilian ship captain.”<sup>36</sup>

It is worth considering that the use of the VPDs has proved to be one of the most effective measures to deter pirates’ attacks. Besides this, if the military personnel involved in the protection of the private vessel is not involved in other operations, such as intelligence recollection, it is clear that its only aim is to counter piracy and so it can be considered one of the “necessary measures” that the UN Security Council authorised to suppress the phenomenon. Nevertheless, it is not completely true that the VPDs “have their movements dictated by shipping companies”; they cede part of their authority, but they maintain all the decisions regarding the use of force for pirates’ attacks and for these decisions they are under the command of the Ministry of Defence of their national State.

## **5. Possible solutions**

All the operations mentioned above are a clear example of the international community commitment to contrast and suppress piracy. However, in order to have effective results it should be necessary to take a step forward. The direction that all subjects of international law should follow is expressed in the United Nations Convention on the Law of the Sea (UNCLOS) which reproduces international customary law. Following this Convention, “on the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board.

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<sup>36</sup> J. BROWN, *Pirates and Privateers: Managing the Indian Ocean’s Private Security Boom*, in *Lowy Institute for International Policy*, n. 39, 2012, pp. 72-74;

The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.”<sup>37</sup>

Nevertheless, this norm represents a discretionary right of jurisdiction because it does not oblige any State to judge people responsible of acts of piracy. In theory, the applicable principle would have been the one according to which the State that seized the pirates during operations to suppress piracy has the duty to judge them unless another State (such as the one of the flag of the vessel attacked or that of membership of the seafarers attacked) would ask for the extradition. In this way, it could be possible the application of the *aut dedere aut judicare* principle in a way that does not create a judicial vacuum.<sup>38</sup> However, this vacuum exists because States involved in counter-piracy operations try to avoid the judgment of pirates and they release these people after having seized their weapons. The UN Security Council is informed of this practice and in its Resolution 1918 (2010) expressed all its concern over cases when people suspected of piracy are released without facing justice. Furthermore, in the same resolution, the UN organ affirmed that “the failure to prosecute persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia undermines anti-piracy efforts of the international community”<sup>39</sup>.

The Security Council did not exclude the creation of special domestic chambers to further the aim of prosecuting and imprisoning people responsible for acts of piracy and armed robbery.<sup>40</sup> As a result, different agreements have been settled between the EU, involved in the Indian Ocean with Operation EUNAVFOR, and Kenya, Seychelles and Mauritius. According to these treaties, these States accept to receive pirates captured by the EU in its operations and they accept to prosecute them. Furthermore, Seychelles and the United Kingdom cooperated to create the Regional Anti-Piracy Prosecution Coordination Centre which is based in Seychelles. The aim of this centre is to create a multinational hub for law enforcement cooperation in order to collect clear evidence for the prosecution of pirates.

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<sup>37</sup> United Nations Convention on the Law of the Sea, article 105;

<sup>38</sup> F. CAFFIO, N. RONZITTI, *La pirateria: che fare per sconfiggerla?*, in *Osservatorio di Politica Internazionale*, n° 44, 2012, p. 10;

<sup>39</sup> Resolution S/RES/1918 (2010), adopted by the Security Council at its 6301<sup>st</sup> meeting on 27<sup>th</sup> April 2010;

<sup>40</sup> *Ibidem*;

In one year, from 2010 to 2011, the number of vessels hijacked by pirates halved and the number of pirated ships dropped also in 2012, passing from 22 to 7 and there was no effective hijacking attacks by pirates in 2013.<sup>41</sup> These results are the sum of different factors in preventing and suppressing piracy in the Indian Ocean. First of all, the numerous military operations involved in patrolling the High Risk Area proved to be an effective deterrence measure as well as the use of the VPDs on board of the commercial vessels. Secondly, the direct effect of the drop of the pirated ships led to the loss of income for the criminals who invested in piracy activities and there is no doubt that the economic factor has a major role in this illegal activity. As a result, less and less investors are financing pirates' activities and the phenomenon of piracy in the Indian Ocean is reducing in scale.

Nevertheless, this does not mean that piracy has been defeated. In fact, this phenomenon has hidden and transformed in all its history and this can be another phase of its transformation. A concrete and long-lasting action should be taken from the State of Somalia. At this time, this territory is considered a "failed State" and it has no effectivity over its territory which is divided in different regions without a central government. The TFG controls only the southern part of Somalia, while the northern part is split between the control of Puntland and Somaliland, two self-declared States with no authority over the territory. Only an effective government which has authority over all the territory could exercise the monopoly of the force to suppress piracy on its nation. The reinforcement and the stabilisation of the State of Somalia should go at the same pace as the supervision of the economic aspect of piracy. Only by making the pirates' activities non-profitable the phenomenon of hijacking ships for ransoms can be suppressed. In order to do so, it is fundamental a better cooperation among States to monitor the financial transaction in the key areas linked to piracy. Finally, it is necessary to transform the right of a State to prosecute people accused of piracy into a binding judicial duty. In this way, the *aut dedere aut judicare* principle would be implemented. At this time, the best option seems to be the creation of regional tribunal in the areas with major piracy activities, as it was outlined by the UN Security Council. The Regional Anti-Piracy Prosecution Coordination Centre can represent the right model to follow.

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<sup>41</sup> Information available at: [www.shipping.nato.int](http://www.shipping.nato.int);

## *SECTION 2 - THE ITALIAN SOLUTION TO FACE THE PROBLEM OF PIRACY*

SUMMARY: 6. Italian framework for the crime of piracy – 7. Italian law ruling the use of the VPDs – 8. Division of powers between the two captains on board and the first VPDs' missions

### **6. Italian framework for the crime of piracy**

In Italian law the crime of piracy is described in the code of navigation, more precisely in the provisions of articles 1135 and 1136. According to these norms, an act of piracy involves the aim of predation or the use of violence to predate, thus the *animus furandi* constitutes an essential element of the crime of piracy. This is the main difference between the Italian definition of this phenomenon and the one given by international law. It is worth considering that the application of these articles is an exception of article 1080 of the code of navigation regarding the applicability of penal provisions which establishes that

*“il cittadino o lo straniero, che, essendo al servizio di una nave o di un aeromobile nazionale, commette in territorio estero un delitto previsto dal presente codice, è punito a norma del medesimo. Il colpevole che sia stato giudicato all'estero, è giudicato nuovamente nello Stato, qualora il ministro della giustizia ne faccia richiesta.”<sup>42</sup>*

[the citizen or the alien who, by being at the service of a national vessel or aircraft, commits in foreign territory a crime established by this code, shall be punished pursuant to the same code. The culprit, that has been judged abroad, could be judged again in the State if the minister of justice would request.]

As a matter of fact, articles 1135 and 1136 follow the principle of universality of jurisdiction for the crime of piracy, which originates from the fact that piracy is considered a crime *iuris gentium* in international law. In this way, any act of piracy can be punished in any place out of the jurisdiction of coastal States.

### **7. Italian law ruling the use of the VPDs**

Italy is directly involved in contrasting piracy in the Indian Ocean. In fact, it takes part of different international military operations such as “Operation Shield” with the NATO, operation “Atalanta – EUNAVFOR” with the EU and as an independent State

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<sup>42</sup> Codice di Navigazione, adopted with R.D. 30 marzo 1942, n° 327, article 1080;

in the operations of the CMF. In addition, Italy is one of the States that offer the possibility to hire the VPDs to commercial ships. This option was regulated in Italian law in 2011 when the Italian Parliament adopted the law n° 130 on the 2<sup>nd</sup> August. This norm (130/2011) establishes modification to provisions for Italian international operations and represents the legal framework for the use of VPDs by Italian vessels. More precisely, in article 5 of this law it is stated that

*“Il Ministero della difesa, nell’ambito delle attività internazionali di contrasto alla pirateria al fine di garantire la libertà di navigazione del naviglio commerciale nazionale, può stipulare con l’armatoria privata italiana e con altri soggetti dotati di specifico potere di rappresentanza della citata categoria convenzioni per la protezione delle navi battenti bandiera italiana in transito negli spazi marittimi internazionali a rischio di pirateria individuati con decreto del Ministro della difesa, sentiti il Ministro degli affari esteri e il Ministro delle infrastrutture e dei trasporti, tenuto conto dei rapporti periodici dell’International Maritime Organization (IMO), mediante l’imbarco, a richiesta e con oneri a carico degli armatori, di Nuclei militari di protezione (NMP) della Marina, che può avvalersi anche di personale delle altre Forze armate, e del relativo armamento previsto per l’espletamento del servizio.”<sup>43</sup>*

[The Ministry of Defense, in the context of the international activities against piracy in order to guarantee freedom of navigation of the national commercial vessels, may conclude with the Italian private shipowners and with other subjects with specific power of representation of the above mentioned category, conventions for the protection of ships flying the Italian flag in transit in the international maritime spaces which are at risk of piracy identified by the decree of the Minister of Defense, having heard the Minister of Foreign Affairs and the Minister of infrastructure and transport, taking into account the periodic reports of the International Maritime Organization (IMO) by means of the boarding, at the request and with burdens on shipowners, teams of Vessel Protection Detachments (VPDs) of Italian Navy, which can also make use of the personnel of the other Armed Forces, and the related equipment required for the completion of the service.]

According to this provision, the personnel of the Italian Army, in particular the members of the Navy, can be deployed on private commercial vessels to fulfil the international commitment of the prevention and suppression of acts of piracy. Notwithstanding their service on private vessels, the members of the VPDs remain soldiers of the Italian Army and, as a consequence, they continue being subject to the Italian law. In particular, acts of military personnel are regulated by the Military Penal

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<sup>43</sup> L. 2 agosto 2011, n° 130, regarding “*Misure antipirateria*”, in G.U. n° 181, 5<sup>th</sup> August 2011, article 5;

Code of Peace and, with no doubt, the troop that form the VPDs are considered part of the Italian Army.<sup>44</sup>

The commitment to international operations involves the risk of the use of force in cases of necessity or distress which can lead to the death not only of soldiers, but also of civilians. In this case, military personnel is subject to the penal code. Nonetheless, in order to avoid disputes among States over the right to judge the servicemen accused, international law envisages rules of customary law that discipline these cases. A clear example of this is the institution of immunity *ratione materiae*. Furthermore, each State regulates the jurisdiction over its Army when its troops are involved in operations abroad in order to remove any possible doubts that can lead to an unpleasant situation or to a dispute with another State.

The Republic of Italy follows this practice for its troops and, even for the authorization of the use of the VPDs, it establishes some provisions about penal jurisdictions over its military personnel. The penal framework of the specific case of the VPDs is stated in article 7 of the above mentioned law 130/2011. The discipline of this article refers to preceding decrees which are applied to all the international military operations in which the State of Italy is involved. More specifically, Italian VPDs are subject to article 5, section 2-6 of the decree law n° 209 of 30th December 2008, converted into law n° 12 of 24th February 2009 which states that

*“per i reati previsti dagli articoli 1135 e 1136 del codice della navigazione [...], commessi in alto mare o in acque territoriali altrui<sup>45</sup> [...] la competenza territoriale è del tribunale di Roma.”<sup>46</sup>*

[for the crimes established in articles 1135 and 1136 of the code of navigation [...], committed on the high seas or in territorial waters of other States, the Court of Rome has the jurisdiction.]

In addition, in the same article is established that for the crimes of piracy (articles 1135 and 1136 of the code of navigation) the Italian penal code is valid, in particular, the provisions of article 7 which disciplines the crimes committed abroad. According to this norm, any Italian or foreign citizen is subject to Italian law if the crime is

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<sup>44</sup> Codice Penale Militare di Pace, adopted with the R.D. 20<sup>th</sup> February 1941, n° 303, article 2;

<sup>45</sup> The possibility to seize pirates or pirates' ships in the territorial water of other States is only referred to mission “Atalanta – EUNAVFOR” of the EU in the High Risk Area.

<sup>46</sup> L. 24 febbraio 2009, n° 12, regarding “*Partecipazione italiana a missioni Internazionali*”, in G.U. n° 47, 26<sup>th</sup> February 2009, article 5;

committed on a foreign territory from part of public officials at the service of the Italian State, by abusing their powers or violating the duties arising from their functions.<sup>47</sup> Moreover, it is worth considering the extent of the application of the penal code over Italian soil and the notion of territory of this code which the VPDs are subject to. Notwithstanding their position, the vessels flying Italian flag are considered part of the Italian territory, unless they are in areas subject to the jurisdiction of another State under international law.<sup>48</sup> Besides this, the crime is considered committed on Italian territory when the action or the omission that causes the crime takes place totally or partially on Italian soil.<sup>49</sup> These pieces of information are fundamental to establish the jurisdiction of a State over another one for the prosecution of military personnel involved in penal accusation deriving from international operations.

Nevertheless, in some cases the military personnel is excluded from being prosecuted under the penal code or the military penal code of peace. In the specific case of the VPDs, the law 130/2011 refers to specific provisions of a previous norm as exemption from penal jurisdiction which states that:

*“1 – sexies. Non è punibile il militare che, nel corso delle missioni [a contrasto della pirateria], in conformità alle direttive, alle regole di ingaggio ovvero agli ordini legittimamente impartiti, fa uso ovvero ordina di fare uso delle armi, della forza o di altro mezzo di coazione fisica, per le necessità delle operazioni militari.*

*1 – septiem. Quando nel commettere uno dei fatti previsti dal comma 1-sexies si eccedono colposamente i limiti stabiliti dalla legge, dalle direttive, dalle regole di ingaggio o dagli ordini legittimamente impartiti, ovvero imposti dalla necessità delle operazioni militari, si applicano le disposizioni concernenti i delitti colposi se il fatto è previsto dalla legge come delitto colposo.”<sup>50</sup>*

[1 – sexies. It is not punishable the soldier who use or order to make use of weapons, force or of any other means of physical coercion, for the needs of military operations, in the course of the missions [contrasting piracy], in accordance with the directives, the rules of engagement or orders legitimately imparted.

1 – septiem. When committing one of the facts envisaged in subparagraph 1-sexies the soldier exceeds negligently the limits set by law, by the directives, by rules of engagement or by the orders legitimately imparted, or imposed by the needs of the

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<sup>47</sup> Codice penale, adopted with R.D. 19<sup>th</sup> October 1930, n° 1398, article 7;

<sup>48</sup> *Ivi*, article 4;

<sup>49</sup> *Ivi*, article 6;

<sup>50</sup> L. 29 dicembre 2009, n° 197, regarding “*Proroga degli interventi di cooperazione allo sviluppo e a sostegno dei processi di pace e di stabilizzazione, nonche' delle missioni internazionali delle Forze armate e di polizia*”, in G.U. n° 303, 31<sup>st</sup> December 2009, art 4;

military operations, the provisions concerning the culpable crimes are applied if the fact is provided by the law as a culpable crime.]

To summarize, Italy is one of the States that have authorised the use of the VPDs on boards of private commercial vessels transiting the High Risk Area with the function of counter-piracy. Following the UN Security Council resolutions and the IMO guidelines, Italy issued a specific law that regulates the deployment of these teams and their position in case of penal prosecution. The VPDs are considered as the other international military operations, thus the military teams receive the orders from the Ministry of Defence and thus they are subject to the Italian jurisdiction as it is established by Italian law in several norms. In particular, for the case of international missions to counter piracy, there are different provisions that exclude penal jurisdiction in case of the use of force to suppress a pirate attack.

#### **8. Division of powers between the two captains on board and the first VPDs' missions**

After having established the legal framework for the deployment of VPDs on board of private commercial vessels with the law 130/2011, the Ministry of Defence and CONFITARMA<sup>51</sup> settled an agreement for the separation of duties among the master of the ship and the captain of the VPDs. The convention, and the annexed protocol, were signed on 11<sup>th</sup> October 2011. According to these documents, once deployed the VPDs team on the ship, the master of the vessel maintains all the duties established in the code of navigation with the only exception of the repression of acts of piracy which are under the responsibility of the captain of the military team. The master of the ship cannot interfere with the decision of the VPDs and vice versa. As a consequence, the captain of the VPDs is the only one who can decide the appropriate measures to avoid a pirate attack, even the recourse to the use of force. The division of duties is clear: *“il Comandante della Nave rimane responsabile delle scelte inerenti la sicurezza della Navigazione e la manovra, incluse, quelle elusive; il Comandante della Nave non è responsabile delle scelte inerenti le operazioni compiute nel respingimento di un attacco dei pirati.”*<sup>52</sup> [the master of the ship remains responsible for the choices inherent

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<sup>51</sup> CONFITARMA is the Italian Shipowners' Confederation which represents more than 90% of the Italian merchant fleet.

<sup>52</sup> Convenzione tra il Ministero della Difesa e l'Armatore, allegato al “Protocollo di Intesa Difesa-CONFITARMA”, Roma, 11th October 2011, article 5;

the safety of navigation and the choices of the manoeuvre, including elusive manoeuvre; the master of the ship is not responsible for the choices inherent the operations carried out in the avoidance of a pirate attack.]

Furthermore, it is worth considering that the Ministry of Defence might not concede the boarding of the VPDs on a vessel if this ship does not respect the minimum requirements of passive protection as envisaged in the Best Management Practices and in the guidelines of the IMO, such as the water spray and the razor wire.<sup>53</sup>

Nevertheless, the *Marò* case in point is a clear example that the above mentioned law 130/2011 does not cover all the possible situations that might happen in a military operation to suppress a pirate attack. The main thing to introduce in article 5 of this norm is the case of an incident involving the use of force in the presence of the VPDs on board of the vessel transiting the High Risk Area. In this case, after having heard respectively the shipowner and the Ministry of Defence, the master of the ship and the captain of the military team should decide together regarding the viable measures that have to be taken, including the route. If there might be a contrast on this decision, the opinion of the Ministry of Defence should prevail on the one of the shipowner in order to avoid difficult and unpleasant situations in the relations among States.

The decision to provide a legal framework for the deployment of military personnel on board of private commercial vessels came in the most intense period of piracy attacks in the Indian Ocean. Among the hijacked vessels in 2011, three of them were Italian: the MV “Rosalia D’Amato”, the crude oil tanker MV “Savina Caylyn” and the MV “Enrico Ievoli”. For all of them, a ransom was paid to the pirates for the release of the ship which caused an indirect cost for the shipowner that can be divided in two sectors, where the first is the most predictable. The ransom was paid by the insurance company which after increased the price of the insurance. The second indirect cost is represented by the impossibility for the shipowner to use the hijacked vessel for trading. Considering that the average value of the cargo of an oil crude tanker is around 60,000,000 €<sup>54</sup>, it is not difficult to understand that the hijacking of one of these ships for several months represents a huge loss for the shipowner. For this reason, CONFITARMA welcomed the decision of the Ministry of Defence to deploy military personnel on board of commercial vessels to counter piracy.

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<sup>53</sup> *Ivi*, article 3;

<sup>54</sup> This information is the result of an evaluation based on the average cargo of an AFRAMAX crude oil tanker and the price of oil at 23<sup>rd</sup> November 2013;

The main purpose of having a military team on board of a ship is to deter pirates from attacking that vessel. If the deterrent purpose is not sufficient, the members of the VPDs can use “all necessary measures” to counter a pirate attack. These measures can or cannot involve force. For example, in the case of a suspected boat, the members of the team should alert the boat with light signals and alarms. If the suspected boat continues to approach, the VPDs might fire warning shots and, ultimately, they can directly shoot the boat. However, this is not a fixed and rigid procedure. The captain of the VPDs is the only one who can decide which measure is the most appropriate to the case in point. Before the *Marò* case, the use of an Italian military team had been useful to avoid two pirate attacks in the same day. On 11<sup>th</sup> February 2012 the MV “Jolly Arancione” was approached by a pirate skiff. The soldiers started using light signals and alarms and showed their weapons. In this case, the presence of armed personnel on board was sufficient to avoid an attack. Later that day, a ship flying the Maltese flag, which was sailing not far from the Italian vessel, was approached by pirates. The master of the Maltese tanker asked for the help of the “Jolly Arancione” and directed its vessel closer to the Italian one. The presence of the VPDs on board of a boat near to the targeted one deterred the pirates from their action.<sup>55</sup>

On 15<sup>th</sup> February 2012 the scenario for another Italian vessel was different. The MV “Enrica Lexie” was sailing on the Laccadive Sea, which is part of the High Risk Area, with a VPDs on board when a boat suspected of acts of piracy started getting closer and closer to the Italian ship. After having used light signals and alarms, the captain of the VPDs decided to fire warning shots on the suspected boat. This was the beginning of the ongoing situation here analysed which raised tensions between the State of Italy and the State of India and led to a diplomatic crisis.

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<sup>55</sup> Information available at: [www.ansa.it/mare/notizie/rubriche/shippingecantieri/2012/02/12/visualizza\\_new.html\\_97739826.html](http://www.ansa.it/mare/notizie/rubriche/shippingecantieri/2012/02/12/visualizza_new.html_97739826.html); [www.corriere.it/cronache/12\\_febbraio\\_11/pirati-san-marco-mercantile\\_1a57ef68-54ae-11e1-b05f-5be01557028e.shtml](http://www.corriere.it/cronache/12_febbraio_11/pirati-san-marco-mercantile_1a57ef68-54ae-11e1-b05f-5be01557028e.shtml);

### 3. THE MARÓ CASE: A CHRONOLOGY OF THE EVENTS

SUMMARY: 9. Introduction – 10. Contrasting versions – 11. The licences granted to the Italian soldiers and the diplomatic crisis – 12. Analysis of the most important aspect of the diplomatic crisis – 13. Present situation

#### 9. Introduction

At a distance of almost 23 months since the date of the incident, some facts are still unclear. Nevertheless, this work will try to reconstruct the events on the bases of the information available. According to the Indian Coast Guard, on the 15<sup>th</sup> February 2012, at approximately 16:30 (11:00 Italian time), the Italian crude oil tanker MV “Enrica Lexie” and the Indian fishing trawler “St. Antony” were in collision course in the Laccadive Sea off the Indian coast of the State of Kerala. On board of the Italian ship, a VPD team had been deployed in Djibouti to protect the vessel from pirate attacks in the High Risk Area.

The day of the incident, the members of the military team saw an unidentified boat sailing in a direction that would have caused a collision course. At a distance of 800 metres, the Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone, belonging to the San Marco Regiment of the Italian Navy, started adopting the BMP indicated by the IMO. Firstly, they used lights signals to communicate with the Indian trawler. Secondly, once it reached 500 metres, the VPD members showed their weapons above their heads to inform the members of the other boat the presence of military personnel on board. The fishing boat did not change course reaching the distance of 100 metres from the Italian vessel<sup>56</sup>. This behaviour was interpreted by the Italian soldiers as a threat and, above all, a pirate threat. As a consequence, the next phase was the use of the general alarm and the fog horn, while the members of the VPD fired warning shots in the water. At this point, the Indian trawler changed its course and returned to the port of Kochi, in the district of Kollam in the State of Kerala. The “Enrica Lexie” continued its course to Egypt when at approximately 18:20 it was contacted by the Indian Coast Guard and asked to reverse to the port of Kochi, where it arrived at 23:00.<sup>57</sup>

The Italian soldiers knew that two Indian fishermen lost their lives on board of the “St. Antony” (Ajesh Binki, 25 years and Selestian Valentine, 45 years) only after

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<sup>56</sup> Information available at: [www.reuters.com](http://www.reuters.com);

<sup>57</sup> Information available at: [pibmumbai.gov.in](http://pibmumbai.gov.in);

having docked at the port of Kochi.<sup>58</sup> The police of the district of Kollam patrolled the area around the Italian vessel for four days, until 19<sup>th</sup> February, when the Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone were arrested and charged with the provisions of the sections 302 of the Indian Penal Code (murder), sections 307 (attempt to murder), 427 (mischief) along with section 34 (common intent)<sup>59</sup>. Since then, the two Italian soldiers have been moved in five different locations looking forward from knowing the decision of the Courts judging their case.

One of the most important things to establish in this case is the position where the incident happened in order to understand which State has jurisdiction over the case. After some initial doubts about the exact place of the incident, it can be stated that the event occurred at 20.5 nautical miles off the coast of India<sup>60</sup>. According to international law, the two boats were in the portion of the sea known as contiguous zone, where a State may exercise the control necessary to prevent infringement of its customs, fiscal, immigration or sanitary laws in an area that may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.<sup>61</sup>

It cannot be hidden that numerous speculations arose on this event. An example of this is the connection of the *Marò* case with the Finmeccanica helicopter bribery scandal or the theory that the vessel which fired against the Indian trawler was not the “Enrica Lexie” but the “Olympic Flair”, a crude oil tanker flying Greek flag which suffered a pirate attack on the same day and in the same area of the Indian contiguous zone as the “Enrica Lexie”.<sup>62</sup> Nevertheless, the aim of this work is not to follow speculative information, but to analyse the case starting from concrete information.

These are the facts at the beginning of the ongoing difficult and tense situation between Italy and India, both of which give different versions about the events of the incident.

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<sup>58</sup> Information available at: indiancoastguard.nic.in;

<sup>59</sup> Supreme Court, judgment of 18<sup>th</sup> January 2013, *Republic of Italy thr. Ambassador & Ors. v. Union of India & Ors.*; SLP(C) NO. 20370 of 2012; High Court of Kerala, judgment of 29<sup>th</sup> May 2012, *Massimiliano Latorre v. Union of India*, 252 KLR 794;

<sup>60</sup> Supreme Court, judgment of 18<sup>th</sup> January 2013, *Republic of Italy thr. Ambassador & Ors. v. Union of India & Ors.*; SLP(C) NO. 20370 of 2012;

<sup>61</sup> United Nations Convention on the Law of the Sea, article 33;

<sup>62</sup> For more information about these theories, please consult: M. MIAVALDI, *I due marò. Tutto quello che non vi hanno detto*, Edizioni Alegre, Roma, 2013; F. VENTURINI, *Uno strappo necessario (e costoso)*, in *Corriere della Sera*, 12th March 2013, pp. 1-3; *India, nessun risvolto politico. Icc conferma attacco a nave greca* in *La Repubblica*, 21st February 2012;

## 10. Contrasting versions

The main aspects that have to be solved are the exact chronology of the events and the decision of the “Enrica Lexie” to reverse and dock the vessel in the port of Kochi.

### *10.1. The Italian version*

According to the Italian deposition, the two Italian soldiers, who were conducting counter-piracy activities on board of the “Enrica Lexie”, sighted a trawler flying no flags. This small boat was approaching the Italian crude oil tanker and a collision course was expected. After having followed the guidelines of the BMP, such as rising speed, using lights signals and alarms, the members of the VPD fired warning shots in the water. Consequently, the small trawler changed its course in the opposite direction.<sup>63</sup>

It is necessary to analyse that the Indian trawler was flying no flags. In the Indian Merchant Shipping Act, which represents the legislation for the merchant vessels, it is stated that its provisions are not applicable to the fishing vessels. As a consequence, the boats that are not registered under such Act are not authorised to fly the Indian flag. The Indian Supreme High Court affirmed this fact in its judgment of the 18<sup>th</sup> January: “the St. Antony was not flying an Indian flag at the time when the incident took place”<sup>64</sup>. This element is not irrelevant in the reconstruction of the events. In fact we have to consider that a small fishing boat flying no flags that did not stop at the light signals and alarms might be easily considered as a pirate skiff.

Following this, the Indian Coast Guard contacted the master of the “Enrica Lexie” requesting the Italian vessel to dock at the port of Kochi in order to identify the boat of a group of suspected pirates who had been captured by the Indian Coast Guard. The two masters on board of the Italian ship, the master of the vessel and the Chief Master Sergeant of the VPD, communicated this request to their superiors, respectively, to the shipowner and to the Ministry of Defence. They received opposing solutions. The former advised the master of the vessel to dock the vessel at the port of Kochi, supporting the Indian request, while the latter suggested respecting the course of navigation. The shipowner solution was implemented by the master of the ship and the Italian vessel redirected its course to Kochi. Once docked at the port, the “Enrica Lexie”

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<sup>63</sup> Press release n° 4 of 15<sup>th</sup> February 2012, available at: [www.marina.difesa.it](http://www.marina.difesa.it);

<sup>64</sup> Supreme Court, judgment of 18<sup>th</sup> January 2013, *Republic of Italy thr. Ambassador & Ors. v. Union of India & Ors.*; SLP(C) NO. 20370 of 2012;

was blocked by the Indian police and the military personnel on board was charged with murder.

Following this event, the Italian Parliament produced a document in which it is stated that the entrance of the Italian vessel in the Indian port was the result of a deception.<sup>65</sup> In this way, the speculative news about the possibility of another vessel shooting at the Indian trawler found more ground.

### *10.2. The Indian version*

According to the Indian version, based on the First Information Report of the captain of the St. Antony, the boat was involved in fishing operations while, all of a sudden, some men on board of a red and black tanker fired at the boat for at least two minutes, killing two fishermen. The trawler changed its course of navigation and docked at the port of Kochi where the captain reported the incident to the local authority. In its deposition, the master of the “St. Antony” maintained that no light signals had been made and that the tanker fired at the boat without provocation.<sup>66</sup>

Nevertheless, the most important thing to analyse is the Indian version of the Italian decision to follow the request of the Indian Coast Guard to dock at the port of Kochi. In fact, the two versions of this event are totally different. As reported by the Indian Coast Guard and the Indian Navy, they verified that the “Enrica Lexie” was the vessel from which the shots had been fired. After having requested to change the course of navigation in direction of the port of Kochi, the Indian Coast Guard intercepted the Italian vessel, probably in the Indian Exclusive Economic Zone<sup>67</sup>. At this point, the Coast Guard pressured the “Enrica Lexie” to change its course of navigation. After initial resistance, the crude oil tanker followed the Indian request.<sup>68</sup>

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<sup>65</sup> Senato della Repubblica, *Informativa del Ministro degli Affari esteri sull'uccisione di un cittadino italiano rapito in Nigeria e sull'arresto di due militari in India e conseguente discussione*, 13th March 2012, pp. 7-8;

<sup>66</sup> V. EBOLI, J. P. PIERINI, *The “Enrica Lexie Case” and the limits of the extraterritorial jurisdiction of India*, in *Quaderni Europei – Università di Catania*, n° 39, 2012, p. 4;

<sup>67</sup> The distance from the coast is not specified, but the Indian Coast Guard intercepted the Italian ship 3 hours after the incident. In this amount of time the crude oil tanker continued its navigation and it is highly probable that it was in an area between the 24 nautical miles (the limit of the Contiguous Zone) and the 200 nautical miles (the limit of the Exclusive Economic Zone);

<sup>68</sup> C. CURTI GIALDINO, *Il caso dei fucilieri di Marina in India: una “Caporetto” diplomatica, politica e giudiziaria*, in *Federalismi.it*, n° 7, 2013, pp. 10-13;

## 11. The licences granted to the Italian soldiers and the diplomatic crisis

Since the beginning of this situation, both States have claimed the jurisdiction over the case but until this time there is no clear decision on which State has the right to judge the two Italian soldiers according to international law. These 23 months have been characterised by rising and weakening tensions between Italy and India with two moments that exemplify the opposite behaviours of the States. The two licences granted by the Indian Government to the Italian soldiers represent the mildest moment of this situation, while the events following the second licence represent the most tense one. In December 2012, the Indian Government and the Italian Ministry of Foreign Affairs Giulio Terzi di Sant'Agata settled an agreement thanks to which the two soldiers could spend two weeks in Italy with their family for Christmas. This period, from the 20<sup>th</sup> December 2012 to the 4<sup>th</sup> January 2013, was the first time in Italy for the two members of the VPD since the incident happened, almost 11 months before. However, this licence was granted only after 60 million of rupee (more than 826,000 euro) given by the Italian Government to guarantee the return of the two soldiers and an *affidavit* in which the Italian Ambassador in India promised their return.<sup>69</sup>

On the 18<sup>th</sup> of January 2013, the Supreme Court of India denied the jurisdiction of the State of Kerala on this case because the incident did not happen in the territorial waters. Nonetheless, the Court expressed its authority over the case and in the same document it stated the necessity to create a special tribunal to judge the Italian soldiers.<sup>70</sup>

A second licence was asked in February 2013 to participate at the elections in Italy. This second licence was granted on the 22<sup>nd</sup> of February for a period of four weeks. This time, the Indian Court asked only for an *affidavit* of the Italian Ambassador to guarantee the return of the Marò. On 11<sup>th</sup> March, the situation collapsed when the Italian Foreign Minister declared that the two soldiers would have not returned to India. Immediately, the Indian Government addressed to the Italian Ambassador for explanations, but this decision was taken without consulting him. As a consequence, the Indian Government announced that the Italian Ambassador could not leave India,

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<sup>69</sup> *Ivi*, p. 28; for more information, see also: [www.rainews24.rai.it/it/news.php?newsid=172872](http://www.rainews24.rai.it/it/news.php?newsid=172872); [www.tgcom24.mediaset.it/include/html/popup/stampapopup.shtml?mondo/articoli/stampa/articolostampa1074060.shtml](http://www.tgcom24.mediaset.it/include/html/popup/stampapopup.shtml?mondo/articoli/stampa/articolostampa1074060.shtml);

<sup>70</sup> Supreme Court, judgment of 18<sup>th</sup> January 2013, *Republic of Italy thr. Ambassador & Ors. v. Union of India & Ors.*; SLP(C) NO. 20370 of 2012;

limiting in this way his freedom of movement. Furthermore, every airport in India received the order not to let the Ambassador leaving the Country<sup>71</sup>. India restrained Italian Ambassador Daniele Mancini from leaving the territory until 18<sup>th</sup> March (then extended until 2<sup>nd</sup> April).

On 21<sup>st</sup> March, this tense situation ended when the same Italian Foreign Minister assured that the two soldiers would have returned to India. Nevertheless, this event represented a multiple crisis in the *Marò* case. In fact, it was the starting point of a diplomatic crisis between the two countries and it strengthened tensions within the Italian Government that ended with the resignation of Minister Terzi.

## **12. Analysis of the most important aspect of the diplomatic crisis**

After having mentioned the most significant events of the *Marò* case, some important and curious aspects can be analysed under international law. First of all, if we accept the Indian version about the changing course of navigation of the “Enrica Lexie”, we are facing a problem of wrongful hot pursuit. Secondly, this work will try to explain the reasons of the Italian Foreign Minister decision that led to the collapse of all the diplomatic efforts made until then. Finally, an evaluation of the Indian Government act to restrain the Italian Ambassador from leaving the country will be given.

### *12.1. The hot pursuit position*

According to international customary law, warships or ships that conduct public services for the coastal State, such as the Coast Guard, might pursue a foreign vessel that has violated the laws and regulations of that State. This basic principle of international law is also stated in the UNCLOS, where it is further affirmed that the “pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted”<sup>72</sup>.

Furthermore, it is worth stating that the hot pursuit has not the same characteristics in all areas of the sea. As a matter of fact, “if the foreign ship is within a contiguous zone, as defined in article 33, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established”. The same thing is

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<sup>71</sup> Supreme Court, note of 14<sup>th</sup> March 2013, n° 4/2013;

<sup>72</sup> United Nations Convention on the Law of the Sea, article 111;

established also for the Exclusive Economic Zone (EEZ): “the right of hot pursuit shall apply *mutatis mutandis* to violations in the exclusive economic zone [...] of the laws and regulations of the coastal State applicable in accordance with this Convention to the exclusive economic zone”<sup>73</sup>. This means that a hot pursuit can start in the contiguous zone only to prevent violations to its customs, fiscal, immigration or sanitary laws. Regarding the EEZ, the rights of the coastal State, for which it can commence a hot pursuit against a foreign vessel, are established in article 56 of the UNCLOS.<sup>74</sup> Furthermore, it is worth considering that a hot pursuit may commence only after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign vessel. This did not happen with the pursuit of the “Enrica Lexie” from part of the Indian Coast Guard which started the pursuit and, only after having approached the ship, used signals to stop the tanker.<sup>75</sup>

An important precedent can be useful to better understand the international customary norms ruling the cases of hot pursuit. In the case “Saint Vincent and Grenadine v. Guinea”, better known as the “Saiga” case, the International Tribunal for the Law of the Sea affirmed that “the conditions for the exercise of the right of hot pursuit under article 111 of the Convention are cumulative; each of them has to be satisfied for the pursuit to be legitimate under the Convention”<sup>76</sup>.

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<sup>73</sup> *Ibidem*

<sup>74</sup> “1. In the exclusive economic zone, the coastal State has:

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

(b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:

(i) the establishment and use of artificial islands, installations and structures;

(ii) marine scientific research;

(iii) the protection and preservation of the marine environment;

(c) other rights and duties provided for in this Convention.”

2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.”, United Nations Convention on the Law of the Sea, article 56;

<sup>75</sup> Information available at: [www.ejiltalk.org](http://www.ejiltalk.org);

<sup>76</sup> *The M/V “Saiga” case, Saint Vincent and Grenadines v. Guinea*, judgment of 1<sup>st</sup> July 1999, n°2;

The Italian version of a deception from part of the Indian Coast Guard seems less probable than the pursuit version. Nevertheless, as the UNCLOS affirms and the International Tribunal for the Law of the Sea confirmed, the hot pursuit has to follow certain phases which are cumulative and the order of which have to be respected. If a pursuit really happened, it started when the “Enrica Lexie” was in the EEZ. This means that India could commence the pursuit only to repress activities related to its sovereign rights in that area, which are: exploring and exploiting, conserving and managing the natural resources, activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds, the establishment and use of artificial islands, installations and structures, marine scientific research, the protection and preservation of the marine environment. Moreover, any visual or auditory signals was given after the hot pursuit had commenced. These two elements constitute a clear violation to what is established in the UNCLOS, that was ratified by both Italy and India, and to what was reaffirmed in the Tribunal judgment. The breach of a norm of international law gives rise to international responsibility of the State. However, Italy has never claimed such violation because it continues with its version of the deception from part of the Coast Guard, but this theory seems the least probable and the least credible.

### *12.2. The Italian decision to hold the Marò*

The Italian decision not to return the two soldiers of the San Marco Regiment to India after the end of the second licence represented a total fallout in the diplomatic relations among these countries. The main result of this risky action was a rising tension between Italy and India until the Italian Foreign Minister stepped back. There are several reasons that explain the failure of this action.

First of all, Italy presented its act as a countermeasure arising from the recognition of a dispute between the two States as it was repeatedly affirmed by Minister Terzi.<sup>77</sup> Nevertheless, as it was stated by the Permanent Court of International Justice and reaffirmed by the International Court of Justice, a dispute is “a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons”<sup>78</sup>. The

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<sup>77</sup> Camera dei Deputati, XVII Legislatura, Resoconto stenografico della seduta del 26 marzo 2013, pp. 15-18;

<sup>78</sup> *Mavrommatis Palestine Concessions (Greece v. United Kingdom)*, P.C.I.J., 1924, (Series. A), n° 2;

recent developments in the international jurisprudence have added that, in order to have an international dispute, it is no more sufficient to have a conflict between the interests of the two subjects, but it is necessary that one party opposes or rejects manifestly the position of the other subject.<sup>79</sup> As a consequence, in this case there is no manifest opposition over the jurisdiction. In fact, the Supreme High Court of India has not expressed its opinion yet. It has established the creation of a special court to decide on the conflict of jurisdiction which is at the centre of this case. Only after this judgment there could be a manifest resistance from one party and, eventually, the establishment of an international dispute between Italy and India.

Secondly, the Italian decision broke the *affidavit* given by the Italian Ambassador in front of the Supreme High Court of India and, as a consequence, it caused a strong reaction from part of the Indian Government. This might be better understood if we consider that part of the doctrine considers the *affidavit* as a bilateral treaty concluded in the simplified form<sup>80</sup>. Notwithstanding the opposing opinion of other jurists, who affirm that the *affidavit* has only a political nature, the international jurisprudence confirmed the binding character of this act: “just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected”.<sup>81</sup>

Nevertheless, the binding character of the unilateral declaration of the *affidavit* might be invalidated if a fundamental change of circumstances occurred. Italy had concrete justification not to return the two soldiers, but the explanation given by the Italian Government seemed too hurried and, on top, Italian motivations were given in different occasions, thus creating a sense of uncertainty in these justifications. An effective decision would have involved the explanation of the decision made by the Italian Government all in one official public statement in which two fundamental explanations would have been clarified: first of all, the essential change in the Court that would judge

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<sup>79</sup> G. ARANGIO-RUIZ, voce *Controversie Internazionali*, in *Enc. Dir.*, vol. X, Milano, 1970, pp. 386-390;

<sup>80</sup> For more information about the nature of the *affidavit*, please see: interview to C. Curti Gialdino in “*IlSussidiario.net*” of 24<sup>th</sup> March 2013; interview to E. Cannizzaro in “*IlSussidiario.net*” of 13<sup>th</sup> March 2013; interview to F. Pocar in “*Il Messaggero*” of 26<sup>th</sup> March 2013;

<sup>81</sup> *Nuclear tests case – Australia v. France*, judgment of 20<sup>th</sup> December 1974;

the Italian soldiers and then the possibility of death penalty in case of a trial held in India. The formation of a special court to try the Italian soldiers represents a clear breach to the basic principle of the natural assigned judge which is present not only in the Italian Constitution<sup>82</sup>, but it is established in other Constitutions of European countries. The creation of a special tribunal might compromise the result of the trial.

Furthermore, the strongest motivation not to return the Marò should have been represented by the possibility of the death penalty. As a matter of fact, the Italian soldiers were charged with section 302 of the Indian penal code, which clearly states that “whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine.”<sup>83</sup> Even if the death penalty is established only in the rarest of rare cases, this does not exclude its implementation in this trial and this constitutes a breach of the prohibition of extradition in a State where the death penalty is still in use. The death penalty is abolished in Italian Constitution in article 27 and the prohibition of extradition to protect a citizen from the death penalty was confirmed by the Italian Constitutional Court in the “Venezia” case. In fact, in that case an Italian citizen, Pietro Venezia, who was charged with murder was not extradited to the state of Florida in the United States because he risked to be condemned to death penalty as established by the federal law. Having returned the Italian soldiers member of the VPD to India represents a deviation from the jurisprudence and a clear violation to the Italian basic principles established in the Constitution.

### *12.3. The violation of the Vienna Convention on Diplomatic Relations*

Following the Italian decision to hold its soldiers in its territory, Indian authorities reacted very strongly. The major action adopted was the restriction of movements of the Italian Ambassador Daniele Mancini. In fact, on 14<sup>th</sup> March 2013 the Supreme High Court adopted an injunction with which Mr. Mancini could not leave Indian territory without the authorization of the court. Moreover, the Minister of the Interior alerted Indian police to avoid the departure of the Ambassador through any Indian border, port or airport. In order to support this action, Indian authorities maintained that the Italian Ambassador lost its immunity from Indian jurisdiction because he broke the *affidavit*

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<sup>82</sup> Costituzione della Repubblica Italiana, adopted on the 22<sup>nd</sup> December 1947, entered into force on the 1<sup>st</sup> January 1948, articles 25 – 102;

<sup>83</sup> Indian Penal Code, adopted on the 6<sup>th</sup> October 1860, entered into force on the 1<sup>st</sup> January 1962, section 302;

given in front of the Supreme High Court. According to it, the direct consequence of this act would have been the waiver of immunity from part of the Ambassador conforming to the Vienna Convention on Diplomatic Relations. In fact, “the initiation of proceedings by a diplomatic agent [...] shall preclude him from invoking immunity from jurisdiction in respect of any counterclaim directly connected with the principal claim.”<sup>84</sup>

Nevertheless, according to the Vienna Convention on Diplomatic Relations which was ratified by both States and which reproduces international customary law “the person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.”<sup>85</sup> The infraction of Mr. Mancini’s inviolability, and as such the violation of the convention, was reproduced in his restriction of movement. It is worth noting that such restriction cannot be acted even in cases of war or as countermeasures. Secondly, a diplomatic agent enjoys immunity from civil, administrative and criminal jurisdiction of the receiving State.<sup>86</sup> The *affidavit* given in front of the Supreme Court represents an act deriving from his official functions. Consequently, Italy is responsible for any wrongful act committed by Mr. Mancini in giving the unilateral declaration.

Finally, it can be said that the Indian thesis cannot be accepted because the Ambassador did not commence any proceeding in front of the Court and because the waiver of immunity must be expressed and can be maintained only by the sending State. Therefore, the Indian decision to restrict the movements of the Italian Ambassador represents a gross violation of the Vienna Convention on Diplomatic Relations.

### **13. Present situation**

At the time this work is being written, the two Italian marines are still detained in India attending the formation of the Special Court which has not been created yet. A major difference arose after the tensions of March 2013. In fact the present situation is characterised by a diplomatic impasse in which the situation seems blocked and in attendance of a decision of the Court. At a distance of 12 months from the Supreme

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<sup>84</sup> Vienna Convention on Diplomatic Relations, adopted on 18<sup>th</sup> April 1961 in Vienna, entered into force on 24<sup>th</sup> April 1964, article 32(3);

<sup>85</sup> *Ivi*, article 29;

<sup>86</sup> *Ivi*, article 31;

High Court decision to form a Special Tribunal to decide over the jurisdiction of the case, this Special Court has not been created and this is not a positive sign for a quick solution of the case.

In addition, it might not be forgotten that the diplomatic crisis between Italy and India left with no solution two important discussions over the international obligations of States and their eventually responsibility. In fact, if the Italian thesis of the fundamental change of circumstances for the breaking of the *affidavit* is not accepted, it would suffer the consequences deriving from the international responsibility for international wrongful acts. The case of India is different because it is certain that it did not accomplish the obligations arising from the Vienna Convention on Diplomatic Relations. As the High Representative of the Union for Foreign Affairs and Security Policy and Vice President of the Commission Catherine Ashton stated:

“the 1961 Vienna Convention on Diplomatic relations is a cornerstone of the international legal order and should be respected at all times. Any limitations to the freedom of movement of the Ambassador of Italy to India would be contrary to the international obligations established under this Convention.

The High Representative continues to hope that a mutually acceptable solution can be found through dialogue and in respect of international rules and encourages the parties to explore all avenues to that effect.”<sup>87</sup>

These violations of international law (including the Italian break of the *affidavit* if the Italian thesis would not be accepted) should give rise to the international responsibility of the States. However, only States can ask for the respect of international law because there is no central authority at an international level which can judge the members of the international community without their approval. Nonetheless, if the violation of the Vienna Convention would not be proved and punished, it would be an unacceptable precedent for international law. The case of the two Italian marines is a unique one. As a matter of fact, it is the first case involving the VPDs charged with murder in their function to counter piracy in the High Risk Area. Moreover, it is the first case in which an incident happen in the EEZ which is a *sui generis* area of the sea with a particular jurisdiction as it is established in the UNCLOS. Besides this, the institution of immunity is questioned, in particular immunity *ratione materiae*.

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<sup>87</sup> *Statement by the spokesperson of EU High Representative Catherine Ashton on the application of the Vienna Convention related to the case of Italian Marines in India*, Brussels, 19 March 2013, available at: [eeas.europa.eu](http://eeas.europa.eu);

**PART II**  
**PRESENTATION OF THE SITUATION BETWEEN THE STATE**  
**OF ITALY AND THE UNION OF INDIA**

**4. CONFLICTING JURISDICTION OVER THE MARO' CASE**

SUMMARY: 14. Introduction – 15. Basic principles for claiming jurisdiction – 16. Conclusion

**14. Introduction**

The international system is organized in a specific manner thanks to which every single person, notwithstanding his position, is under the authority of at least one State. In this way, every part of the world is subject to the sovereign powers of a State. As a consequence, it is fundamental to understand which State has authority over an area in order to know which are the norms to follow. The sovereign powers exercised by a State represent a clear manifestation of its jurisdiction over an area. The State authority can be divided into three types of jurisdiction branches according to the historical model of the State: the prescriptive jurisdiction, which implies the rule-making power; the enforcement jurisdiction, which involves the ability of the State to enforce law against particular people; and adjudicatory jurisdiction, which encompasses the authority to subject certain people, events or things to the process of its judicial proceedings.<sup>88</sup>

In the present international system the authority of the State is exercised following the basic principle of the sovereignty of a State over its territory (the land, the sea and the air). With some exception, a State can exercise its authority outside its borders and within the borders of another State in the principle of extraterritoriality. An example of this is the jurisdiction of a State in its Embassies abroad or over its vessels. In cases of extraterritorial jurisdiction the State has its authority over people notwithstanding their positions only to achieve preconceived aims. In the case in question, we are facing a problem of concurrent jurisdiction as the “Enrica Lexie” is a vessel flying Italian flag and the area in which the incident occurred is part of the Indian territory according to its

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<sup>88</sup> General Assembly resolution A/CN.4/596, *Immunity of State officials from foreign criminal jurisdiction*, pp. 11-12;

municipal legislation and further repeated in the judgment of the Court of Kerala. At this point it is fundamental to consider the division of the sea and the history of freedom enjoyed in the high seas.

The principle of freedom in the high seas is historically attributed to Hugo Grotius and his book “Mare Liberum”. According to his thoughts, the freedom of navigation was linked with the primary principle of freedom of trade and it constituted the basic element in a global system in which the sea should be seen as a *res communis omnium*.<sup>89</sup> The States had full sovereignty over a portion of the sea named territorial sea with a breadth of 3 nautical miles. The territorial sea was, and is still, considered part of the territory of a State in which its norms are fully applicable. Nevertheless, nowadays this part of the sea covers a wider area that is extended to a maximum of 12 nautical miles as it is established by international customary law and by the UNCLOS.<sup>90</sup> The principle of freedom in the high seas faced the opposition of the needs of the States to exclusively exploit the resources of the sea. The direct consequence was a progressive erosion of this principle in favour of the creation of new areas of the sea in which the coastal States might enjoy only certain sovereign rights. The first example of this is represented by the institution of the continental shelf according to the US President Truman.

Along with the erosion of the principle of freedom of the sea, the international law of the sea was subject to several attempts of codification. After an initial attempt made by the League of Nations with the conference of the Hague in 1930, the Geneva Conventions represent the first codification of international norms of the sea. To be more precise, four conventions had been discussed in 1958 in Geneva, namely: the convention on the territorial sea and the contiguous zone, the convention on the high seas, the convention on fishing and conservation of the living resources of the high seas and the convention on the continental shelf. A further step was taken in the 1980's when the UNCLOS was written. In fact, this convention establishes the creation of a new area in which the coastal States enjoys certain sovereign rights regarding, for example, fishing activities and economic exploitation of that area: the exclusive economic zone.

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<sup>89</sup> G. KOJANEC, voce *Navigazione (dir. intern. pubbl.)*, in *Enc. dir.*, vol. XXVII, Milano, 1977, pp. 683-684;

<sup>90</sup> United Nations Convention on the Law of the Sea, article 3: “Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.”

This zone is an area beyond and adjacent to the territorial sea which shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.<sup>91</sup>

### **15. Basic principles for claiming jurisdiction**

The problem of the division of State jurisdiction arises when we consider the legislative jurisdiction and, as a consequence of this, the adjudicatory jurisdiction. In fact, an international system where each State claims its jurisdiction over people or things notwithstanding their positions is unthinkable because there would not be any global order. Nevertheless, in some cases there might be the possibility of a concurrent jurisdiction. In other words, two different States claim its jurisdiction over the same episode because they have been substantially affected by events to assert its authority over such events. In order to avoid an illegal extension of State authority there might be identified in international law several principles that encompass the right for a State to exercise its jurisdiction, criminal jurisdiction included. These bases of jurisdiction are the territorial principle, the nationality (or active personality principle), the passive personality principle, the protective principle and the universal principle.

Regarding the first principle, it determines jurisdiction by reference to the place where the act was committed and it generally applies to every person on the State territory or on board of its vessels or airplanes. This principle meets some difficulties in its application for example when there are cases in which the wrongful act started in a State but had its consequences on the territory of another one. In this case, the jurisdiction may be subjective or objective, where the former covers an incident which is initiated within a State's territory but it produced its effects outside it; while the latter refers to an incident that originates outside the territory of a State but is completed within it.<sup>92</sup> A clear example of this case was the Lockerbie disaster where both the USA and the UK claimed their jurisdiction over the event.

According to the active personality principle, this founds jurisdiction on an existing personal *nexus* between the national and the prosecuting State, while the passive personality principle determines jurisdiction by reference to the nationality of the

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<sup>91</sup> *Ivi*, article 57;

<sup>92</sup> General Assembly resolution A/CN.4/596, *Immunity of State officials from foreign criminal jurisdiction*, pp. 12-13;

injured person.<sup>93</sup> There is no doubt that the territorial principle and the active nationality principle correspond to international customary law and that there is a preference in nowadays States practice for the former. This strengthens the theory that the international system is based on a territorial jurisdiction<sup>94</sup>. Regarding the passive personality principle, it seems the least justifiable as a general principle among the various bases of jurisdiction.<sup>95</sup>

The protective principle and the universal principle are not considered part of international customary law. The former recognises jurisdiction on the national interest injured by a person whose conduct outside its boundaries represents a threat to the State security or is in contrast with State functions. The universal principle determines jurisdiction by reference to the nature of the offence recognized as of universal concern, regardless of the *locus delicti* and the nationalities of the offender and of the victim. Piracy is the quintessential example of this principle.<sup>96</sup>

Even if the practice seems to indicate that the territorial principle is the most followed, a State might claim its jurisdiction on the basis of any of the above principles or a combination thereof. In the case in question, both Italy and India claim their jurisdiction on the basis of different principles and with different explanations.

### *15.1. Indian claims for jurisdiction*

The Union of India lamented the lack of submission of a Pre-Arrival Notification for Security (PANS) from part of the “Enrica Lexie” as it is required from its guidelines. In fact, it requires commercial vessels with private contractors or VPDs on board to obtain this notification before entering and transiting the Indian exclusive economic zone at least 24 hours in advance.<sup>97</sup> This is a direct result of the declaration made by the Government of India at the time of the ratification of the UNCLOS. As a matter of fact, in the second part of this statement the State of India declared that “the Government of the Republic of India understands that the provisions of the Convention do not authorize

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<sup>93</sup> *Ibidem*;

<sup>94</sup> A. CASSESE, *International Law*, 2<sup>nd</sup> ed., Oxford University Press, Oxford, 2005, pp. 451-453;

<sup>95</sup> I. BROWNLIE, *Principles of Public International Law*, 6<sup>th</sup> ed., Oxford University Press, Oxford, 2003, p. 302;

<sup>96</sup> General Assembly resolution A/CN.4/596, *Immunity of State officials from foreign criminal jurisdiction*, pp. 12-13;

<sup>97</sup> Information available at: [dgshipping.gov.in](http://dgshipping.gov.in);

other States to carry out in the exclusive economic zone and on the continental shelf military exercises or manoeuvres, in particular those involving the use of weapons or explosives without the consent of the coastal State.”<sup>98</sup> The lack of submission of this clearance was seen as a breach of Indian domestic law and represents a point of conflict in the ongoing situations between India and Italy on the attribution of jurisdiction over the *Marò* case.

Nevertheless, Indian claims of jurisdiction are founded on other motivations. In fact, the Republic of India asserts its jurisdiction over the case in question on the basis of two main principles: the nationality of the victims and the position of the event. Regarding the former, there is no doubt that the two victims, Ajesh Binki, 25 years and Selestian Valentine, 45 years, were Indian nationals on board of an Indian vessel. Nevertheless, as it was mentioned above, this principle of jurisdiction represents the passive nationality principle which does not correspond to an international principle of customary law. Regarding the claims of jurisdiction according to the position of the vessels at the time of the incident, it is worth considering what the Supreme High Court of India stated in its judgment of 18<sup>th</sup> January 2013:

“while India is entitled both under its Domestic Law and the Public International Law to exercise rights of sovereignty up to 24 nautical miles from the baseline on the basis of which the width of Territorial Waters is measured, it can exercise only sovereign rights within the Exclusive Economic Zone for certain purposes. The incident of firing from the Italian vessel on the Indian shipping vessel having occurred within the Contiguous Zone, the Union of India is entitled to prosecute the two Italian marines under the criminal justice system prevalent in the country.”<sup>99</sup>

In accordance with its decision, the Supreme Court of India maintained that the State of India has full sovereignty up to 24 nautical miles which includes not only the territorial waters, but also the contiguous zone. What is worth analyzing in this statement is whether this claim of sovereignty is in accordance both with Indian domestic law and the public international law. Regarding the latter, it is undoubtedly referred to the UNCLOS in which the contiguous zone is described and in which the powers of the coastal State are expressly stated. In fact, according to such convention

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<sup>98</sup> Information available at; [www.un.org](http://www.un.org);

<sup>99</sup> Supreme Court, judgment of 18<sup>th</sup> January 2013, *Republic of Italy thr. Ambassador & Ors. v. Union of India & Ors.*; SLP(C) NO. 20370 of 2012;

every coastal State might exercise the control in this area necessary to:

“(a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;

(b) punish infringement of the above laws and regulations committed within its territory or territorial sea.”<sup>100</sup>

Nothing in this article or in the UNCLOS refers to the possibility of the coastal State to extend its full sovereignty and, as a consequence, its jurisdiction out of the territorial sea. Moreover, the incident at the centre of the case in question does not correspond to an infringement of Indian customs, fiscal, immigration or sanitary laws.

Nevertheless, a different position is expressed in Indian domestic law, more precisely in the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976 (from here after Maritime Zones Act). As a matter of fact, the powers of the coastal State in the contiguous zone expressed in such Act are slightly different. India can exercise control over this area also regarding the general security of the State and it can extend its enforcement power “as if the contiguous zone is a part of the territory of India”<sup>101</sup>. This possibility of extension of full control over the sea is also established for other areas such as the exclusive economic zone which is superimposed to the contiguous zone when it is declared, as it is the case of India. Furthermore, the Indian Parliament extended the application of the Indian Penal Code and the Code of Criminal Procedure up to the limit of the exclusive economic zone thanks to the notification S.O. 671 E dated 27<sup>th</sup> August 1981.<sup>102</sup> According to this municipal Act, the State of India expanded its criminal jurisdiction up to 200 nautical miles which is the limit of the exclusive economic zone.<sup>103</sup>

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<sup>100</sup> United Nations Convention on the Law of the Sea, article 33;

<sup>101</sup> The Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976, (Act n° 80), 28<sup>th</sup> May 1976, article 5(5)(b);

<sup>102</sup> High Court of Kerala, judgment of 29<sup>th</sup> May 2012, *Massimiliano Latorre v. Union of India*, 252 KLR 794;

<sup>103</sup> “Offence committed in exclusive economic Zone : When an offence is committed by any person in the exclusive economic zone described in sub-section (1) of section 7 of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 (80 of 1976) or as altered by notification, if any, issued under sub-section (2) thereof, such person may be dealt with in respect of such offence as if it had been committed in anyplace in which he may be found or in such other place as the Central Government may direct under Section 13 of the Said Act.” Code of Criminal Procedure, Act n° 2 of 1974, adopted on 25<sup>th</sup> January 1974, entered into force on 1<sup>st</sup> April 1974, article 188A;

At this point it is fundamental to analyse which is the relation between municipal law and international law in order to understand if the above mentioned notification made by the Indian Parliament is applicable or if it is in contrast with international law principles. According to what was established by the Supreme High Court of India, “if a conflict [between the municipal laws and the UNCLOS] was inevitable, the domestic laws must prevail over the International Convention and Agreements”<sup>104</sup>. The position here expressed by the most important organ of the judiciary system in India seems to be extremely dualist in nature as regarding the concept of applicability of international law. To better understand the problem it might be necessary to try to give a definition of both branches of law. International law is a law applicable among the subjects of the international community, mainly sovereign States and international organizations, while municipal law applies within a State and regulates the relations of its citizens with each other and with the executive.<sup>105</sup> According to the dualist theory position, the two type of law remain sovereign in each field of competences, but they do not interfere with each other. The main thought of the dualist theory might be summarize in a statement of one of the most influent supporters of the dualist theory, Professor Oppenheim, who stated as follow:

"Neither can International Law *per se* create or invalidate Municipal Law, nor can Municipal Law *per se* create or invalidate International Law. International Law and Municipal Law are in fact two totally and essentially different bodies of law which have nothing in common except that they are both branches-but separate branches--of the tree of law. Of course, it is possible for the Municipal Law of an individual State by custom or by statute to adopt rules of International Law as part of the law of the land, and then the respective rules of International Law become *ipso facto* rules of Municipal Law.”<sup>106</sup>

On the other hand, the monist theory considers international law and domestic law as part of the same legal system. In addition, this theory assigns the priority to the former by placing it at the top of the juridical pyramid as it was stated by Professor Kunz:

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<sup>104</sup> Supreme Court, judgment of 18<sup>th</sup> January 2013, *Republic of Italy thr. Ambassador & Ors. v. Union of India & Ors.*; SLP(C) NO. 20370 of 2012;

<sup>105</sup> I. BROWNLIE, *Principles of Public International Law*, p. 32;

<sup>106</sup> M. S. McDOUGAL, *The Impact of International Law upon National Law: a Policy-Oriented Perspective*, in *South Dakota Law Review*, vol. 4, 1959, p. 29;

"The primacy of the Law of Nations means that the supraordination of the international juridical order to the municipal juridical orders of the single States, means that the 'sovereign States' are delegated partial juridical orders of the international juridical order, means that the pyramid of the law does not end with the basic norm of the juridical order of a given single state, but that at the top of the pyramid of law stands the international juridical order..."<sup>107</sup>

According to what has been presented, the Union of India follows a strict dualist theory where the competences related to the international concern and, as such, depending from international law are divided and distinguished from the competences of the sovereign State in its domestic jurisdiction. Nevertheless, in the present global interaction among States over more and more topics it seems highly improbable to keep absolutely separate these two branches of law. In fact, international law and municipal law have more and more institutions to regulate in common and while domestic law rules the behaviours within a State territory, international law settles the life of the international community. Sovereign States, which are the main subjects of international law, should conform their municipal law to what they established at an international level through agreements or through their behaviours which gave rise to international customs.

The main aim of both legal systems is to maintain a viable global order. In order to do so, it is necessary that both international law and domestic law respect the limit of their jurisdiction. This means that in a situation or in a dispute involving sovereign States the only law that might be applicable should be international law. This is a fundamental principle of the global order which has been established since the existence of international law and further reaffirmed by the judgment of the Permanent Court of International Justice regarding the *Greco-Bulgarian communities* case in which the Court of the League of Nations stated that "it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty."<sup>108</sup> In the case here analysed, both Italy and India are contracting parties of the UNCLOS which does not establish in any part of its provisions any possibility for the coastal State to extend its full sovereignty over 12 nautical miles that is the limit of the territorial sea.

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<sup>107</sup> *Ivi*, p. 30;

<sup>108</sup> *Greco-Bulgarian communities case*, P.C.I.J., 1930, (Series. B), n° 17

Nevertheless, in the Maritime Zones Act, 1976 it is clearly stated the opposite. In fact, according to the provisions of this domestic act, the State of India might alter the limit of its territorial waters, contiguous zone and exclusive economic zone whenever it considers necessary so to do.<sup>109</sup> Furthermore, in the judgment of the Supreme High Court of 18<sup>th</sup> January 2013 it is maintained and further asserted that no domestic law has been enacted by the Parliament to give effect to the provisions of the UNCLOS and, as such, the only possible applicable law in the State of India is the Maritime Zones Act, 1976. The Indian thesis does not seem viable nor acceptable first of all because not only does the UNCLOS represent a treaty in force for both States, but also because it fully represents international customary law. This means that there is no need to adopt any special principles or procedures for making customary international law authority within its boundaries<sup>110</sup>. This principle is further recognized and reaffirmed by international law doctrine according to which there is a general duty to bring internal law into conformity with obligations under international law. Nevertheless, a State is not bound to modify its law, but if a dispute arise, it has to follow international law.<sup>111</sup>

Secondly, the Union of India in its Constitution clearly stated that the State should “foster respect for international law and treaty obligations in the dealings of organized peoples with one another”<sup>112</sup>. As a consequence, in relations among States at an international level, the only law applicable is international law. It is necessary to understand if this is a case involving two independent and sovereign States or one State (in the case in point India) that claims the application of its domestic law for the prosecutions of two civil people. In other words, it is fundamental to establish if the two Italian soldiers enjoy immunity *ratione materiae* or not.

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<sup>109</sup> The Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976, (Act n° 80), 28<sup>th</sup> May 1976, articles 3(3), 5(2), 7(2);

<sup>110</sup> M. S. McDOUGAL, *The Impact of International Law upon National Law: a Policy-Oriented Perspective*, in *South Dakota Law Review*, vol. 4, 1959, pp. 69;

<sup>111</sup> I. BROWNLIE, *Principles of Public International Law*, pp. 32-45; A. CASSESE, *International Law*, 2<sup>nd</sup> ed., Oxford University Press, Oxford, 2005, pp. 213-234; P. DAILLIER, A. PELLET, *Droit International Public*, 6<sup>th</sup> ed., L.G.D.J., Paris, 1999, pp. 274-288;

<sup>112</sup> The Constitution of India, adopted on the 26<sup>th</sup> November 1949, entered into force on the 26<sup>th</sup> January 1950, article 51(c);

### *15.2. Italian claims for jurisdiction*

On the other hand, also the State of Italy has different reasons to claim its jurisdiction over the case in point. In fact, the Italian position is based on the fact that both the Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone are Italian nationals. With no doubt, also India claimed its jurisdiction according to the nationality of the victims, but, as it was mentioned above, because the international system is based mainly on a territorial division for State jurisdiction, the passive nationality principle seems the least justifiable for claiming jurisdiction. In this sense, not only can Italy assert its jurisdiction on the basis of the active nationality principle, but also on the basis of the territorial principle. In fact, the event that gave rise to the ongoing situation happened on board of the vessel “Enrica Lexie” which is considered by international law part of the territory of the flag State. It is true that the event took place only partially on board of the Italian vessel and that also India claimed its jurisdiction on the basis of the same principle.

Nevertheless, like the case of the nationality principle, we are facing a contrast regarding the passive and the active aspect of the territorial principle. The doctrine has not taken a clear position regarding this aspect and, as a consequence, the issue might seem blurry. However, according to who is conducting this work, the active territorial principle follows the same rationale of the active personality principle. This means that as the active nationality principle is considered more relevant than the passive one, the active territorial principle would have to be regarded as more influent than the passive territorial principle.

Furthermore, the Italian claim of jurisdiction is also based on the provisions of the UNCLOS regarding the high seas. As a matter of fact, according to the Convention “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.” In the case in point both the flag State and the State of which the people accused is the Republic of Italy and, as such, it would be the only State authorised by the UNCLOS to prosecute the two members of the VPD. In addition, the same article of the Convention further states that “no 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”<sup>113</sup> thus reinforcing the Italian exclusive claims of jurisdiction over the case in point and the absolute exclusion of jurisdiction of the Union of India.

The important thing to analyse in this case is whether the expression “any other incident of navigation” should include the events constituting the case in point. It is worth considering that the word incident or the expression incident of navigation are highly used in the agreements among international community members and in the documents of the international organizations in general. As an example, in the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia the word incident is widely used to express any dangerous situation that might arise in countering piracy. In addition, the expression incident of navigation is used by the international organizations involved in facing the problem of piracy, among which we can name the International Maritime Organization (IMO), the International Maritime Bureau (IMB), the International Chamber of Commerce in its special division of the Commercial Crime Services and many others.

Nevertheless, even if the expression “incident of navigation” is widely used, there is no definition that clarifies it and, as such, it is difficult to establish whether the incident in question, that is a firing incident, should be treated as an incident of navigation or not. Excluding that the expression incident of navigation does not include events of collision, it might be stated that it includes any other events including any damage to a vessel or any injury to a person. According to the Italian position, this is the interpretation of the incident in question and, as a consequence, the provisions of article 94 of the UNCLOS would find application. In fact, according to the said article,

“Each State shall cause an inquiry to be held by or before a suitably qualified person or persons 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 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.”<sup>114</sup>

Moreover, since the beginning of this situation, the State of Italy has always maintained that the event happened during a mission to counter piracy in the High Risk

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<sup>113</sup> United Nations Convention on the Law of the Sea, article 97;

<sup>114</sup> *Ivi*, article 94(7);

Area which bases its rationale on article 100 of the UNCLOS for the fullest possible cooperation among States to repress the phenomenon of piracy. For this reason, according to the Italian position, the misunderstanding that the Indian fishing vessel was a pirate vessel which caused the accused to fire should be treated as a consequence of the Italian involvement in the international framework settled in the High Risk Area to reduce and suppress the phenomenon of piracy. Besides this, the Italian Government further asserted that the members of the VPD fully accomplished the guidelines provided by the IMO. In addition, it stated that this type of mission to counter the phenomenon of piracy is in accordance with the resolutions adopted by the Security Council of the United Nations and, as such, any domestic Court of India could not prosecute the two Italian soldiers on the basis of its lack of jurisdiction over the case.

It is important to analyse another point raised in the case in question which is the legal or illegal entrance of the “Enrica Lexie” in the Indian contiguous zone/exclusive economic zone according to the Pre-Arrival Notification for Security that the Government of New Delhi requires. The request of such notifications is the direct result of the unilateral declaration that the State of India made upon ratification of the UNCLOS maintaining that “the Government of the Republic of India understands that the provisions of the Convention do not authorize other States to carry out in the exclusive economic zone and on the continental shelf military exercises or manoeuvres, in particular those involving the use of weapons or explosives without the consent of the coastal State.”<sup>115</sup> As a consequence, according to this statement, the VPDs boarded on private vessels transiting the Indian exclusive economic zone are considered by the Indian Government as military manoeuvres which require the authorization of the central Government.

On the other hand, the State of Italy had deposited a unilateral declaration upon signature that was opposite to the one of the State of India and when the latter made its declaration the Italian Government reaffirmed its position while depositing the instrument of ratification. This statement announced once more that “according to the Convention, the coastal State does not enjoy residual rights in the exclusive economic zone. In particular, the rights and jurisdiction of the coastal State in such zone do not include the right to obtain notification of military exercises or manoeuvres or to

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<sup>115</sup> Information available at: [www.un.org](http://www.un.org);

authorize them.”<sup>116</sup> At this point it is necessary to understand the importance of such declarations and the effects that they might or might not produce on the application of the provisions of the UNCLOS.

First of all, it is worth considering that unilateral declarations should be distinguished from reservations for several reasons. While reservations are ruled at an international level by the Vienna Convention on the Law of Treaties which fully represents international customary law, unilateral interpretative declarations are not ruled in the same convention. Moreover, interpretative declarations might be made upon signature, ratification, acceptance, approval or access to a treaty even if it expressly excludes the possibility to make any reservation because they do not pretend to modify the legal effects of the treaty, but only to specify or clarify them. A clear example of this case is the UNCLOS which explicitly denies the possibility to make any reservation to the treaty but it does not preclude any State from making declarations or statements which “do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State”.<sup>117</sup> As a consequence, unilateral interpretative declarations should be seen as mere political statements with no legal effects on the provisions of a treaty.

Nevertheless, the practice is not uniform and part of the doctrine considers interpretative declarations at the same level of reservations on the basis of the intention of the State that made such declaration which had the purpose to modify the legal effect of certain provisions of the treaty. As a matter of fact, according to the Vienna Convention on the Law of Treaties the term reservation “means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”<sup>118</sup>. This definition focuses more on the aim of the reservation than on the use of the word to describe it. The direct consequence is the distinction between mere interpretative

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<sup>116</sup> *Ibidem*

<sup>117</sup> United Nations Convention on the Law of the Sea, article 310;

<sup>118</sup> Vienna Convention on the Law of the Treaties, adopted on 23<sup>rd</sup> May 1969 in Vienna, entered into force on 27<sup>th</sup> January 1980, article 2(1)(d);

declarations and qualified interpretative declarations which are, in substance, reservations.<sup>119</sup>

The formers follow the definition given by the International Law Commission according to which “interpretative declaration means a unilateral statement, however phrased or named, made by a State or an international organization, whereby that State or that organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions.”<sup>120</sup> As such, they cannot modify treaty obligations and they cannot be considered, by definition, as incompatible with the object and purpose of the treaty in question. A mere interpretative declaration, therefore, has to be considered as a unilateral statement which has no particular value and certainly cannot bind the other parties to the treaty. Whether or not the interpretation is correct, its author remains bound by the provisions of that treaty.<sup>121</sup>

On the other hand, qualified interpretative declarations are seen as unilateral statements made with the precise aim to modify the application of a treaty or certain provisions of it and, as such, they are considered as reservations. The direct consequence is that these qualified declarations has to be treated differently from the mere declarations and their legal framework is the same of reservations as it is established in the Vienna Convention on the Law of Treaties. Moreover, because they are considered as reservations, qualified interpretative declarations has to respect the substantive and formal validity. As a consequence, if a treaty clearly denies the possibility to make any reservation or the qualified interpretative declarations are incompatible with the object and purpose of the treaty in question, those declarations have to be considered invalid. This is the practice followed by the European Court of Human Rights in its judgment in the *Belilos case*. In fact, the Court classified Switzerland’s interpretative declarations to the European Convention on Human Rights as a reservation.<sup>122</sup> As a result, a State might not avoid the risk of violating its international obligations by basing its position on an interpretation of the treaty that it

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<sup>119</sup> D. M. McRAE, *The legal effect of interpretative declarations*, in *British Yearbook of International Law*, vol. 49, 1978, pp. 160-161;

<sup>120</sup> International Law Commission, *Guide to Practice on Reservations to Treaties*, in *Yearbook of the International Law Commission*, vol. II, part 2, 2011, article 2.1;

<sup>121</sup> General Assembly resolution A/CN.4/624/Add.2, *Fifteenth report on reservations to treaties*, by Alain Pellet, *Special Rapporteur*;

<sup>122</sup> General Assembly resolution A/CN.4/614/Add.1, *Fourteenth report on reservations to treaties*, by Alain Pellet, *Special Rapporteur*;

put forward unilaterally. If this interpretation would not correspond to the ordinary meaning of the treaty according to its object and purpose, the author of that declaration might violate the provisions of that treaty and, as a consequence, the international responsibility for wrongful acts may arise.

“The legal effect of an interpretative declaration depends initially upon whether the declarant seeks only to offer an interpretation of the treaty that may be found subsequently to be incorrect (a 'mere interpretative declaration'), or whether the declarant purports to make its acceptance of the provision in question conditional upon acquiescence in that interpretation (a 'qualified interpretative declaration'). The significance of the former lies in the effect it may have in subsequent proceedings to interpret the treaty, and this significance will vary according to whether the declaration has been accepted, ignored or objected to by other contracting parties. The latter type of interpretative declaration, on the other hand, must be assimilated to a reservation, for by asserting that its interpretation overrides any contrary interpretation the declarant has purported to exclude or to modify the terms of the treaty. Hence the legal consequences that attach to reservations ought to apply to 'qualified interpretative declarations'.”<sup>123</sup>

It is clear at this point that interpretative declarations might constitute an useful element to be taken into account as an aid to interpret a treaty. Nevertheless, it is necessary to point out that any State can object to the interpretation made by another member of the international community. Obviously States which expressly object to the declaration will be protected from any argument that they might have accepted in it. On the other hand, “acceptance would constitute an admission, which does not bind the State making it, but has probative value varying according to the circumstances in which it was made. A State making an interpretative declaration, therefore, is taking the opportunity in advance to influence any subsequent interpretations of the treaty, the extent of that influence in part being affected by the reaction of other States to the declaration.”<sup>124</sup> In fact, an interpretative declaration that was approved by several States might be considered having greater value as constituting a clear evidence of the will of the author of that statement in cases of interpretation of the treaty. Nevertheless, because such declarations are unilateral statements, they cannot be imposed to any other contracting State even if it has been silent.

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<sup>123</sup> D. M. McRAE, *The legal effect of interpretative declarations*, in *British Yearbook of International Law*, vol. 49, 1978, p. 172;

<sup>124</sup> *Ivi*, pp. 15-16;

The importance of interpretative declarations in clarifying the meaning of a treaty or certain provisions of it has been highlighted also by the International Court of Justice which affirmed that “interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument.”<sup>125</sup> Coming back to the case in point, it is necessary to understand if the declaration made by the State of India might produce any effect on the interpretation of the UNCLOS or the opposition made by the State of Italy should be considered a sufficient tool to protect its position from any argument that might have arose from the application of the Indian interpretation. To better understand this situation it might be useful recalling the decision of the International Court of Justice in the case concerning maritime delimitation in the Black Sea. In this case the Court had to make a determination as to the value of an interpretative declaration formulated by Romania upon the signature and the ratification of the UNCLOS. In its judgment the Court paid little attention to the Romanian interpretative declaration, affirming what follows:

“Finally, regarding Romania’s declaration [...], the Court observes that under Article 310 of the United Nations Convention on the Law of the Sea, a State is not precluded from making declarations and statements when signing, ratifying or acceding to the Convention, provided these do not purport to exclude or modify the legal effect of the provisions of the United Nations Convention on the Law of the Sea in their application to the State which has made a declaration or statement. The Court will therefore apply the relevant provisions of United Nations Convention on the Law of the Sea as interpreted in its jurisprudence, in accordance with Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969. Romania’s declaration as such has no bearing on the Court’s interpretation.”<sup>126</sup>

To conclude, notwithstanding the value attributed to interpretative declarations, they do not modify any legal effect produced by the provisions of the UNCLOS. In fact, if they are considered as qualified interpretative declaration and, as such, as reservations, they have to be treated as invalid according to the same convention, more precisely, according to its article 309 that does not allow the formulation of any reservation. On the other hand, if Indian statement is considered as a mere interpretative

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<sup>125</sup> General Assembly resolution A/CN.4/614, *Fourteenth report on reservations to treaties*, by Alain Pellet, *Special Rapporteur*;

<sup>126</sup> *Maritime delimitation in the Black Sea (Romania v. Ukraine)*, judgment of 3<sup>rd</sup> February 2009;

declaration, it has low or no influence on the interpretation of the provisions of the treaty and, much less it has binding power to other member parties of the same treaty.

The last point of the Italian position regarding the claims of jurisdiction over the case in question concerns the institution of immunity *ratione materiae*. Since the very beginning the State of Italy asserted that the two members of the VPD arrested by the policemen of the State of Kerala were acting as official State organs while the Union of India denied this position. The conflict regarding the recognition or not of the immunity *ratione materiae* will be treated in the next chapter.

## **16. Conclusion**

Once analysed the positions both of the Union of India and the State of Italy regarding their claims of jurisdiction over the case in point, it is clear that several doubts have arisen. It is therefore necessary trying to solve those doubts in order to better understand which might be a viable solution to the case fully respecting international law and domestic laws.

The first thing to settle regards the concept of sovereignty and the Indian claim to extend its penal code and its code of criminal procedure up to 200 nautical miles represented by its exclusive economic zone. It would be questioned if this act represents a lawful action deriving from the fully sovereignty of a State over its territory or if it has to be considered an unlawful claim of sovereignty over such area.

Secondly, it is fundamental to understand the limit of the application of the jurisdiction of a State out of its borders in what is called extraterritoriality. Thirdly, after having affirmed the fact that India ratified the UNCLOS but it has not adopted any law to implement the provisions of the convention in its domestic legal system, it is important to clarify which provisions have to be taken into account in order to solve the situation of the concurrent jurisdiction. In fact, according to the Union of India, the provisions of the Maritime Zones Act should represent the legal framework of the law of the sea.

Finally, it should be questioned whether the interpretative declaration might have any influence or legal effect on the development of the case in point. An attempt to answer to all these doubts would be given in the third part of this work.

The situation in question is a unique case involving several basic institution of international law which are at the basis of international relations. As a consequence, by solving the doubts around these principles, this case would represent a stabilizing

element which might strengthen these rules of international law. On the other hand, a misleading interpretation of this case might give rise to contradicting elements at an international level which would risk to weaken these principles. First of all, the concept of equality of sovereign States might find a clamorous veer if any Indian Court would accuse an independent State like Italy. This event would break the basic principle of *par in parem non habet iurisdictionem*.

Secondly, by affirming the limit of sovereignty of a State and its difference from sovereign powers, it would be easier to detect and condemn other cases of lawful or unlawful claims of sovereignty over areas which do not form part of the territory of that State. Finally, the respect of international law in international relations is fundamental and much more when the international norms correspond to international customs. As a consequence, it is fundamental to understand the framework of contrasts between international law and domestic law.

## **5. PROBLEM REGARDING THE RECOGNITION OF IMMUNITY *RATIONE MATERIAE***

SUMMARY: 17. Introduction – 18. Rationale to extend immunity to the armed forces – 19. The origin of immunity *ratione materiae*: the *McLeod* case – 20. Analysis of the acts covered by immunity – 21. Limits for the recognition of immunity – 22. Recognition of immunity in international jurisprudence – 23. A modern development of immunity – 24. Conclusion

### **17. Introduction**

International relations among States constitute an essential element in the world order since the Peace of Westphalia in 1648 which is considered the beginning of international law. Since then, international law has tried to achieve its main aim which is the global order through the protection of some basic values such as the preservation of foreign State organs, of international organizations and of foreign citizens. In order to do so, each State recognizes the equality of the other members of the international community and it limits the exercise of its jurisdiction on its territory and, in this way, each State would foster the development of international relations. The direct result of the reduction of a State jurisdiction over its territory is represented by the institution of immunities for foreign States or international organizations. By limiting its jurisdiction in its territory regarding certain issues, each State assures to receive the same treatment from the other members and, as a consequence, it would enjoy the same recognition at an international level and the same immunities in the territory of other States. No State would question the role of immunities in the world order otherwise the same State would expose itself to an equal and opposite treatment from part of the other members which might signifies the exclusion from the international community.

“State immunity is a rule of international law that facilitates the performance of public functions by the State and its representatives by preventing them from being sued or prosecuted in foreign courts. Essentially, it precludes the courts of the forum State from exercising adjudicative and enforcement jurisdiction in certain classes of case in which a foreign State is a party. It is a procedural bar (not a substantive defence) based on the status and functions of the State or official in

question. The grant of immunity is now understood as an obligation under customary international law.”<sup>127</sup>

In the framework of international law it is possible to distinguish various types of immunities which cover different aspects and different State organs. Among these there are diplomatic immunities, consular immunities, sovereign and head of State immunities, State immunities and immunities of international organizations.<sup>128</sup> The grant of immunity is traditionally explained according to three different theories: the extraterritoriality theory, the representative theory and the functional necessity theory.<sup>129</sup> Conforming to the former, the institution of immunity has to be perceived as an extension of the territory of the sending State in its missions or in its visits in foreign territories on the basis of the well-established principle *par in parem non habet iurisdictionem*. The direct consequence of this State equality is the fact that no State has the power to claim its jurisdiction over another.

According to the representative theory, immunity is based on the idea that the mission of a sending State personifies it, in particular the sovereign or head of State represents in his person the whole power of the State. However, this theory seems to belong to past centuries and it does not find more ground in the present international community. The theory that seems to represent a more contemporary rationale of immunity in the current world order is the functional necessity theory. As reported by this concept, immunity is absolutely necessary for a representative of a mission in order to perform his functions.<sup>130</sup>

Since what is considered the beginning of international law and contemporary international relations, the range of issues covered by immunity has been reducing over the centuries until nowadays where the concept of absolute State immunity is completely disappeared. It is possible to distinguish between two main actions that a State can take: decisions *acta iure imperii*, which are acts ascribable to the sovereign or public acts and choices *acta iure gestionis*, which are acts referring to commercial activities. It is, therefore, necessary to understand to which acts immunity is granted. In

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<sup>127</sup> J. CRAWFORD, *Brownlie's principles of Public International Law*, 8<sup>th</sup> ed., Oxford University Press, Oxford, 2012, p. 487;

<sup>128</sup> General Assembly resolution A/CN.4/596, *Immunity of State officials from foreign criminal jurisdiction*;

<sup>129</sup> *Ibidem*;

<sup>130</sup> *Ibidem*;

the case in question, the situation involves two Italian soldiers who had been deployed on an Italian vessel to accomplish a mission to counter piracy in accordance with international guidelines of the IMO and the UN. On the basis of these premises, Italy claimed the application of immunity to this case since the very beginning.<sup>131</sup> On the other hand, the Union of India denied the Italian position because it maintains that the two members of the VPD were not acting for the State of Italy but they were hired for private purposes. Moreover, the Indian Government further stated that a firing incident cannot be covered by immunity as it regards criminal jurisdiction.

However, in analysing matters related to the institution of immunity of State officials from foreign criminal jurisdiction it is worth considering three main aspects which are, more precisely: the determination of which State officials enjoy immunity from foreign criminal jurisdiction; the determination of which acts are covered by such immunity and the determination whether international law recognizes any exceptions or limitations to that immunity. It is possible to divide the institution of immunity into two different types which are, namely, immunity *ratione personae* and immunity *ratione materiae*. While the former is also referred to as personal or absolute immunity, the latter is also presented as functional immunity. According to the functional necessity theory mentioned above, the rationale for the grant of immunity does not rely on a personal benefit for State officials, but rather it aims to guarantee the effective achievement of their functions on behalf of their respective States. This rationale is not referred only to immunity *ratione materiae*, but also to immunity *ratione personae*.

### **18. Rationale to extend immunities to the armed forces**

First of all, the majority position of the doctrine regarding the institution of immunity seems to be that the two branches of this institution, namely *ratione personae* and *ratione materiae*, share the same procedural nature. In other words, “both types of immunities constitute a bar from the exercise of jurisdiction by foreign criminal tribunals, and not a defence on the merits which would exclude the criminal responsibility of the State official concerned.”<sup>132</sup> Immunity *ratione personae* is

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<sup>131</sup> Note Verbale n° 95/553 issued by the Embassy of Italy in New Delhi to the Ministry of External Affairs, Government of India, reported in Supreme Court, judgment of 18<sup>th</sup> January 2013, *Republic of Italy thr. Ambassador & Ors. v. Union of India & Ors.*; SLP(C) NO. 20370 of 2012;

<sup>132</sup> General Assembly resolution A/CN.4/596, *Immunity of State officials from foreign criminal jurisdiction*;

generally seen as an absolute immunity with a broader material scope which is granted to a restrictive group of people among which there are diplomats, head of States and Foreign Ministers. This type of immunity does not cover only acts committed in discharge of official functions, but it is also granted for private acts and, as such, it represents an absolute bar from the exercise of any jurisdiction by foreign courts.

On the other hand, immunity *ratione materiae* is limited only to acts implemented in the discharge of official functions by a broader group of people referred to as State officials. The principle that immunity is granted to State officials in general finds support in the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, more precisely in the *Blaškić* case. As a matter of fact, in this judgment it is affirmed that

“The Appeals Chamber dismisses the possibility of the International Tribunal addressing subpoenas to State officials acting in their official capacity. Such 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 a State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on 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.”<sup>133</sup>

However, international law and, in particular, customary international law does not define who has to be considered a State official and, as a consequence, the group of State officials who might enjoy this type of immunity is theoretically vast. Nevertheless, according to the Draft articles on responsibility of States for internationally wrongful acts

“the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State. [...] An organ includes any person or entity which has that status in accordance with the internal law of the State.”<sup>134</sup>

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<sup>133</sup> *Prosecutor v. Blaškić*, (Case n° IT-95-14), Appeals Chamber, Judgment on the Request of the Republic of Croatia for the review of the decision of Trial Chamber II of 18<sup>th</sup> July 1997;

<sup>134</sup> Draft articles on responsibility of States for internationally wrongful acts, adopted on 10<sup>th</sup> August 2001 by the International Law Commission, article 4;

Accordingly, it seems difficult to deny that members of State's armed forces do not form part of State officials and, consequently, each State adopted domestic laws in order to establish more precisely which are the armed troops that have to be considered part of the State Army. As it has been presented before in this work<sup>135</sup>, along with the Army, the Air Force and the Italian Finance Police, also the Navy has to be treated as part of the State military apparatus. The practice to include the members of the armed forces as a State organ is as well established as the practice to settle a legal framework for their immunities. The Union of India, like the State of Italy, ruled the institution of immunities for its armed forces in its Code of Criminal Procedure.<sup>136</sup> What seems strange is the fact that notwithstanding a domestic law protecting its armed forces which is similar to the laws of many other States of the international community, the State of India has not recognized the immunity to the two Italian soldiers yet.

In addition, if further evidence should be needed in order to strengthen the principles established in article 4 of the Draft articles on responsibility of States for internationally wrongful acts mentioned above, the International Court of Justice in its advisory opinion in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* affirmed as a well-established rule of customary international law that the attitude of any State organ must be considered as an act of that State.<sup>137</sup> Furthermore, there is a clear rationale on the decision to deploy members of the armed forces to contrast the phenomenon of piracy. In order to reduce and suppress piracy attacks, there might be the possibility to seize suspected people or suspected vessels in accordance with article 105 of the UNCLOS. However, this seizure might be conducted without adequate grounds and, as such, a misinterpretation of the situation might arise. The direct consequence of any mistake committed would give rise to the direct responsibility which cannot be attributed to anybody but the national States of the soldiers as they have to be treated as State organs.<sup>138</sup>

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<sup>135</sup> See Part I, Chapter 2 – Section 2;

<sup>136</sup> “no member of the Armed Forces of the Union shall be arrested for anything done or purported to be done by him in the discharge of his official duties”; Code of Criminal Procedure, Act n° 2 of 1974, adopted on 25<sup>th</sup> January 1974, entered into force on 1<sup>st</sup> April 1974, article 45(1);

<sup>137</sup> General Assembly resolution A/CN.4/596, *Immunity of State officials from foreign criminal jurisdiction*;

<sup>138</sup> N. RONZITTI, voce *Pirateria (dir. vigente)*, in in *Enc. dir.*, vol. XXXIII, Milano, 1983, pp. 919-920;

### **19. The origin of immunity *ratione materiae*: the *McLeod* case**

It is worth analysing at this point the case that is considered the initial point of immunity *ratione materiae* for members of armed forces. The affair in question is the *McLeod* case which dates back to the XIX century. Mr. *McLeod* was a member of the British Army when his troop attacked the steamer *Caroline*, which flagged US flag but which was hijacked and used by the rebels, in 1837 after the suppression of the Canadian rebellion.<sup>139</sup> The surviving rebels found a refuge in the United States where they tried to reestablish a military troop to support the remnants of the rebellion in Canada. At this point, the destruction of the *Caroline* seemed the best way to prevent further reinforcements of the Canadian rebels. The steamer was believed to be docked on the British coast of the Niagara River. However, it was on the American side when the British operation started. The expedition was not aimed at invading American territory from the outset by those circumstances and that the necessity of preventing the rebels from further use of the ship overcame the normal respect of national territory. During this mission, two American citizens were killed and the steamer was destroyed. The following year, 1838, the British Government officially assumed the whole responsibility for the destruction of the ship. However, in 1841, when Mr. *McLeod* went back to the United States for private reasons, he was arrested in New York and charged with murder.<sup>140</sup>

The British Government rejected the US position and demanded his release because the attack to the steamer *Caroline* had to be considered an official act of the British Government and, as such, Mr. *McLeod* was acting under official orders. Consequently, any responsibility had not to be considered to be attributed to the British citizen, but to the Government of the United Kingdom. According to the UK, the question had to be considered a matter of international law because it involved two national independent governments and no domestic courts had the right to decide over such question. Both the US and the UK believed that an individual who acts as part of the armed forces of a sovereign State cannot be personally responsible for such acts. A trial was issued

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<sup>139</sup> R. Y. JENNINGS, *The Caroline and McLeod Cases*, in *The American Journal of International Law*, vol. 32, 1938, pp. 82-85; M. S. McDOUGAL, *The Impact of International Law upon National Law: a Policy-Oriented Perspective*, in *South Dakota Law Review*, vol. 4, 1959, p. 85;

<sup>140</sup> For more information, see M. T. C. Gould, H. Fowler, *Gould's Stenographic Reporter V2: The Trial of Alexander McLeod, for the Murder of Amos Durfee (1841)*, Whitefish, Kessinger Publishing, 2009, pp. 340-358;

against Mr. McLeod and no evidence of his participation could be brought to the court and, as a consequence, he was released.

As a result of the McLeod case and the subsequent judgment, clear principles of international law were established. First of all, it was further reaffirmed the inviolability of sovereign State territories and the importance of the maintenance of peace and order among nations.<sup>141</sup> Nevertheless, it was recognized that during armed conflicts this principle might be violated by armed forces of foreign States while conducting military missions. What is important is that it was affirmed and accepted as a true principle that a member of the Army of a sovereign State has to be considered as an individual-organ of that State and every act must be considered as an act of the State.

## **20. Analysis of the acts covered by immunity**

In the determination of which acts are covered by immunity, it is necessary to distinguish once more between immunity *ratione personae* and *ratione materiae*. Because the former is considered an absolute bar to the exercise of former jurisdiction, it is generally accepted that it covers all acts that a State official might carry out in the discharge of his functions including both private and public acts.

On the other hand, regarding the immunity *ratione materiae*, it is fundamental to distinguish the acts carried out as an official organ of the State from the actions of private interest. The position of the legal literature, reinforced by the Institut de droit international, seems to be widely accepted when it considers actions taken for private gratification or predominantly motivated by personal reasons to be excluded from immunity *ratione materiae*.<sup>142</sup> However, a part from this exception, it seems that immunity *ratione materiae* has to be granted to all other acts taken by a State official in the discharge of his functions. For this reason, it seems appropriate to align the immunity regime with the international norms on attribution of State responsibility. This position was reaffirmed in the *Jones* case where it was pointed out that

“It has until now been generally assumed that the circumstances in which a state will be liable for the act of an official in international law mirror the circumstances in which the official will be immune in foreign domestic law. There is a logic in

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<sup>141</sup> R. Y. JENNINGS, *The Caroline and McLeod Cases*, in *The American Journal of International Law*, vol. 32, 1938, p. 95;

<sup>142</sup> General Assembly resolution A/CN.4/596, *Immunity of State officials from foreign criminal jurisdiction*;

this assumption: if there is a remedy against the state before an international tribunal, there should not also be a remedy against the official himself in a domestic tribunal. The cases and other materials on state liability make it clear that the state is liable for acts done under colour of public authority, whether or not they are actually authorised or lawful under domestic or international law.”<sup>143</sup>

However, by analysing the Project of articles for State responsibility for internationally wrongful acts, there is no specific provision that establishes whether the conduct of a State official has to be regarded as carried out in the discharge of the official functions. It might be said that if a State official acts exceeding the orders or his superiors or contravening them, these actions are not covered by immunity *ratione materiae*. Nevertheless, article 7 of the Draft articles on Responsibility of States for internationally wrongful acts deals with such behaviours. In fact, it establishes that for *ultra vires* acts “the conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.”<sup>144</sup>

Accordingly, the International Law Commission pointed out that regarding State officials, and armed forces in particular, it is more important the apparent authority of the State official and not the motives inspiring his conduct nor the abusive characters that such conduct might have. “It is irrelevant for this purpose that the person concerned may have had ulterior or improper motives or may be abusing public power. Where such a person acts *in an apparently official capacity, or under colour of authority*, the actions in question will be attributable to the State”<sup>145</sup>. At this point it seems undeniable that the two Italian soldiers were acting under “colour of authority” as it is undeniable that they have to be considered as State officials thanks to the fact that they are members of the Italian Navy. Nevertheless, according to Judge Chelameswar of the Supreme Court of India, the firing incident happened on 15<sup>th</sup> February 2012 constitutes

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<sup>143</sup> House of Lords, judgment of 14<sup>th</sup> June 2006, *Jones (Respondent) v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Appellants); Mitchell and others (Respondents) v. Al-Dali and others and Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Appellants); Jones (Appellant) v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Respondents) (Conjoined Appeals)*, UKHL 26

<sup>144</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, article 7;

<sup>145</sup> General Assembly resolution A/CN.4/596, *Immunity of State officials from foreign criminal jurisdiction*;

a criminal act and, in addition, after 23 months the immunity *ratione materiae* has not been granted yet. There is no doubt that the act at the centre of this situation is a criminal act even if it came from a misinterpretation of the situation. However, “if unlawful or criminal acts were considered, as a matter of principle, to be “non-official” for purposes of immunity *ratione materiae*, the very notion of “immunity” would be deprived of much of its content”.<sup>146</sup> In other words, the conduct does not have to be lawful to attract immunity.

The last question that is necessary to consider is whether a distinction between *acta iure imperii* and *acta iure gestionis* influences the situation between Italy and India in the ongoing situation of the Italian Marò. As it was stated before, while an *acta iure imperii* refers to acts implemented in the applicability of the sovereign power of a State, an *acta iure gestionis* has to be referred to commercial activities and, as such, it does not seem to attract any form of immunity. Nevertheless, it has been considered that the distinction between the two acts is irrelevant in the case of immunity *ratione materiae*. As a consequence, every *acta iure gestionis* carried out by a State organ would still qualify as official.<sup>147</sup> According to the work of the International Law Commission on the Immunity of State officials from foreign criminal jurisdiction,

“the reasons for excluding *acta iure gestionis* from the scope of immunity *ratione materiae* of State officials would appear to be unclear, especially in view of the fact that such acts are attributable to the State in the same way as are *acta iure imperii*. In the light of the foregoing, there would seem to be reasonable grounds for considering that a State organ performing an act *iure gestionis* which is attributable to the State is indeed acting in his or her official capacity and would therefore enjoy immunity *ratione materiae* in respect of that act.”<sup>148</sup>

Nonetheless, a famous case of international jurisprudence regarding the institution of immunity seems to contradict what have been affirmed until now. The case in question is the *Rainbow Warrior* case and the related judgment of the domestic court of New Zealand. The vessel “Rainbow Warrior”, which was flying British flag, was docked at the port of Auckland in New Zealand when it suffered an attack from the French secret services in 1985. The vessel sank after an explosion in which one person died and the High Court of Auckland charged with manslaughter two French members

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<sup>146</sup> *Ibidem*;

<sup>147</sup> *Ibidem*;

<sup>148</sup> *Ibidem*;

of the secret services. According to the proceeding, the fact that the two French servicemen acted within the terms of their orders had not to be considered as an exclusion from criminal jurisdiction and the judge condemned them to ten years of prison in New Zealand. However, France maintained that this detention was unjustified and a dispute between the two States arose in front of the UN Secretary General who decided that the act of the two French agents had to be regarded as an act of the State. As a direct result, France was considered responsible of an international wrongful act, namely it violated the territorial sovereignty of New Zealand. The dispute was settled with French official excuses and a compensation for the damages caused.<sup>149</sup>

The *Rainbow Warrior* case has several points in common with the case in question of the Italian soldiers. In both cases a foreign court has denied the grant of immunity *ratione materiae* to the soldiers, even if in the latter case the Supreme Court of India has postponed this decision by moving the case to another domestic court. By not recognizing immunity to the two French agents because the accomplishment of superior orders does not constitute a bar from foreign criminal jurisdiction, the judgment of the High Court of Auckland seems to constitute a jurisprudential precedent for the court of India. In addition, the practice adopted after the Second World War seems to validate this theory. As a matter of fact, since then the members of the international community started to settle bilateral or multilateral agreement in order to rule the institution of immunities. A clear example of this practice is the settlement of the Status of Forces Agreements (SOFAs) which regulate which State has the priority for the jurisdiction and which type of immunity has to be granted to the members of the armed forces involved in foreign territories.

### **21. Limits for the recognition of immunity**

No SOFAs have been settled between Italy and India, but does this mean that because of the increasing settlement of these agreements the international customary principle of immunity *ratione materiae* granted since the *McLeod* case is now disappeared? Before trying to answer this question, some issues have to be discussed. First of all, in international law not all the acts of foreign organs are covered by immunity. After the Second World War, in fact, an increasing practice has been adopted and it consists in not granting immunity to State officials that are responsible of international crimes such

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<sup>149</sup> C. FOCARELLI, *Lezioni di diritto internazionale*, Padova, CEDAM, 2012, vol.2, pp. 633-637;

as genocide, torture, war crimes, crimes against humanity and any breach to the humanitarian international law. A clear example of this practice is the *Pinochet* case and, more recently, the judgment of the International Criminal Court against the President of Kenya Uhuru Muigai Kenyatta who has been charged with murder, deportation or forcible transfer, rape and other inhumane acts.<sup>150</sup>

Furthermore, other types of acts might be excluded from the grant of immunity. In fact, in order to determine whether an act performed by a State official in a foreign territory is covered by immunity *ratione materiae*, it is fundamental to consider if the foreign State had authorised such operation or not. In this respect, it has been affirmed that immunity *ratione materiae* is not granted and does not cover acts committed in gross violation of the territorial sovereignty of another State, among which there are sabotage, kidnapping, murder committed by a foreign secret service agent or aerial intrusion.<sup>151</sup> It seems evident that the *Rainbow Warrior* judgment of the High Court of Auckland does not represent a contrasting point with the well-established principle of immunity *ratione materiae* for members of the armed forces affirmed since the *McLeod* case. In fact, the case involving French secret service agents represented a gross violation to the territorial sovereignty of New Zealand and, as such, it cannot be covered by immunity *ratione materiae*.

Nevertheless, even if the ongoing situation between Italy and India presents different points in contact with the *Rainbow Warrior* case, it is true that there are also big differences. First of all, in the case in question there is no gross violation of the Indian territory because the circumstances at the basis of the situation did not happen on Indian soil, nor in Indian territorial waters. Secondly, it does not involve members of the secret services but State officials of the Italian Navy. It can be stated that even if the international practice is more directed in settling bilateral (in the case of the SOFAs) or multilateral (in the case of the peacekeeping operations of the UN) agreements, this does not indicate that the international customary principle established in the *McLeod* case and reaffirmed many times since has disappeared. On the contrary, it reveals the attitude of the members of the international community which are willing to fix the rules for which State has the primary right for the jurisdiction and the rules that deal with the grant of immunity. However, it seems inappropriate to maintain that members

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<sup>150</sup> Information available at: [www.icc-cpi.int](http://www.icc-cpi.int);

<sup>151</sup> General Assembly resolution A/CN.4/596, *Immunity of State officials from foreign criminal jurisdiction*;

of the armed forces of a State, which are State officials, are not covered by immunity *ratione materiae* in absence of a bilateral or multilateral agreement that establishes these rules.

## **22. Recognition of immunity in international jurisprudence**

Several cases of international jurisprudence might be presented as a further confirmation of the recognition of State immunity from foreign jurisdiction and, more related to the case in point, of the fact that members of the armed forces are covered by immunity *ratione materiae* because they have to be seen as State organs in discharge of official functions.

The first case that is worth presenting is the *Al-Adsani v. United Kingdom* in which a Kuwaiti citizen, Mr. Al-Adsani, started a proceeding against his national country in the United Kingdom after having declared that he suffered mistreatment while he was imprisoned in the State of Kuwait. After an initial sentence of the British judges, the Court of Appeal of the United Kingdom recognized that it had not the power to express a judgment over the case in question and it motivated this decision by admitting and confirming that the State of Kuwait was covered by the institution of State immunity which acts as a bar to the exercise of foreign jurisdiction. At this point, Mr. Al-Adsani started a proceeding in front of the European Court of Human Rights on the basis of the belief that the grant of immunity to his national State constituted a breach to article 6 of the European Convention on Human Rights which establishes the right for a fair trial.

In its judgment of 21<sup>st</sup> November 2001, the European Court of Human Rights affirmed that

“sovereign immunity is a concept of international law, developed out of the principle *par in parem non habet imperium*, by virtue of which one State shall not be subject to the jurisdiction of another State. The Court considers that the grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State’s sovereignty.”<sup>152</sup>

After having established that no breach to the European Convention on Human Rights was committed, the Court further maintained that it was “unable to discern in

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<sup>152</sup> *Case of Al-Adsani v. United Kingdom*, Application N° 35763/97, Judgment of 21<sup>st</sup> November 2001;

the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State”.<sup>153</sup>

Another important case that is worth mentioning is the incident of the Cermis. On 3<sup>rd</sup> February 1998 a US soldier on a US military aircraft broke the cables of the funicular railway of the Mount Cermis causing the death of 20 people. Because the incident took place on Italian soil, the Public Prosecutor’s Office of Trento started a proceeding against seven US soldiers. Nevertheless, the Tribunal of Trento, in its judgment of 13<sup>th</sup> July 1998, declared the impossibility for any Italian court to express its judgment on the case of the incident of the Mount Cermis. The decision was based on the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, namely on the provisions of article VII which establishes the priority of the sending State in the exercise of State authority in case of a concurrent jurisdiction.<sup>154</sup> However, in this way it would seem that the *Incident of the Cermis* case does not represent any evidence to the fact that the immunity *ratione materiae* has to be granted to the members of a foreign State armed forces even in absence of an agreement. On the other hand, it does seem to abolish this theory.

Nevertheless, notwithstanding the fact that this decision was based on a multilateral agreement and, as such, on fixed rules among States, the Tribunal of Trento affirmed that this decision has not to be interpreted as an abdication of the host State in front of the sending State. On the contrary, its decision confirms that it does reaffirm a well-established principle of international customary law regarding the members of armed forces which can be presented as *la loi suit drapeau: ubi signa est iurisdictio*.<sup>155</sup> According to this principle, the exercise of the State jurisdiction over the members of

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<sup>153</sup> *Ibidem*;

<sup>154</sup> “In case where the right to exercise jurisdiction is concurrent the following rules shall apply:

a. The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to

i. offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State or of a dependent;

ii. offences arising out of any act or omission done in the performance of official duty.”

Article VII (3) of the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, adopted on 19<sup>th</sup> June 1951 in London; entered into force on 23<sup>rd</sup> August 1953;

<sup>155</sup> Tribunal of Trento, judgment n° 161 of 13<sup>th</sup> July 1998, *Incidente del Cermis*;

armed forces is a priority of the sending State and not of the host State because the Army has to be considered as part of the State in discharge of official functions.

Furthermore, it is worth considering the *Jones* case in analysing matters of whether members of the armed forces of a State are covered by immunity *ratione materiae*. The issue at the heart of the judgment of the British House of Lords was whether it had jurisdiction to entertain proceedings brought by Mr. Jones against a foreign State and its officials. Mr. Jones accused the Ministry of the Kingdom of Saudi Arabia and a colonel of Saudi Arabia armed forces of mistreatment and acts of torture while he was imprisoned. The Kingdom of Saudi Arabia claimed its immunity from British jurisdiction since the beginning. The House of Lords presented this case as a contrast between two principles of international law.

“One principle, historically the older of the two, is that one sovereign state will not, save in certain specified instances, assert its judicial authority over another. The second principle, of more recent vintage but of the highest authority among principles of international law, is one that condemns and criminalises the official practice of torture, requires states to suppress the practice and provides for the trial and punishment of officials found to be guilty of it.”<sup>156</sup>

The judge then recalled the *Al-Adsani* case above mentioned and he further affirmed that no international instruments, judicial authorities or other materials could have the power to demonstrate that a State or a State official does not enjoy immunity from jurisdiction in the courts of another State. In addition, the judge of the House of Lords maintained that a foreign State is entitled to claim immunity for its agents as it is entitled to claim it for itself. “The foreign State’s right to immunity cannot be circumvented by suing its servants of agents.”<sup>157</sup> Furthermore, in the same judgment the court reinforced the international law principle, codified in article 4 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, according to which any act or conduct of a State official has to be treated as an act or conduct of the State itself.

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<sup>156</sup> House of Lords, judgment of 14<sup>th</sup> June 2006, *Jones (Respondent) v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Appellants); Mitchell and others (Respondents) v. Al-Dali and others and Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Appellants); Jones (Appellant) v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Respondents) (Conjoined Appeals)*, UKHL 26;

<sup>157</sup> *Ibidem*;

As a direct consequence, where State immunity is applicable, the national court has no authority to exercise domestic jurisdiction. Concluding its judgment, the British court affirmed that State immunity is not a self-imposed restriction on the jurisdiction of its courts which a State might choose to adopt or not. It is imposed by international law without any discrimination between States.<sup>158</sup>

A further element of evidence of the basic principle of immunity *ratione materiae* that has to be granted to the members of armed forces is represented by the judgment of the Italian Court of Cassation in the *Calipari* case. Mario Luiz Lozano, a member of the US Army involved in a military operation in Iraq, was charged with murder and attempt of murder by the Tribunal of Rome for the events of the 4<sup>th</sup> March 2005 that led to the death of the member of the SISMI Nicola Calipari. The Italian Court of Cassation in its judgment of 19<sup>th</sup> June 2008 had to consider which court could prosecute the US soldier. In order to do so, the Court analysed the principles of international law which give the authority to every State to claim its jurisdiction over a case. After having considered the priority of the principle of the flag, the Court maintained that this assumption is limited by the application of immunity *ratione materiae*. In fact, on the institution of immunity the Court denied the existence of Italian penal jurisdiction. Moreover, it added that the only State which could exercise its adjudicative powers was the USA<sup>159</sup>.

### **23. A modern development of immunity**

A more recent trend towards the institution of immunity is represented by the UN Convention on Jurisdictional Immunities of States and their Property, adopted by the General Assembly in 2004 on the basis of the work done by the International Law Commission. Notwithstanding the fact that this convention is not into force, it surely represents a modern interpretation of immunity. The convention covers the question of immunities of a State from adjudication and from enforcement and, even if the main topic is about State immunity, this opinion is highly relevant if we consider that immunity *ratione materiae* of State officials can be deemed as an expression of it on the basis of the well-established principle of international law according to which the conduct of a State official has to be treated as the conduct of the national State.

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<sup>158</sup> *Ibidem*;

<sup>159</sup> Court of Cassation, judgment of 19<sup>th</sup> June 2008, *Procuratore Generale della Repubblica v. Mario Luiz Lozano*, section I, n° 31171/2008;

As it has been stated, this convention is not into force. Nevertheless, this does not mean that it cannot influence the practice of the members of the international community on matters relating the institution of immunity. As a matter of fact, it might be presented another example of a convention that is not into force but that influences the development of international relations among States: the Draft Articles on the Responsibility of States for Internationally Wrongful Acts. When it was first presented, it was criticized by the majority of the members of the international community and it seemed not to become a binding treaty. Nevertheless, more and more cases of jurisprudence, both national and international, started taking into account this convention for the reconstruction of the State practice and, in this way, more and more provisions have been recognized as representing international customs. It can be stated that this convention now fully represents international customary rules and it is binding for all the members of the international community.

A similar case might be represented by the UN Convention on Jurisdictional Immunities of States and their Property. In fact, even if it is not into force, it has been signed by 28 States and 14 countries ratified it.<sup>160</sup> Among the signatory States there is the Union of India and this can be interpreted as clear evidence of the will of the State to recognize that jurisdictional immunity of States are generally accepted as a principle of customary international law. Furthermore, different provisions of the convention seem to codify well-established principles of international customs. A relevant example for the *Marò* case is represented by article 18 which states that “a State shall not be considered to have consented to the exercise of jurisdiction by a court of another State if it intervenes in a proceeding or takes any other step for the sole purpose of: (a) invoking immunity”.<sup>161</sup> Moreover, the importance of this convention was affirmed in the above mentioned *Jones* case in which the House of Lords maintained that it “powerfully demonstrates international thinking on the point”.<sup>162</sup>

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<sup>160</sup> Status as at 18th October 2013 as reported in: [treaties.un.org](http://treaties.un.org);

<sup>161</sup> United Nations Convention on Jurisdictional Immunities of States and Their Property, adopted by the General Assembly on 2<sup>nd</sup> December 2004, article 18;

<sup>162</sup> House of Lords, judgment of 14<sup>th</sup> June 2006, *Jones (Respondent) v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Appellants); Mitchell and others (Respondents) v. Al-Dali and others and Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Appellants); Jones (Appellant) v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Respondents) (Conjoined Appeals)*, UKHL 26;

What is most important is that this convention seems to further reaffirm fundamental principles at the basis of international relations among the members of the international community. In fact, by affirming that no State has the power to sue another State the principle *par in parem non habet iurisdictionem* is confirmed. Another important principle that has to be protected from abuses is the non-intervention of foreign countries in the domestic affairs of a State. If these principles were not respected, every State would risk a dangerous erosion of its full sovereignty and independence.

## 24. Conclusion

To conclude, the most important thing to establish in the case analysed in this work is whether the two Italian soldiers were acting in the discharge of their official functions in order to accomplish to a mission to counter piracy in the internationally recognized High Risk Area. With no doubt it can be said that members of the armed forces of a State have to be treated as State officials and, as a direct consequence, they are covered by immunity *ratione materiae* for their conduct.

Nevertheless, the Union of India maintained that the two Italian members of the VPD were privately hired by the shipowner and, as a consequence, they cannot be treated as acting in discharge of their official functions. This position was established since the first proceeding instituted by the Court of Kerala in which it can be read that “where the members of military forces of a country commit wrongful acts, while engaging in non-military functions, it is quite appropriate for the aggrieved state to claim jurisdiction and subject them to the local law”. It was further stated that “the marines were not under the command of their immediate Superior Officer, but under the Captain of the vessel” and, as a consequence, they “are not entitled to any sovereign immunity”.<sup>163</sup>

Nevertheless, the Indian thesis seems unacceptable for several reasons. First of all, the VPDs deployed on board of Italian vessels are not privately hired because the military members do not receive any payment from the shipowner. They do receive their compensation directly from their military command. Secondly, the members of the VPDs are soldiers of the Italian Navy and, as such, they do not stop to be members of the Italian armed forces while they are implemented for the protection of Italian private vessels. As a consequence, they should not stop to be treated as soldiers with the direct

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<sup>163</sup> High Court of Kerala, judgment of 29<sup>th</sup> May 2012, *Massimiliano Latorre v. Union of India*, 252 KLR 794;

consequence of the grant of immunity *ratione materiae* as if they were employed in other international operations. Thirdly, as it is established in the Italian law that rules the deployment of the VPDs on private vessels,

*“il Comandante della Nave rimane responsabile delle scelte inerenti la sicurezza della Navigazione e la manovra, incluse, quelle elusive; il Comandante della Nave non è responsabile delle scelte inerenti le operazioni compiute nel respingimento di un attacco dei pirati.”*<sup>164</sup> [the master of the ship remains responsible for the choices inherent the safety of navigation and the choices of the manoeuvre, including elusive manoeuvre; the master of the ship is not responsible for the choices inherent the operations carried out in the avoidance of a pirate attack.]

The division of the duties between the master of the ship and the captain of the VPD seems very clear and there is no doubt that the two masters can take their decision in absolute autonomy and independence. There is no reason to think that the Chief Master Sergeant Massimiliano Latorre was under the command of the master of the “Enrica Lexie” when the incident with the Indian trawler “St. Antony” happened. On the contrary, the members of the VPD were under the command of the Italian Ministry of Defence.

Finally, even the Indian theory according to which the Italian soldiers do not attract immunity because their conduct cannot be considered as an *acta iure imperii* of their national State seems to find no ground. As a matter of fact, as it was presented before, according to the International Law Commission, there is no reason to distinguish between an *acta iure imperii* and an *acta iure gestionis* when it is carried out by a State member. In every case it should be considered as a conduct of a State organ in discharge of its official functions. Even if the VPD team was deployed on a private vessel, the same solution of the deployment of military teams of the Italian armed forces to protect Italian ships was a result of the decision of an independent and sovereign State and, as such, every consequences of this conduct, performed by State officials, should be attributable to the State of Italy.

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<sup>164</sup> Convenzione tra il Ministero della Difesa e l’Armatore, allegato al “Protocollo di Intesa Difesa-CONFITARMA”, Roma, 11th October 2011, article 5;

## 6. COMPARISON BETWEEN TWO SIMILAR CASES: THE *LOTUS* CASE AND THE *MARÒ*' CASE

SUMMARY: 25. Introduction – 26. Reconstruction of the judgment of the Permanent Court of International Justice – 27. Contrasting opinions on the *Lotus* judgment – 28. Impact of the *Lotus* case and development of international law

### 25. Introduction

What seems worth analysing at this point is the basic elements that characterize the case. We are facing a maritime incident happened in an area where the coastal State has no full sovereignty because it did not occur in the territorial waters. Two vessels were involved in this incident and, as a consequence of a mistaken decision of one of them, the first vessel caused the death of some people on board of the second ship. At this point the first vessel, which caused the incident, docked in a port of the national State of the victims and some members of the crew were arrested while a domestic court started a proceeding against them. Notwithstanding the fact that this does seem the *Marò* case analysed in this work, what has just been presented is another incident of navigation which occurred in 1926, better known as the *Lotus* case. As it can be seen, the *Lotus* case and the *Marò* case have several points in common and, for this reason, the former has been recalled also in the judgment of the Supreme Court of India as a jurisprudential precedent to analyse for the ongoing trial.

The fact that these two cases seem so similar and the fact that the *Lotus* affair was recalled in the judgment of the Indian Supreme Court to claim its jurisdiction over the *Marò* case cannot be left apart. It does seem having a momentous importance, on the contrary, to analyse this precedent incident with all its implications deriving from the judgment of the Permanent Court of International Justice in order to better understand the shared elements and the contrasting points between the two cases. This would permit to understand whether the *Lotus* case constitutes a concrete precedent for the ongoing trial against the two Italian marines or if the international practice on the maritime incident has changed. With the help of some articles of important authors and on the basis of the Permanent Court of International Justice sentence on the case, I will try to analyse the Court's decision and the relevant findings. Then, I will try to compare those findings with the principles of international law that nowadays rule the relations among the members of the international community.

## 26. Reconstruction of the judgment of the Permanent Court of International Justice

The facts of the *Lotus* case can be resumed as follow. On 2<sup>nd</sup> August 1926, a collision occurred between the French mail steamer “Lotus” and the Turkish collier “Boz-Kourt”, between five and six nautical miles to the north of Cape Sigri. The Turkish vessel suffered serious damages and it sank. As a consequence, eight Turkish members of the crew of the ship who were on board died. After having succour the shipwrecked people, the French steamer continued its route to Istanbul where it arrived the day after the incident. The Turkish police started an enquiry for the events that led to the collision of the two vessels and, as a result of this examination, the lieutenant of the French vessel, Mr. Demons, was placed under arrest without previous notice to the French Consul-General. The French citizen was accused of manslaughter and the case was first heard by the Criminal Court of Istanbul which delivered its sentence on 15<sup>th</sup> September of the same year. Even if Lieutenant Demons submitted that the Turkish Courts had no jurisdiction, he was condemned and imprisoned.<sup>165</sup>

As it is reported in the judgment of the Permanent Court of International Justice,

“the action of the Turkish judicial authorities with regard to Lieutenant Demons at once gave rise to many diplomatic representations and other steps on the part of the French Government or its representatives in Turkey, either protesting against the arrest of Lieutenant Demons or demanding his release, or with a view to obtaining the transfer of the case from the Turkish Courts to the French Courts.”<sup>166</sup>

As a result, both States agreed to submit the decision of the conflict of jurisdiction over the case to the Permanent Court of International Justice at The Hague which had to decide the questions posed by the France and Turkey with opposite points of view. Their questions to the Permanent Court of International Justice read as follow:

"Has Turkey, contrary to Article 15 of the Convention of Lausanne of July 24th, 1923, respecting conditions of residence and business and jurisdiction, acted in conflict with the principles of international law-and if so, what principles-by instituting, following the collision which occurred on August 2nd, 1926, on the high seas between the French steamer Lotus and the Turkish steamer Boz- Kourt and upon the arrival of the French steamer at Constantinople-as well as against the captain of the Turkish steamship-joint criminal proceedings in pursuance of

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<sup>165</sup> S.S. “*Lotus*” (*France v. Turkey*), P.C.I.J., 1927, (Series. A), n° 10;

<sup>166</sup> *Ibidem*;

Turkish law against M. Demons, officer of the watch on board the Lotus at the time of the collision, in consequence of the loss of the Boz-Kourt having involved the death of eight Turkish sailors and passengers?”<sup>167</sup>

At this point the Court asked itself on the basis of which norms it was competent to express a judgment. The answer derived directly from the same article 15 of the Convention of Lausanne of July 24th, 1923, respecting conditions of residence and business and jurisdiction which establishes that for all questions of jurisdiction, the court shall decide in accordance with the principles of international law.<sup>168</sup> On this point the Republic of France maintained that the notion of “principles of international law” should have been interpreted in the light of the preparatory work of the Convention of Lausanne and, more precisely, on the basis of a Turkish proposal to extend its jurisdiction to crimes committed in the territory of a third State, after having provided that, under Turkish law, such crimes were within the jurisdiction of Turkish Courts.<sup>169</sup> This proposal was rejected by the delegates of several nations, among which there was France. Nevertheless, the Court rejected this opinion and, on the contrary, recalled that there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself. Furthermore, it reaffirmed the meaning of the expression “principles of international law” which has to be considered as “international law as it is applied between all nations belonging to the community of States”.<sup>170</sup>

The Court analysed then whether existed a norm of international law that ruled that type of events. The answer of the Court to this question seems negative and, on the contrary, it affirmed that a State might extend its criminal jurisdiction on events that started in a foreign territory but which produced their effects in the national territory. This opinion was based on a comparison between the case of an incident of navigation and the case of a shot fired from a country which produces its effect on another State. This comparison gave rise to the meaning that a crime might be located not only where it started, but also it might be located where it produced its effects. This is at the centre of the passive territoriality principle.

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<sup>167</sup> *Ibidem*;

<sup>168</sup> Treaty of Lausanne, adopted on 24<sup>th</sup> July 1923 in Lausanne, entered into force on 6<sup>th</sup> August 1924, article 15;

<sup>169</sup> G. SALVIOLI, *Il caso del “Lotus”*, in *Riv. Dir. Int.*, vol. VI, 1927, p. 525;

<sup>170</sup> S.S. “Lotus” (*France v. Turkey*), P.C.I.J., 1927, (Series. A), n° 10;

“The offence for which Lieutenant Demons appears to have been prosecuted was an act – of negligence or imprudence – having its origin on board the *Lotus*, whilst its effects made themselves felt on board the *Boz-Kourt*. These two elements are, legally, entirely inseparable, so much so that their separation renders the offence non-existent. Neither the exclusive jurisdiction of neither State, nor the limitations of the jurisdiction of each to the occurrences which took place on the respective ships would appear calculated to satisfy the requirements of justice and effectively to protect the interests of the two States. It is only natural that each should be able to exercise jurisdiction and to do so in respect of the incident as a whole. It is therefore a case of concurrent jurisdiction.”<sup>171</sup>

On the basis of this assumption, the Court assumed that the cause of the incident was a wrong manoeuvre of navigation whose author was on board of the damaging vessel and whose effects were produced on the damaged ship. Moreover, the Court presumed that the vessels should be treated as part of the territory of their flag State and finally, it maintained that the events at the basis of the *Lotus* incident should be regarded as a wrongful act started in a foreign territory (or in a foreign vessel) which produces its effects in the national territory of a State (or on a national vessel).<sup>172</sup> The Court did not found its opinion on a positive rule of international law because it did not find any principle of international law establishing the jurisdiction of States in cases of incident of navigation out of the territorial waters. As we have seen, its opinion was based on an analogy with a similar situation.

The Permanent Court of International Justice deeply analysed the principle of international law according to which jurisdiction is above all territorial. This means that, unless an international treaty or international customary law allows to do so, a State cannot exercise its jurisdiction outside its territory. On the other hand, within its territory a State can exercise its jurisdiction even without specific rules of international law, thus affirming that a State has full sovereignty in its territory in the matters of domestic jurisdiction. This full sovereignty might be limited only by rules of international law as it was stated by the Court itself in its judgment:

“It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application

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<sup>171</sup> *Ibidem*;

<sup>172</sup> G. SALVIOLI, *Il caso del “Lotus”*, in *Riv. Dir. Int.*, vol. VI, 1927, pp. 529-530;

of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present.”

The PCIJ then continued affirming that:

“Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable. This discretion left to States by international law explains the great variety of rules which they have been able to adopt without objections or complaints on the part of other States [...] In these circumstances all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.”<sup>173</sup>

As a consequence of this full sovereignty of a State in its territory, the Court questioned itself whether a vessel should have to be considered as part of the territory on which the State could exercise its authority. Notwithstanding the positive answer of the Court<sup>174</sup>, it is worth noting that assimilating the vessels to the territory of a State does not mean that it might gain neither a worse position, nor a better position. It might not gain a worse position means that if a wrongful act committed on the State territory implies the competence of that State, the same rationale has to be used for wrongful acts committed on a vessel flying the flag of that State. On the other hand, the fact that a ship does not enjoy a better position than the State territory means that if the wrongful act started on the territory of another State or on board of one of its vessels, the State which suffers the consequences cannot extend its jurisdiction on another State territory because it would violate the basic principle of State equality.<sup>175</sup>

The main argument of the French Government regarding its jurisdiction over the *Lotus* case was based on the maintenance that any breach of navigation rules fall

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<sup>173</sup> S.S. “*Lotus*” (*France v. Turkey*), P.C.I.J., 1927, (Series. A), n° 10;

<sup>174</sup> “A corollary of the principle of the freedom of the seas is that a ship on the high seas is assimilated to the territory of the State the flag of which it flies, for, just as in its own territory, that State exercises its authority upon it, and no other State may do so”, in S.S. “*Lotus*” (*France v. Turkey*), P.C.I.J., 1927, (Series. A), n° 10;

<sup>175</sup> G. SALVIOLI, *Il caso del “Lotus”*, in *Riv. Dir. Int.*, vol. VI, 1927, p. 533;

exclusively within the jurisdiction of the State under whose flag the vessel sails.<sup>176</sup> Accordingly, the flag State principle would constitute a norm of international law establishing exclusive jurisdiction. In order to reinforce its position, the French Government quoted several judgments of domestic courts which expressed the same principle. However, the Permanent Court of International Justice in its judgment denied the existence of a rule of international law that gives exclusive jurisdiction to the flag State in case of a crime started on board of a vessel which produced its effects on board of a third State ship. As a consequence, the Court decided that Turkey, by instituting criminal proceedings against the French citizen, did not act in conflict with the principles of international law. This decision was based on the comparison between the case of the maritime incidents and a case of an incident started on a State territory that produced its effects on a third State territory.

“If, therefore, a guilty act committed on the high seas produces its effects on a vessel flying another flag or in foreign territory, the same principles must be applied as if the territories of two different States were concerned, and the conclusion must therefore be drawn that there is no rule of international law prohibiting the State to which the ship on which the effects of the offence have taken place belongs, from regarding the offence as having been committed in its territory and prosecuting, accordingly, the delinquent.”<sup>177</sup>

Nevertheless, it is interesting to analyse that the Court affirmed that it could not be maintained the existence of a rule of international law that granted exclusive jurisdiction in cases of maritime incidents to the State under whose flag the vessel sails. In this way the Court recognized the absence of a negative principle of international law, but it did not affirm the existence of any positive principle that allowed Turkey to start a trial against a foreign citizen for a wrongful act started on board of a foreign vessel. In other words, if the Court denied the existence of an exclusive jurisdiction for France, it did not affirm any principle of international law that authorized Turkish domestic courts to prosecute Lieutenant Demons.

## **27. Contrasting opinions on the *Lotus* judgment**

The fact that the *Lotus* case has several points in common with the *Marò* case increases its importance in this analysis. In fact, it is necessary to understand whether the

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<sup>176</sup> S.S. “*Lotus*” (*France v. Turkey*), P.C.I.J., 1927, (Series. A), n° 10;

<sup>177</sup> *Ibidem*;

judgment of the Permanent Court of International Justice has to be considered as reflecting international law and, if so, whether it can represent a starting point for the solution of the *Marò* case. First of all, it would be useful to start from the statements of the judges of the Court who decided over the *Lotus* case and from the fact that the Court's decision passed with six favorable votes and six dissenting votes, with the President vote that resulted decisive.

Notwithstanding the fact that after the decision one of the dissenting judges approved the Court's sentence, the equality in the vote showed that the principles expressed by the Court were not perceived by the majority of the judges as reflecting the principles of international law. This might be easily found also in the same statements of the judges on the decision of the Court. In fact, regarding the principle of sovereignty it was affirmed that "the *principle of the sovereignty of States* in criminal matters [does not represent] a universal, undefined, unlimited sovereignty such as Turkey adduced, but a sovereignty founded upon *and limited* by the territory over which the State exercise its dominion, that is to say, territorial sovereignty."<sup>178</sup> As further evidence on the importance of this principle, it was maintained that

*"la famille des Nations consiste en une agglomération de différents États, souverains et indépendants. Cette indépendance et cette souveraineté produisent la conséquence fondamentale qu'aucune loi nationale, en l'espèce aucune loi pénale, ne peut s'étendre ni exercer sa force obligatoire en dehors du territoire national. Cette vérité fondamentale, qui n'est point une coutume mais la conséquence directe et inévitable de sa prémiss, est une règle logique de droit, est le postulat même de l'indépendance interétatique."*<sup>179</sup>

[The family of nations consists of a collection of different sovereign and independent States. The fundamental consequence of their independence and sovereignty is that no municipal law, in the particular case under consideration no criminal law, can apply or have binding effect outside the national territory.

This fundamental truth, which is not a custom but the direct and inevitable consequence of its premiss, is a logical principle of law, and is a postulate upon which the mutual independence of States rests.]

It seems, therefore, evident that the decision of the Permanent Court of International Justice did not find unanimity in the opinions of its judges in the reproduction of the principles of international law at the basis of its judgment and it found much less concordant attitudes towards the possibility for a State to extend its jurisdiction out of

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<sup>178</sup> Dissenting opinion by M. Weiss, p. 49; available in: [www.icj-cij.org](http://www.icj-cij.org);

<sup>179</sup> Dissenting opinion by M. Loder, pp. 34-35; available in: [www.icj-cij.org](http://www.icj-cij.org);

its territory. As a matter of fact, as reported by Lord Finlay, “the government of the country of the injured person is entitled to bring pressure to bear upon the government of the offender to have him brought to justice, but it has no right to assert for this purpose in its own courts a jurisdiction which they do not possess.”<sup>180</sup>

## **28. Impact of the *Lotus* case and development of international law**

Notwithstanding the contrasting positions on the judgment, the *Lotus* case represents, with no doubt, a fundamental piece of the history of international jurisprudence and, as a consequence, it is not rare that other courts refer to it while expressing their judgments. This was also the case for the High Court of Kerala and the Supreme Court of India. In fact, both of them referred to the *Lotus* case while indicating their position regarding the claim for Indian jurisdiction over the *Marò* case. More precisely, the opinion expressed in the judgments of both Indian courts indicates that the *Lotus* case has to be considered an important evidence in the maintenance of the passive territorial principle which reflects the comparison of the Permanent Court of International Justice: an incident involving two vessels flying different State flags has to be compared to a wrongful act commenced in one State which produced its consequences within the territory of another State. Furthermore, in the Supreme Court of India was affirmed by one of the respondents that “the decision in the *Lotus* case continued to be good law in cases such as the present one”<sup>181</sup>, with the obvious reference to the *Marò* case. In accordance with this position, the Indian claim of jurisdiction over the case here analysed should be accepted on the basis of the passive territorial principle that finds evidence in the *Lotus* case.

Nevertheless, this hypothesis does not seem to find any ground in modern international law and, in particular, in the *Marò* case. As a matter of fact, the practice of the members of the international community appears to have overruled the decision of the Permanent Court of International Justice. More precisely, after the Second World War several treaties have been signed to express the position of the international community on the matter of penal jurisdiction in cases of maritime incidents. By signing a treaty, the legal framework of the issue was settled and, in this way, in the event of another similar incident of navigation, it would have been easier to identify

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<sup>180</sup> Dissenting opinion by Lord Finlay, p. 56; available in: [www.icj-cij.org](http://www.icj-cij.org);

<sup>181</sup> Supreme Court, judgment of 18<sup>th</sup> January 2013, *Republic of Italy thr. Ambassador & Ors. v. Union of India & Ors.*; SLP(C) NO. 20370 of 2012;

which rule of international law should be applicable. The first concrete example of this shift from the judgment of the Court of The Hague is represented by the International Convention for the unification of certain rules relating to penal jurisdiction in matters of collision or other incidents of navigation adopted in Brussels in 1952. In the very first article the principle of the exclusive jurisdiction of the flag State is expressed by saying that

“in the event of a collision or any other incident of navigation concerning a sea-going ship and involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, criminal or disciplinary proceedings may be instituted only before the judicial or administrative authorities of the State of which the ship was flying the flag at the time of the collision or other incident of navigation.”<sup>182</sup>

Although this convention entered into force in 1955, the Republic of Italy cannot invoke the provisions presented above because the Union of India neither signed nor ratified this convention and, as a consequence, it does not constitute a binding treaty for India. However, this convention does represent a fundamental document in order to understand the will of the members of the international community to change the principles established in the *Lotus* judgment of the court of The Hague. This willingness to overrule the decision of the Permanent Court of International Justice might be seen also in the subsequent attempts to codify the framework of the law of the sea, started with the first international conference on the law of the sea which was called by the United Nations in 1958 in Geneva. The result of this international meeting can be seen in the four international conventions adopted, among which the one regarding the high seas has momentous importance in the case in point. In fact, further evidence of a shift from the decision of the *Lotus* case might be found in it, thus reaffirming the principle of the exclusive competence of the flag State in case of penal proceedings which was denied in the judgment of 1927. The Geneva convention on the high seas reads as follow,

“In the event of a collision or of any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or

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<sup>182</sup> International Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collision or other Incidents of Navigation, adopted on 10<sup>th</sup> May 1952 in Brussels, entered into force on 20<sup>th</sup> November 1955, article 1;

of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such persons except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national.”<sup>183</sup>

What seems important to establish at this point is which is the view of the UNCLOS regarding the matters of incident of navigation involving penal responsibility. In fact, it is widely recognized that the UNCLOS reproduces international customary law and, as a consequence, it binds all the members of the international community notwithstanding their ratification to this convention. Article 97 of the UNCLOS deals with penal jurisdiction in matters of collision or any other incident of navigation and it is an accurate reproduction of article 11 of the Geneva convention on the high seas presented above. This confirms once more that the principles established in the *Lotus* case cannot be seen as corresponding to international law. On the contrary, international practice moved to an opposite direction and this behaviour might be easily found in all the treaties regarding the law of the sea signed after the Second World War.

Any reference to the *Lotus* case as a “good law” for the judgment of the two Italian marines seems to be inappropriate also because the same Supreme Court of India admitted that “the principles enunciated in the *Lotus* case have, to some extent, been watered down by Article 97 of the UNCLOS 1982.”<sup>184</sup> Actually, not only does article 97 of the UNCLOS seem to have watered down the principles of the *Lotus* case, but it does seem that it represents a complete shift from those principles denying any involvement of States other than the flag State.

To conclude, the judgment of the Permanent Court of International Justice on the *Lotus* case represents, with no doubt, an important element in international jurisprudence which rose numerous debates which are still discussed today. In fact, this sentence was presented by the Indian domestic courts as a jurisprudential precedent to take into account for the solution of the ongoing situation of the two Italian soldiers detained in India. Nevertheless, it cannot be affirmed that the principles expressed in the *Lotus* case form part of nowadays international law. On the contrary, starting from the dissenting opinions of the same judges of the Court of The Hague, it can be understood that the solution of that case had been controversial. In addition, after the Second World

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<sup>183</sup> Convention on the High Seas, article 11(1);

<sup>184</sup> Supreme Court, judgment of 18<sup>th</sup> January 2013, *Republic of Italy thr. Ambassador & Ors. v. Union of India & Ors.*; SLP(C) NO. 20370 of 2012;

War, an important shift in the international thinking on the point was expressed through the signing of several international treaties that establish the exclusive jurisdiction of the flag State in the event of a collision or of any other incident of navigation which involve penal responsibility. This provision is also established by the UNCLOS which is the international convention that settles the framework of the law of the sea in international law. It can be, therefore, affirmed that any claim to consider the *Lotus* case as a jurisprudential precedent to the case analysed in this work should be considered as an unfounded and unjustified pretension.

**PART III**  
**CRITICAL ANALYSIS OF THE MAJOR ASPECTS OF THE**  
**“MARO” CASE**

**7. THE JURISDICTIONAL FRAMEWORK OF THE EXCLUSIVE ECONOMIC ZONE**

SUMMARY: 29. Introduction – 30. Relevance of Indian notification at an international level – 31. Creation of the Exclusive Economic Zone – 32. Rights and duties of coastal States in the EEZ according to the UNCLOS – 33. Rights and duties of third States in the EEZ according to the UNCLOS – 34. Conclusion

**29. Introduction**

In the second part of this work several questions have arisen regarding, most of all, the Indian claim of jurisdiction for the incident involving the Italian vessel “Enrica Lexie” and the Indian trawler “St. Antony”. These doubts about the claims of Indian courts for the jurisdiction over this case are mainly based on the extension of Indian internal law, more precisely criminal law, up to 200 nautical miles which is the limit of its exclusive economic zone. Undoubtedly, any State has the right to exercise its authority in some areas outside its territory and its territorial waters. What is important to understand is the limit of this extended authority and, regarding the case here analysed, it is fundamental to establish the jurisdictional rights and limitation of a coastal State in the sea. It might be affirmed that India is not the only State that extended its authority out of the borders of the territorial sea. However, this does not mean that it is an act admitted by international law nor accepted by the other members of the international community.

Moreover, as it has been already stated, the Union of India ratified the UNCLOS, but it never adopted an internal law in order to adapt its previous legal framework that regulated the law of the sea to the one established at an international level. This might be seen in the light of a strict dualist interpretation of international law, which does not represent, on the other hand, a justification for breaching international norms. Both States have the right to claim jurisdiction for prosecuting the two Italian members of the VPD according to the principles of territoriality and nationality. The difference is that

the Indian claims stem from the passive aspect of those principles, while Italy might claim its jurisdiction according to the active nationality principle and the active territorial principle which are considered more justifiable than the passive aspects in international law.<sup>185</sup>

What is undeniable is that the *Marò* case seems to present a concurrent jurisdiction. For this reason, it is fundamental to establish the legal framework of the sea area where the incident took place. There is no doubt that it did not happen in Indian territorial waters excluding, as a consequence, the full sovereignty of the coastal State. Since the incident can be placed at a distance between 20.5 and 22.5 nautical miles from the Indian coast, it can be stated that it happened in the contiguous zone. However, this area is also under the regime of the exclusive economic zone because when a State claims its EEZ, it superimposes over the contiguous zone and this is also the case of the Indian EEZ. The last thing to establish is whether the flag State principle, developed in contrast to the Permanent Court of International Justice judgment over the *Lotus* case, might find any application in the case in point.

The aim of this part is to analyse and establish the lawfulness of the Indian claim of prevalence of the domestic law over international law and the Indian notification of extension of its penal code and its code of criminal procedure. Moreover, this part would be focused in particular on the EEZ with the main objective to define and separate the rights of a coastal State and third States on the basis of the UNCLOS which is the pillar of the law of the sea.

### **30. Relevance of Indian notification at an international level**

The notification made by the Indian Government with which it extended its penal code and its code of criminal procedure is at the centre of a discussion whether this act is lawful or not at an international level. This notification was made in 1981 by the Ministry of Home Affairs in accordance with the domestic legislation that regulated Indian law of the sea at that time. In fact, this notification was made before the signature of the UNCLOS while the Indian Maritime Zones Act entered into force in 1976. According to this domestic law that recognised the existence of an area of exclusive economic competence for the coastal State,

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<sup>185</sup> A. CASSESE, *International Law*, pp. 451-453; I. BROWNLIE, *Principles of Public International Law*, p. 302;

“the Central Government may, by notification in the official Gazette, -  
(a) extend, with such restrictions and modifications as it thinks fit, any enactment for the time being in force in India or any part thereof to the exclusive economic zone or any part thereof; and  
(b) make such provisions as it may consider necessary for facilitating the enforcement of such enactment, and any enactment so extended shall have effect as if the exclusive economic zone or the part thereof to which it has been extended is a part of the territory of India.”<sup>186</sup>

It is interesting to note that the exclusive economic zone is considered “as part of the territory of India” and, as a consequence, the Indian Government extended its internal norms to such area. However, in 1994 the UNCLOS entered into force and, since then, it is widely assumed to represent international customary law on the law of the sea. As a consequence, every single member of the international community, even those who did not signed or ratified the treaty of Montego Bay, has the duty to follow the provisions expressed in it. The rights and freedoms for coastal States and third States are clearly stated in the UNCLOS and further claims might be seen as a breach of the rights of other States and, as such, they might give rise to responsibility for internationally wrongful acts. The fact that the Indian Government has not adopted yet an internal law to implement the provisions of the UNCLOS is not a justification for not following its provisions and, moreover, it much less allows the domestic courts to apply the internal law in a judgment where State organs are involved. In the case in question, the Italian State organs are, with no doubt, the two members of the Italian Navy.

In order to better understand this situation, it seems useful to explain the contrast between the Indian domestic law and the provisions established at an international level. As the Supreme Court of New Delhi maintained in its judgment of the 18<sup>th</sup> January 2013, India is entitled both under its domestic law and the public international law to exercise rights of sovereignty up to 24 nautical miles from the baseline<sup>187</sup>, thus affirming its jurisdiction over the case in question. Nevertheless, no provisions in the UNCLOS authorised any State to establish its full sovereignty out of the 12 nautical miles which are the limits of the territorial waters. In all other areas, the coastal State enjoys sovereign rights over specific matters. What might allow this extension of sovereignty over the contiguous zone can be seen in the Indian constitution. As a matter

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<sup>186</sup> The Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976, (Act n° 80), 28<sup>th</sup> May 1976, article 7(7);

<sup>187</sup> Supreme Court, judgment of 18<sup>th</sup> January 2013, *Republic of Italy thr. Ambassador & Ors. v. Union of India & Ors.*; SLP(C) NO. 20370 of 2012;

of fact, it establishes that “the limits of the territorial waters, the continental shelf, the exclusive economic zone, and other maritime zones, of India shall be such as may be specified, from time to time, by or under any law made by Parliament.”<sup>188</sup>

However, it is a well-established principle of international law that in the relations between the members of a treaty the provisions of any domestic law should not prevail over those of the treaty in question. The *ratio* of this principle should also apply where provisions of a constitution are involved. The same conclusion was expressed by the Permanent Court of International Justice in its advisory opinion regarding the *Treatment of Polish Nationals and other persons of Polish origin or speech in the Danzing Territory* when it stated that

“it should however be observed that, while on the one hand, according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted, on the other hand and conversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.”<sup>189</sup>

At this point, where we are facing a contrast in the application between the Maritime Zones Act and the UNCLOS, it is worth questioning which law should prevail in the case of contrast between a principle of international law and one established by the domestic law, including the constitution of a State. In order to do so, it is important to recall the fact that it is the domestic law that has to adjust to the norms of international law and not vice versa. The problem in this specific case seems to be in the fact that the constitution of the Union of India authorizes the Parliament to specify the limits of the different areas of the sea from time to time. This means that there might be a contrast between a constitutional law and the provisions established by the UNCLOS, which do not permit any change in the limits of the territorial waters, the contiguous zone, the continental shelf or the exclusive economic zone.

Nevertheless, the same constitution of India provides that “the State shall endeavour to [...] foster respect for international law and treaty obligations in the

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<sup>188</sup> The Constitution of India, adopted on the 26<sup>th</sup> November 1949, entered into force on the 26<sup>th</sup> January 1950, article 297(3);

<sup>189</sup> *Treatment of Polish Nationals and other persons of Polish origin or speech in the Danzing Territory*, P.C.I.J., 1931, (Series. A/B), n° 44;

dealings of organized peoples with one another”<sup>190</sup>. This is the only article of the constitution of India that refers to the application of international law in the domestic law and the fact that it maintains to foster respect for international law in general appears to include both customary and treaty law. It might be affirmed that, in some aspects, this part of the Indian constitution is similar to article 10 of the Italian constitution which provides that “*l'ordinamento giuridico italiano si conforma alle norme del diritto internazionale generalmente riconosciute.*”<sup>191</sup> [Italian legal order adapts itself to the norms of international law which are generally recognized]. This comparison highlights the fact that for both States the respect of international law should play a fundamental role in the international life of that State and, for this reason, any doubt in the case of a contrast between domestic and international law has to be solved.

The main doubt is whether international law should be applicable even in case of contrast with a constitutional law. What appears from the main doctrine is the fact that international law should prevail even if it is in contrast with a constitutional norm, unless it is a fundamental constitutional principle.<sup>192</sup> The direct consequence is that if article 51 of the Indian constitution can be compared to article 10 of the Italian constitution, the respect of the UNCLOS would assume a constitutional level. As such, the contrast would be between a constitutional principle (the respect of the UNCLOS) and an ordinary law, namely the Maritime Zones Act, with the result of the application of the UNCLOS as a norm of higher grade. Furthermore, the fact that article 297 of Indian constitution allows the Parliament to modify the limits of the areas of the sea does not influence the case in point. In fact, any modification to the sea limits would be implemented by an ordinary law, thus contrasting again with the higher grade law of the UNCLOS.

Nevertheless, the provisions of the UNCLOS would find application even if article 51 of the Indian constitution and article 10 of the Italian constitution cannot be compared. As a matter of fact, although the UNCLOS has not been adopted by Indian legislation, its provisions have to be treated as corresponding to customary international

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<sup>190</sup> The Constitution of India, adopted on the 26<sup>th</sup> November 1949, entered into force on the 26<sup>th</sup> January 1950, article 5(c);

<sup>191</sup> Costituzione della Repubblica Italiana, adopted on 22<sup>nd</sup> December 1947, entered into force on the 1<sup>st</sup> January 1948, article 10(1);

<sup>192</sup> C. FOCARELLI, *Lezioni di diritto internazionale*, pp. 224-232; P. DAILLIER, A. PELLET, *Droit International Public*, pp. 280-286;

law and, as such, they apply in the internal courts. This principle was affirmed by the same Supreme Court of India which stated that “although these conventions have not been adopted by legislation, the principles incorporated in the conventions are themselves derived from the common law of nations as embodying the felt necessities [...] and are as such part of the common law of India”<sup>193</sup>. The contrast would be, at this point, between two laws of the same grade but entered into force in different periods. This does not constitute a problem because the well-established principle of *lex posterior derogat priori* would find application with no doubts<sup>194</sup>. In this case, the *lex posterior* is the UNCLOS and, as such, it would find again application in case of contrast with the Maritime Zones Act.

To summarize, notwithstanding the fact that article 51 of the Indian constitution and article 10 of the Italian constitution might be compared, the provisions established in the UNCLOS would find application in any case of contrast with the Maritime Zones Act either because the international convention would be a higher grade law in the domestic legal order, or because it represents a *lex posterior*. It is, therefore, fundamental to establish the regime of the exclusive economic zone according to this treaty in order to understand which State has the right to start a proceeding over the case in question. Any illegal claim of jurisdiction which is in contrast with the principles of the UNCLOS or of international law in general might give rise to the responsibility of the State.

### **31. Creation of the Exclusive Economic Zone**

In order to establish which State has the right to exercise its jurisdiction over the case in question, it is necessary to solve the doubts regarding the territoriality principle. As it has been affirmed many times in this work, a State might claim its jurisdiction only on the basis of the principles of nationality and territoriality. This can also be confirmed by reading the judgment of the European Court of Justice in what is known as the *Wood Pulp* cases, in which it maintained that “the only two legal bases of jurisdiction in international law are the principles of nationality and territoriality”<sup>195</sup>. However, even if both States might claim their jurisdiction according to the passive and the active aspects

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<sup>193</sup> Supreme Court, judgment of 26<sup>th</sup> February 1992, *M.V. Elisabeth and Ors. v. Harwan Investment and Trading*, 1993 AIR 1014, 1992 SCR (1)1003;

<sup>194</sup> P. DAILLIER, A. PELLET, *Droit International Public*, p. 284;

<sup>195</sup> *Joined Cases 89/85, 114/85, 116-117/85, 125-129/85, A. Ahlström Osakeyhtiö v. Commission (Wood Pulp)*, judgment of 27<sup>th</sup> September 1988;

of nationality principle, the possibility to use the passive sphere of it have been already presented as being the least justifiable in international law.

On the other hand, before expressing any judgment about the territoriality principle, it is fundamental to understand how the exclusive economic zone is regulated at an international level. After the Second World War an increasing number of States started asserting rights and jurisdiction over sea areas which formed part of the high seas maintaining that those areas were rich of natural resources. This process might find its roots in the Truman Declaration of 1945 in which the US President extended the possibility to exploit the natural resources of the continental shelf up to 200 nautical miles. Since then, many other countries extended its portion of sea to 200 nautical miles and the idea for a new zone of the sea started advancing<sup>196</sup>. The idea of an exclusive area of the sea in which the State could have exclusive control over the economic resources and, in particular, over fish stocks, started emerging and some countries adopted a domestic legislation that established the creation of this area. The Maritime Zones Act adopted by the Indian Parliament in 1976 is a clear example of this practice. In this act the contiguous zone and the exclusive economic zone are defined as areas beyond and adjacent to the territorial waters with a limit, respectively, of 24 nautical miles and 200 nautical miles from the baseline.<sup>197</sup>

In the Geneva Conventions on the law of the sea there was no mention to an exclusive area in which the coastal States could exercise their authority over the economic resources. However, this area was felt necessary for most part of the international community members which wanted to extend their jurisdiction and to control autonomously the legislation of fish stocks, oil and gas extraction which are highly present within the limit of 200 nautical miles. This need for such area on one hand and the lack of international regulation on the other hand led to a blurring situation in which the distinction between the territorial sea and the high sea was difficult. The international convention signed in Montego Bay in 1982 on the law of the sea represents the solution to this problem. In fact, it instituted the possibility for coastal States to claim their exclusive economic zone which is defined as an area beyond and adjacent to the territorial sea<sup>198</sup>, subject to part V of the UNCLOS. When a coastal State

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<sup>196</sup> Information available at: [www.fao.org](http://www.fao.org);

<sup>197</sup> The Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976, (Act n° 80), 28<sup>th</sup> May 1976, articles 5(1) and 7(1);

<sup>198</sup> United Nations Convention on the Law of the Sea, article 55;

claims the existence of this area, it will be superimposed over the contiguous zone and the coastal State does not extend its sovereignty, but it enjoys specific sovereign rights on the economic sphere. Nevertheless, it was far from easy reaching an agreement on the legal regime of this area during the negotiations that led to the UNCLOS. In fact, the coastal States wanted to extend their full sovereignty over this part of the sea while, on the other hand, other States wanted to maintain the rights of the high seas within this new area. The exclusive economic zone could have become an extension of the State territory with a wide extension of the coastal State authority over it or it could have been transformed into an area governed by the principles of the high seas except for the economic rights. The compromise found in the UNCLOS rejects both options because it is considered a *sui generis* area with a *sui generis* legal regime. As a further definition of this area,

*“la zone économique exclusive apparaît [...] comme une zone maritime sui generis, comme une zone de transition entre la mer territoriale et la haute mer. Dans la zone économique, l’État côtier ne jouit pas de la souveraineté territoriale, mais seulement de la souveraineté économique sur les ressources qu’elle contient.”*<sup>199</sup>

[the exclusive economic zone seems a maritime zone *sui generis*, as a transitional area between the territorial sea and the high seas. In the economic zone, the coastal State does not have territorial sovereignty, but it has only economic sovereignty over the resources in that area.]

The idea and the effective implementation of the exclusive economic zone might be considered the most important innovation and a great change brought with the adoption of the UNCLOS. Following the provisions of this convention there are now three different types of maritime areas with different governing legal regime. In the territorial sea the coastal State has the full sovereignty and a high degree of jurisdictional authority limited only by third States’ right of innocent passage. On the contrary, in the high seas the coastal State has almost no jurisdictional control over that area. In the EEZ jurisdiction might be placed between these two extremes.<sup>200</sup>

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<sup>199</sup> D. PHARAND, U.LEANZA, *The continental shelf and the exclusive economic zone/ Le plateau continental et la zone économique exclusive*, vol. 19, Martinus Nijhoff Publishers, Dordrecht, 1993, in *Ocean Development* edited by S. Oda, p. 222;

<sup>200</sup> C. PURVIS, *Coastal State Jurisdiction under UNCLOS: the Shen Neng 1 Grounding on the Great Barrier Reef*, in *The Yale Journal of International Law*, vol. 36, 2011, pp. 207-217, pp. 209-210;

However, it is not rare for coastal States to try to extend their jurisdiction over the lawful limits of the territorial waters. These claims to jurisdiction have always tended to harden into claims to sovereignty<sup>201</sup> and they are not a recent tendency. In fact, unlawful attempts to extend jurisdiction out of the limits recognized by international law might be observed between the last decades of the XIX century and the first decades of the XX century. As an example, the United States extended its jurisdiction in the Behring Sea beyond the 3 nautical mile limit<sup>202</sup> through a domestic law. The US Navy seized and damaged a foreign vessel out of the 3 miles in an area where the US domestic law was extended. The court of arbitration that expressed its judgment over the case decided that this seizure was illegal because it occurred beyond the limits of territorial waters recognised by international law. As a consequence, the US had to repair to its wrongful act by the payment of the damages.<sup>203</sup>

This trend might be also found in more recent times regarding, for example, the exclusive economic zone. One of the main purposes of this area is to constitute a substantive balance zone between coastal State rights and the rights of third States. Nevertheless, this balance was and is challenged by this tendency of coastal States to extend their national legislation over this part of the sea with the consequences of enhancing the competences and the jurisdiction of the coastal State and limiting at the same time the rights of third States in that area. Along with the enhancement of competences and jurisdiction, it is not rare that the coastal State add new competences and jurisdiction that are not granted by international law. The notification made by the Indian Parliament in 1981 that extended the implementation of the penal code and the code of criminal procedure is a clear example of this trend. However, India is not the only country that extended its authority over the EEZ through national legislation. In fact, other States tried to rule through domestic laws matters regarding military activities, general installation and customs in the EEZ<sup>204</sup>.

At this point it might be argued that this tendency of the coastal States to extend their jurisdiction over the exclusive economic zone represents a development of a new aspect of international customary law. If this were the case, we should recognize the

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<sup>201</sup> I. BROWNLIE, *Principles of Public International Law*, p. 175;

<sup>202</sup> In that period the territorial waters limit for international law was established at 3 nautical miles. It was extended to nowadays 12 nautical miles after the Second World War.

<sup>203</sup> E. BORCHARD, *Relation between International Law and Municipal Law*, in *Virginia Law Review*, vol. 27, n°2, 1940, pp. 145-146;

<sup>204</sup> Information available at: [www.un.org](http://www.un.org);

elements at the basis of every international customary norm which are the *usus* or *diuturnitas* and the *opinio iuris sive necessitatis*. The former is represented by a uniform and coherent behaviour of the members of the international community. In order to have a stable practice, this behaviour should be followed by the majority of the States. Therefore, the totality of them is not necessary. On the other hand, the *opinio iuris* is the confidence about the fact that this behaviour is obligatory or, at least, it is felt as necessary.<sup>205</sup> This well-established principle of international law was also confirmed by the International Court of Justice in several cases stating that two conditions must be fulfilled in order to have an international customary norm.

“Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief,[...] is implicit in the very notion of the *opinio iuris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.”<sup>206</sup>

However, it does seem that neither the objective element of the *usus* nor the subjective one of the *opinio iuris* find real ground. As a matter of fact, the States that extended their rights and jurisdictions over the limit of the 12 nautical miles represent less than half of the members of the international community<sup>207</sup>, which does not constitute the majority of the States and, as a consequence, this indicates that this tendency is not so spread. Regarding the *opinio iuris*, it does not seem that this trend is felt as obligatory or as necessary for the global order. It seems, indeed, a behaviour that purely responds to economic reasons of the coastal States thus indicating that it should not be considered as an element of a developing international custom.

The problem of the extension of domestic laws and enforcement of such legislation within the EEZ of the coastal State was also held by the Tribunal for the Law of the Sea in its decision on the *Saiga* case to be contrary to the principles of the UNCLOS. In the *Saiga* case Saint Vincent and the Grenadines contended that the extension of the customs laws of Guinea to the exclusive economic zone were contrary to the UNCLOS because it does not give any right to coastal States to extend the application of their

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<sup>205</sup> C. FOCARELLI, *Lezioni di diritto internazionale*, pp. 85-94;

<sup>206</sup> *North Sea Continental Shelf cases (Federal Republic of Germany v. Denmark/Federal Republic of Germany v. Netherlands)*, judgment of 20<sup>th</sup> February 1969;

<sup>207</sup> Information available at: [www.un.org](http://www.un.org);

domestic laws to that zone. Recognizing the breaching of the provisions of the UNCLOS regarding the hot pursuit and the seizure of foreign vessels, the Tribunal added that “the institution of the exclusive economic zone has not diminished the well-established freedom of navigation.”<sup>208</sup>

What seems to clearly emerge is that if a coastal State extends its domestic legislation on issues over which it does not have competence and jurisdiction under the UNCLOS, the other members of the international community are not bound to comply with such laws. Accordingly, the Indian extension of its penal code and its code of criminal procedure over its EEZ might be seen as an unlawful expansion of its authority. It is clear also from article 56 of the UNCLOS that the coastal State does not have full sovereignty over this area, but it can exercise determined sovereign rights. The phrase sovereign rights should not be confused with the term sovereignty. In fact, they have a completely different meaning. While sovereignty corresponds to the complete freedom and power of an independent State to exercise its authority over a territory, which includes also the territorial sea, the sovereign rights indicate that a State might take any action necessary for and connected with specific and determined rights.<sup>209</sup>

### **32. Rights and duties of coastal States in the EEZ according to the UNCLOS**

After having confirmed that any unilateral extension of authority over the internationally recognized limit of the territorial waters constitutes an act that does not have widespread support and after having affirmed that this practice does not constitute an emerging international customary norm, it is fundamental to establish the regime of the exclusive economic zone as it is formulated in Part V of the UNCLOS. It is worth starting from the provisions establishing the rights, jurisdiction and duties of the coastal State in this part of the sea. Article 56 reads as follow:

- “1. In the exclusive economic zone, the coastal State has:
- (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

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<sup>208</sup> *The M/V “Saiga” case, Saint Vincent and Grenadines v. Guinea*, judgment of 1<sup>st</sup> July 1999, n°2;

<sup>209</sup> J. BARTELSON, *The Concept of Sovereignty Revised*, in *European Journal of International Law*, vol. 17, n° 2, 2006, pp. 469-472;

- (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
    - (i) the establishment and use of artificial islands, installations and structures;
    - (ii) marine scientific research;
    - (iii) the protection and preservation of the marine environment;
  - (c) other rights and duties provided for in this Convention.
2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.
  3. The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI.”<sup>210</sup>

This article presents several things that are interesting and necessary to analyse in order to better understand the role of the exclusive economic zone in international law. First of all, a link between the application of the continental shelf regime in the EEZ might be found in this article. The main purpose of this provision is to provide a better level of harmonization between the two different regimes. This can also be understood if we consider the repetition that a coastal State has sovereign rights for exploiting natural resources, even non-living, on the seabed and its subsoil. In fact, these provisions can be found also in the part of the UNCLOS concerning the continental shelf.<sup>211</sup> Once more, this part of the convention is useful to better understand the concept of sovereign rights that have not to be confused with the concept of sovereignty. According to the what is defined by the convention, sovereign rights are exclusive in the sense that if the coastal State does not explore or exploit the natural resources in that area of the sea, no one may undertake these activities without the express consent of the coastal State.<sup>212</sup> This clearly indicates the prevalence of the coastal States over third States, but only regarding specific matters. The coastal State has a privilege over specific and limited rights which cannot be extended by the State itself. In this aspect relies the main and most important difference between sovereign rights and sovereignty. The fact that the same article 56, and Part V in general, lists only occupations with an economic purpose (such as the production of energy) makes even more clear that the rights of the coastal State in the EEZ include only economic activities.

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<sup>210</sup> United Nations Convention on the Law of the Sea, article 56;

<sup>211</sup> *Ivi*, articles 76(1) and 77(1);

<sup>212</sup> *Ivi*, article 77(2);

For what concerns the aspect of jurisdiction of the coastal State in the EEZ, which is of a paramount importance in the case analysed in this work, the same article 56 provides the extent of the jurisdiction of the coastal State. As it has been stated many times, the EEZ is not subject to the sovereignty of the coastal State and, for this reason, its right to regulate the activities in this portion of the sea are clearly expressed and limited to the establishment and use of artificial islands, installations and structures; to marine scientific research and, finally, to the protection and preservation of the marine environment. It is true that there is an extension to other rights and duties, but this refers only to the ones provided in the same convention of Montego Bay. More precisely, the extension regarding the jurisdiction of the coastal State over the matters mentioned above in its EEZ might be found in Part VI, Part XII and Part XIII, which regulate, respectively, the continental shelf, the protection and preservation of the marine environment and the marine scientific research.

Furthermore, because the EEZ is superimposed to the contiguous zone for its first 12 nautical miles, in this specific portion of the sea the coastal State might also apply the control necessary to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulation.<sup>213</sup> Finally, the coastal State might exercise the right of hot pursuit in the contiguous zone or exclusive economic zone according to article 111 of the UNCLOS. This means that the hot pursuit may only be undertaken if there has been a violation of the rights or regulations of the coastal State applicable in that specific area of the sea.

The key element of this article is that it does not give residual rights or jurisdiction to the coastal State to regulate matters in the EEZ which are not established in the provisions of the UNCLOS. In other words, the jurisdiction of any coastal State is limited to the issues clearly expressed in the convention of Montego Bay because the EEZ is not subject to the sovereignty of States and, as a consequence, any attempt to extend the domestic jurisdiction over this area out of the specific matters established by the provisions of the UNCLOS has to be considered as unlawful, thus creating a breach to international law.

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<sup>213</sup> *Ivi*, article 33(1);

### 33. Rights and duties of third States in the EEZ according to the UNCLOS

After having analysed the rights, jurisdiction and duties of coastal States on the exclusive economic zone, it is important to consider also the provisions of the UNCLOS establishing the rights and duties of third States in this *sui generis* zone. This is necessary to better understand the legal framework of this area not only from the coastal States' perspective, but also from the point of view of third States that have determined rights and duties. The *sui generis* legal regime of States other than the coastal State is established in article 58 which reads as follow:

“1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.

2. Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.

3. In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.”<sup>214</sup>

This article provides the pillar for the freedoms and obligations of third States in every EEZ. Because this part of the sea is not comparable neither to the territorial water, nor to the high seas, the freedoms of the high seas recalled in article 87<sup>215</sup> find a limitation in their application in the EEZ. It is worth considering that of the four main freedoms established in the Geneva convention on the high seas, fishing is now considered an exclusive activity for the coastal State in the exclusive economic zone. However, the freedoms of navigation, overflight and lying of submarine cables and pipelines still remain for third States in this area, although they are subject to the respect

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<sup>214</sup> *Ivi*, article 58;

<sup>215</sup> Freedom of the high sea that are extended to the EEZ comprises: freedom of navigation, freedom of overflight, freedom to lay submarine cables and pipelines, subject to Part VI, freedom to construct artificial islands and other installations permitted under international law, subject to Part VI, freedom of fishing, subject to the conditions laid down in section 2, freedom of scientific research, subject to Parts VI and XIII.

of the provisions of Part V regulating the EEZ, Part VI regulating the continental shelf and Part XII regulating the marine scientific research.

It is interesting to notice that this article provides that all third States might enjoy “other internationally lawful uses of the sea” related to the freedoms above mentioned, including the freedom of navigation. Regarding the *Marò* case analysed in this work, it is worth questioning whether the deployment of VPDs, formed by members of armed forces, is considered as a lawful use of the sea. With no doubt this question regards the freedom of navigation and, in order to answer it, we should consider the special regime of the area in which the incident between the “Enrica Lexie” and the “St. Antony” took place. In fact, it happened in what has been presented as the High Risk Area, a special and determined zone of the Indian Ocean that was identified as an area of possible piracy attacks. According to the international organizations involved in the repression of the phenomenon of piracy in this zone, the States involved are authorised to take any necessary measure to prevent any piracy aggression, including the use of privately contracted armed security personnel.

However, as it has been already stated, along with the use of private teams an increasing number of States started deploying on their private vessels members of their armed forces. This practice of the VPDs has not been denied by any of the international institutions operating in the High Risk Area and, as such, it should be considered as a lawful use of the sea related to the freedom of navigation. On the contrary, in the BMP it is clearly stated the possibility to implement armed private maritime security contractors for the protection of the ships, but it is also confirmed the preference to the VPDs.<sup>216</sup> It is worth recalling that the BMP is a set of guidelines approved not only by the IMO, but also by numerous international organizations involved in the reduction and suppression of piracy, among which there are the International Maritime Bureau (IMB), the International Chamber of Shipping, the United Kingdom Maritime Trade Operations (UKMTO) and many others. This represents further evidence to the fact that the use of VPDs, and in the case in point the use of the Italian VPD on board of the “Enrica

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<sup>216</sup> “Subject to risk analysis, careful planning and agreements the provision of Military Vessel Protection Detachments (VPDs) deployed to protect vulnerable shipping is the recommended option when considering armed guards.”, in IMO MSC.1/Circ.1339 on *Piracy and armed robbery against ships in waters off the coast of Somalia*, implementing the *Best Management Practices for protection against Somalia based piracy*, 14<sup>th</sup> September 2011;

Lexie”, is considered an internationally lawful use of the sea related to the freedom of navigation.

The most interesting aspect of article 58 of the UNCLOS regards the provisions establishing the application of specific articles of the same convention related to the high seas within the exclusive economic zone. More precisely, these articles concern different aspects of the jurisdiction on the high seas and they also include the provisions assigned to counter piracy. This means that in the exclusive economic zone, as in the high seas, all States shall cooperate to the fullest possible extent in the repression of piracy<sup>217</sup> by implementing the provisions established in the UNCLOS. As a consequence, the actions to counter piracy would assume the same form both if they are conducted in the high seas or in the exclusive economic zone.

Another article that finds application in the EEZ regards the possibility for any State to claim sovereignty over the high seas. Article 89 of the UNCLOS reads as follow: “no State may validly purport to subject any part of the high seas to its sovereignty.”<sup>218</sup> This provision is perfectly in accordance with the fundamental and well-established principle of the freedom of the sea. The most important aspect regards the extension of this norm to the exclusive economic zone in a manner that we could restate this article. It would maintain that no State may validly purport to subject any part of the exclusive economic zone to its sovereignty out of the specific matters of competence established in Part V, namely jurisdiction in relation to fisheries regulation, the establishment and use of artificial islands, installations and structures, marine scientific research, the protection and preservation of the marine environment, and other residual economic interests in that area. As a consequence, the notification made by the Indian Ministry of Home Affairs extending the Indian penal code and the code of criminal procedure might and should be considered as an infringement of this provision of article 58 of the UNCLOS. Extending the domestic criminal law out of the territory of a State means an extension of the possibility for that State to exercise its authority out of the limits established by the international community. In the case here in point, the Indian notification has to be considered nothing but a violation of Part V of the UNCLOS establishing the legal framework of this *sui generis* area.

Furthermore, the jurisdictional framework for the enforcement against crimes at sea established for the high seas finds application also in the EEZ thanks to article 58. The

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<sup>217</sup> United Nations Convention on the Law of the Sea, article 100;

<sup>218</sup> *Ivi*, article 89;

basic principle in the high seas is that the flag State has exclusive jurisdiction over its vessels. In fact, this principle is established by article 97 which has been already presented in this work regarding the contrasting viewpoints on the expression “other incident of navigation”. This article clearly states that in cases of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal responsibility of any sailor on board of that vessel, the only authority which can exercise its jurisdiction is either the flag State or the State of which such person is a national.<sup>219</sup> In the case in point, we should consider the same provisions established in the high seas by article 97 as moving to the EEZ thanks to article 58 of the same convention. As a consequence, in the event of any incident of navigation within the EEZ, as in the high seas, the coastal State has no authority to exercise its jurisdiction unless the person or people involved in the incident have its nationality.

However, in the incident between the “Enrica Lexie” and the “St. Antony”, both the flag State and the national State of the people involved in the event is the State of Italy and there is no ground for the Union of India to institute a penal proceeding against the two members of the Italian Navy. Undoubtedly, the Indian authorities opposed the use of the term incident in the events that took place on 15<sup>th</sup> February 2012. Nevertheless, even if we exclude the fact that those events do not constitute an incident of navigation, the State of Italy could and should exercise its exclusive jurisdiction over the case in point according to the flag State principle. As a matter of fact, this pillar of international law of the sea is reaffirmed in other part of the UNCLOS. Regarding the status of ships it is affirmed that every vessel “shall sail under the flag of one State only and [...] shall be subject to its exclusive jurisdiction on the high seas”<sup>220</sup> or on the EEZ thanks to the application of article 58. The principle of the exclusive competence of the flag State over its vessels on the high seas and on the EEZ is also affirmed in the duties of the flag State, thus confirming the fact that it represents the main principle of international law to follow on the high seas and on the EEZ. Every State shall “assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship”<sup>221</sup>.

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<sup>219</sup> *Ivi*, article 97;

<sup>220</sup> *Ivi*, article 92;

<sup>221</sup> *Ivi*, article 94(2)(b);

### 34. Conclusion

The creation and the implementation of the EEZ after almost thirty years of debates about the new international convention on the law of the sea was one of the main development of the UNCLOS and it might be seen as a *sui generis* area in which the rights and freedoms of coastal States and third States are balanced. These rights and duties regards also the prevention and the suppression of piracy which continuously grew and developed in particular in the Indian Ocean and off the coast of Somalia. This phenomenon represented and still represents a danger for every vessel transiting that area. In order to be more effective in the contrast to the risks of a piracy attack each State should be aware of the international legal framework established by the UNCLOS. This position might be taken for granted, however, the *Marò* case well illustrates that there are still some doubts about the implementation of the UNCLOS among the members of the international community.

As a matter of fact, this international convention rather than being regarded as a normal treaty, it does represent international customary principles of the law of the sea which every single State is bound to follow. The fact that several countries adopted domestic laws to extend their jurisdiction and, as a direct consequence, their sovereignty in an area in which it is clearly stated that they enjoy only sovereign rights might indicate that the application established by the UNCLOS in the EEZ are not clear. If this is the case, the extension of jurisdiction over the EEZ by coastal States could become lawful if there would be an innovation of the UNCLOS or if there would be a clear change in the behaviour of the majority of the States, thus creating a new international customary norm. This is not an impossible solution, however, it might gain the consent of most part of the international community and it might be felt as a duty in order to become an international custom.

It is also worth recalling that the signature and the ratification of international conventions are absolutely free actions that any State might or might not take. Adopting the provisions of a treaty at an international level expresses the willingness to cooperate with the other members of the international community to settle a common framework for a specific issue. Any State party to an international treaty is bound to it and should make any effort to follow the provisions established with the other members. Not only has this obligation to be respected for treaties, but also and even more for international customary norms which bind every single member of the international community in order to achieve a common behaviour at a global level. According to this, there is no

reason for the Union of India not to comply with the UNCLOS both because it ratified this convention and because it is widely considered to reproduce international customary law of the sea.

International treaties are agreements to which each State is free to participate or not. If one State ratified the provisions established in an international convention it is because this is its will and not because it is forced to do so. The fact that most members of the international community agreed to the UNCLOS and started following it, was the signal that this treaty should be considered as reproducing the international customary rules about the law of the sea. The principle according to which each State is bound to accomplish to its obligations arising from international agreements or customs is not only a well-established assumption of international law, but it represents a pillar of international relations itself. If any State starts not to perform its duties deriving from international agreements, the conclusions of treaties would have no sense and the global system would have no order. The importance of the respect of international duties is highlighted since the existence of international relations and it has been reaffirmed numerous times since. As an example, the Permanent Court of International Justice declared as self-evident the principle that “a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfillment of the obligations undertaken”<sup>222</sup>. Moreover, as further evidence, the UN renewed the concept by establishing that “every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty.”<sup>223</sup>

However, as it has been discussed in this chapter, it does not seem that the majority of the members of the international community are feeling the necessity to change the legal framework of the EEZ, and on the law of the sea in general, established in the UNCLOS. In fact, the additional claims of jurisdiction on the EEZ were adopted by a narrow part of the international community, thus not representing a sufficient number to talk about a possible development of a new international custom. As such, a coastal State cannot extend its domestic legislation to the EEZ without breaching the provisions

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<sup>222</sup> *Exchange of Greek and Turkish Populations*, P.C.I.J., 1925, (Series. B), n° 10;

<sup>223</sup> General Assembly resolution A/RES/375(IV), *Draft Declaration on Rights and Duties of States*; article 13;

of the UNCLOS. This attitude to accomplish to the international duties is widely criticized since and it might be affirmed that

"If a gover[n]ment could set up its own municipal law as the final test of its international rights and obligations, then the rules of international law would be but the shadow of a name, and would afford no protection either to states or to individuals. It has been constantly maintained and also admitted by the Government of the United States that a Government can not appeal to its municipal regulations as an answer to demands for the fulfillment of international duties."<sup>224</sup>

For this reason it can be stated that the provisions established in Part V of the UNCLOS, and in particular the provisions of articles 56 and 58 analysed in this part, have to be considered as the international legal framework to solve the *Marò* case. Any Indian declaration that extended its sovereignty over its EEZ or contiguous zone must be seen as a clear violation of international law. This position might be also reinforced by different international judgments that reaffirmed the fact that a coastal State in its EEZ enjoys only sovereign rights and it does not possess full sovereignty. In the case concerning the delimitation of the maritime boundary between Guinea and Guinea-Bissau, the court of Arbitration created to decide over the dispute clearly stated that "*ni la zone économique exclusive, ni le plateau continental ne sont des zones de souveraineté*"<sup>225</sup> [neither the exclusive economic zone, nor the continental shelf are zones of sovereignty]. Additionally, the International Court of Justice reinforced this principle by maintaining that the continental shelf and the exclusive economic zone are "areas in which States have only sovereign rights and functional jurisdiction."<sup>226</sup>

Article 56 of the UNCLOS analysed in this part provide that every coastal State shall have due regard to the rights and duties of third States while exercising its rights and performing its duties over the EEZ. The same duty is established in article 58 of the same convention. Third States exercising their rights in the EEZ shall have due regard to the rights and duties of the coastal State. It is worth understanding the meaning of this "due regard" obligation. Regarding the first case, it seems that the due regard concerns the respect of the most fundamental rights and freedoms that any State should enjoy on

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<sup>224</sup> E. BORCHARD, *Relation between International Law and Municipal Law*, in *Virginia Law Review*, vol. 27, n°2, 1940, p. 141;

<sup>225</sup> Reports of International Arbitral Awards, *Delimitation of the maritime boundary between Guinea and Guinea-Bissau*, judgment of 14th February 1985, vol. XIX, p. 194;

<sup>226</sup> *Case concerning maritime delimitation and territorial questions between Qatar and Bahrain (Qatar v. Bahrain)*, merits, judgment of 16<sup>th</sup> March 2001;

the sea, such as the right of innocent passage and the freedom of navigation. This means that a coastal State when exercising its sovereign rights on its EEZ (for example the exploitation of natural resources) it should take into consideration the rights of third States avoiding to the possible extent any possibility to cause a damage to any third State.

On the other hand, the due regard commitment established in article 58 is slightly different. In fact, it might be interpreted that third States, while exercising their rights in the EEZ, should take into consideration only the rights and duties of the coastal States and not to the interests of that State. The rights and duties of a coastal State in its EEZ are limited to rights of economic activities in general. In this way, there is no commitment for third States to give due regard also to the security interests or to domestic legislation out of the economic sphere of the coastal State.

To conclude, it does not seem that the framework established in the UNCLOS is out-of-date nor it appears unclear. As it has been presented in this part, the provisions establishing the rights and duties of coastal and third States are extremely clear. The problem, therefore, is not in the UNCLOS itself. It is in the inability or in the lack of will of States to accomplish to the framework decided by themselves through the signature and the ratification of an international treaty. The *Marò* case here analysed clearly represents a possibility for the States involved to follow the provisions established in the UNCLOS and recognizing any mistake committed both by the State of Italy and the Union of India. This case might be the possibility for a reinforcement of the legal framework of the law of the sea or, on the other hand, it could represent a weakening of that system. In fact, the weakness of the international law system stems in the voluntary element for the submission of disputes among States. No dispute can be solved without the consent of the parties involved. The fragility of the system

“consists in the inability to compel nations to submit their disputes to a court and the physical power of States, exercised on occasion without regard to law, to constitute themselves plaintiff, judge and sheriff in their own cause. The theory that international law is not necessarily binding on States, sustained by so many theorists and jurists, though founded on essential error, can only aggravate this weakness in the system and postpone the maturity of that international legal order for which most of them profess to be working.”<sup>227</sup>

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<sup>227</sup> E. BORCHARD, *Relation between International Law and Municipal Law*, in *Virginia Law Review*, vol. 27, n°2, 1940, p. 148;

## 8. SETTLEMENT OF THE SITUATION OF THE *MARO*' CASE

SUMMARY: 35. Introduction

### 35. Introduction

A dispute arising among members of the international community should be seen as a by-product of international relations and, as such, it does not necessarily represent a negative thing. In fact, thanks to disputes international law might develop and affirm certain fundamental principles. On the other hand, an international order without disputes might not mean a peaceful coexistence of States, but rather it might represent a static society which is not able to change and develop. Undoubtedly, not all disputes are equal in the consequences they produce or might produce on a social level and not all disputes are settled in the same way.

As a matter of fact, until the creation of the League of Nations, first, and the United Nations, after, war could be found among the solutions adopted to solve a dispute between States. Nevertheless, one of the main purposes of these international organisations was, and still is, the maintenance of international peace and security. International law tries to achieve the same objective and since the aftermath of the Second World War a basic principle of customary international law has been developing and affirming: the peaceful settlement of disputes. However, the international system is characterised by an anarchical structure which means that there is not sovereign authority that might impose its decisions over the other members of the international community. This has a direct consequence on the sphere of the settlement of disputes. In fact, this absence of an higher authority means that there is theoretically no international legal obligation to solve or try to solve disputes among States. The settlement of a dispute, or the submission of it to third parties for impartial adjustment, is in this way a voluntary action that a State might or might not take.

Nevertheless, the States that are members of the United Nations, that means the vast majority of the world's nations, have assumed several treaty obligations in this respect which derive from the Charter of the organization. Since the very first article of this Charter it is clear that one of the purposes of the UN is to maintain international peace and security and, in order to do so, all members are asked to take effective measures for the "adjustment or settlement of international disputes or situations which might lead to

a breach of the peace.”<sup>228</sup> Furthermore, the UN Charter provides that “all Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”<sup>229</sup> It is true that even if the provisions of a treaty bind only the members of that agreement, with no doubt it can be affirmed that all the members of the international community has to follow the provisions of the UN Charter as they are fully recognized as part of international customary law.

It can be argued whether all disputes have to be solved or if the UN Charter requests only the settlement of disputes which might represent a threat to international peace and security. Undoubtedly, according to Chapter VI of the UN Charter, and in particular to article 33, “the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”<sup>230</sup> It might seem that there is an obligation to settle only those disputes that represent a menace to the maintenance of international peace and security. A further element that might strengthen this hypothesis is that without the authorization of all the parties involved in a dispute, the Security Council, in particular, and the UN, in general, have no power to intervene in such dispute unless it represents a threat to the peace, breach of the peace or act of aggression.

Nevertheless, according to the practice of the International Court of Justice, it might be affirmed that there is some evidence of a principle of international customary law which requires to the parties of a significant dispute to negotiate in good faith and try to reach an agreement to settle the dispute. An example of this practice can be found in the judgment of the International Court of Justice in the *North Sea Continental Shelf* cases in which it affirmed that “the parties are under an obligation to enter into negotiations with a view to arriving at agreement” and this obligation is “a principle which underlies all international relations”<sup>231</sup>. As a further evidence, the same Court maintained that Governments “are under mutual obligations to undertake negotiations in good faith for

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<sup>228</sup> Charter of the United Nations, adopted on 26<sup>th</sup> June 1945 in San Francisco, entered into force on 24<sup>th</sup> October 1945, article 1(1);

<sup>229</sup> *Ivi*, article 2(3);

<sup>230</sup> *Ivi*, article 33(1);

<sup>231</sup> *North Sea Continental Shelf cases (Federal Republic of Germany v. Denmark/Federal Republic of Germany v. Netherlands)*, judgment of 20<sup>th</sup> February 1969;

the equitable solution of their differences”<sup>232</sup>. This principle finds further support in the provisions of the General Assembly Declaration on Friendly Relations in which the basic purposes of the UN are reaffirmed and, among them, the principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered is confirmed. In addition, it is stated that in the event of failure to reach a solution by one of the peaceful means “the parties to a dispute have the duty [...] to continue to seek a settlement of the dispute by other peaceful means agreed upon by them”.<sup>233</sup>

It is worth understanding, at this point, which solution has been adopted by the Republic of Italy and the Union of India in order to solve the situation here analysed. Moreover, it is interesting to consider whether other solutions might have been adopted in order to find an agreement between the two States. If other solutions are possible, they might be implemented in order to achieve a definitive settlement of this situation.

### ***SECTION 1 – SOLUTIONS ADOPTED***

SUMMARY: 36. Solution through negotiations – 37. The recourse to the NIA court for judging the Italian soldiers

#### **36. Solution through negotiations**

Since the beginning of the situation involving two Italian soldiers detained in India for the presumed killing of two Indian fishermen during a mission to counter piracy on board of an Italian vessel in the internationally recognized High Risk Area, both States were willing to solve this problem through peaceful means as established in the basic principles of international law. More precisely, the State of India and the State of Italy tried to achieve an agreement on the basis of a negotiation.

Negotiation is the predominant and preferred peaceful mean to resolve international disputes because the parties directly communicate with each other and try to find an

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<sup>232</sup> *Fisheries Jurisdiction cases (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, judgment of 25<sup>th</sup> July 1974;

<sup>233</sup> General Assembly resolution A/RES/2625(XXV), *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*;

agreement of the issue without the involvement of any third party.<sup>234</sup> With the exception of cases in which the dispute is submitted directly to an adjudicative method, negotiation represents an essential element of any dispute settlement and it can be more or less evident according to the techniques adopted. When *ad hoc* diplomatic means are adopted, such as conferences with experts or members of each party of the dispute, the negotiation is conducted in a more evident way. Otherwise, if it is conducted by using ordinary diplomatic methods, such as private meeting, it would appear less visible.<sup>235</sup> Several reasons might explain why negotiation is by far the preferred peaceful mean to solve a dispute among States. First of all, this method involves almost no risk when a State try to deal with a dispute. In fact, each party has the maximum control over the conduct of the negotiation and its possible outcome and no State is bound to accept any agreement if it finds inappropriate. Secondly, because any agreement that is the outcome of a negotiation is the result of a free choice of each party of the dispute, it is presumed that each State would be willing to fulfil the obligations taken in such agreement. Moreover, negotiation favors compromise and accommodation among the parties involved in a dispute and, as such, by reaching an agreement through negotiation it is also possible to strengthen long term relations among those States. Finally, negotiation generally represents the simpler and less costly method to solve disputes and it might be conducted with more secret or less publicity than other peaceful means.

However, negotiation presents different limitations which risk to jeopardize the settlement of a dispute and which represent the weak points of this instrument. First of all, it is not sure that through negotiations the parties would reach a solution. In fact, if the positions of the parties are too far and neither of them are willing to reach a compromise, negotiation highly risks an impasse. In this case, a third party seems necessary to try to achieve a settlement of the dispute. Secondly, the result of negotiation might not reflect international law principles and it might rather reproduce the political will of the parties. In this way, however, international basic principles might be at risk and the involvement of a third neutral party would be both preferable and necessary. Finally, a party involved in a dispute might be simply not willing to negotiate what it considers one of its principles or what it considers part of its sovereign powers.

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<sup>234</sup> C. FOCARELLI, *Lezioni di diritto internazionale*, pp. 618-619;

<sup>235</sup> G. ARANGIO-RUIZ, voce *Controversie Internazionali*, in *Enc. Dir.*, vol. X, Milano, 1970, pp. 397-398;

In the *Marò* case analysed in this work, even if the fact that the two Italian soldiers are still held in India in attendance of a judgment, negotiations between Italy and India led to some (slow) results. In fact, the clearest examples of the positive outcomes of the negotiation between the two States is represented by the two licences given by the Union of India to the two Italian members of the VPD. In the period between December 2012 and February 2013, the diplomatic situation between the two countries appeared with no manifest problems or frictions. However, during the second licence and, more precisely, after the statement of the former Italian Foreign Minister in which he affirmed that the two soldiers would have not returned in India, the tensions between Rome and New Delhi increased immediately with the direct result of a negative effect on future negotiations. In fact, since then no other agreement has been reached between the two countries and it seems extremely difficult in this situation that an arrangement would come as a result of negotiations between Italy and India. It really seems that the direct diplomacy between the two States can produce no concrete outcomes.

However, before the diplomatic impasse of March 2013, the negotiations between Italy and India led to another important result. As a matter of fact, the two States concluded a bilateral agreement on the transfer of sentenced people. According to this agreement, a person sentenced in the territory of one contracting States, namely Italy and India, may be transferred to the territory of the other to serve the sentence imposed on him.<sup>236</sup> In order to do so, different provisions have to be followed. First of all, the convicted person has to be a national of the receiving State<sup>237</sup>. Secondly, the judgment has to be definitive<sup>238</sup>. Thirdly, the transferring State and the receiving State has to agree<sup>239</sup> and, finally, the acts or omissions for which the person has been convicted has to be considered as crimes by the law of the receiving State<sup>240</sup>. The clear intent of this agreement is to create a possibility of a return in Italy in the event of a final judgment of any court of India.

Along with the diplomatic attempts to reach an agreement through negotiations, different Indian courts claimed to have jurisdiction on the *Marò* case and, as such, they

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<sup>236</sup> Agreement between the Government of the Republic of Italy and the Government of the Republic of India on the transfer of sentenced persons, adopted on 10<sup>th</sup> August 2012, entered into force on 1<sup>st</sup> April 2013, article 2(1);

<sup>237</sup> *Ivi*, article 4(a);

<sup>238</sup> *Ivi*, article 4(b);

<sup>239</sup> *Ivi*, article 4(g);

<sup>240</sup> *Ivi*, article 4(f);

tried to sue the two Italian soldiers. First of all, the High Court of Kerala started a proceeding against the Chief Master Sergeant of the San Marco Regiment Massimiliano Latorre and the Sergeant of the San Marco Regiment Salvatore Girone and it was the first court to accuse them with murder. In addition, in its judgment of 29<sup>th</sup> May 2012, the court of the federate State of Kerala affirmed two basic things: first of all, it excluded the jurisdiction of Italy from the case on the basis of the extension of the applicability of the Indian Penal Code and the Code of Criminal Procedure up to 200 nautical miles through the notification of the Ministry of Home Affairs<sup>241</sup>. Secondly, it denied the recognition of immunity *ratione materiae* to the two Italian marines because, according to the court, “they were not discharging any official function in exercise of sovereign powers.”<sup>242</sup>

### **37. The recourse to the NIA court for judging the Italian soldiers**

The situation partially changed with the judgment of the Supreme Court of India of 18<sup>th</sup> January 2013. In fact, this tribunal recognized that the State of Kerala has no jurisdiction on the case in point and, as such, its court has no power to prosecute the two Italian soldiers. However, the Supreme Court did not recognize Italian jurisdiction. It moved the trial from a federate State court to the Supreme Court of the central Government maintaining the same accusation of murder. Initially, the Supreme Court concluded its judgment with the intention to institute a court *ad hoc* for the case but this decision was strongly opposed by the State of Italy because it would have represented a clear breach to the basic principle of the natural assigned judge. The situation seemed to have no solution until April 2013 when the National Investigation Agency (NIA) of India took over the investigation of the Supreme Court of India of the two Italian marines<sup>243</sup>. At the present stage there is no definitive judgment and the case is still under investigation. However, the decision to pass the investigation to the NIA was opposed by Italy which questioned the competence of this court over the case.

As a matter of fact, the NIA is a federal agency created by the central Government of the Union of India with the main objective to fight terrorism and to investigate related crimes. What seems certain in the *Marò* case is that it does not involve any

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<sup>241</sup> High Court of Kerala, judgment of 29<sup>th</sup> May 2012, *Massimiliano Latorre v. Union of India*, 252 KLR 794;

<sup>242</sup> *Ibidem*;

<sup>243</sup> Information available at: [www.nia.gov.in](http://www.nia.gov.in);

form of terrorism. Moreover, the NIA is competent only for investigating and prosecuting offences under a limited number of domestic Acts, among which there is the Suppression of Unlawful Acts Against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002 (from here after SUA Act) which is the domestic law that implemented the international Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation (from here after SUA Convention). This international convention represents the only international agreement among the members of the international community in respect of the suppression of international terrorism at sea. However, the Indian Act is the only that is worth mentioning because is the only element which might link the case in question with the NIA as it was taken into account by the High Court of Kerala in its judgment.<sup>244</sup>

Accordingly, the court of the federate State of Kerala charged the two Italian marines with the violation of article 3 of the SUA Act which determines the offences against ship, fixed platform, cargo of a ship, maritime navigational facilities, etc. More precisely, the provisions of this article are applicable to “whoever unlawfully and intentionally commits an act of violence against a person on board a fixed platform or a ship which is likely to endanger the safety of the fixed platform or, as the case may be, safe navigation of the ship shall be punished with imprisonment for a term which may extend to ten years and shall also be liable to fine.”<sup>245</sup> However, the same law provides that any person that causes the death of any other person shall be punished with death.<sup>246</sup> The unlawful act is considered to be an offence under the SUA Act when it is committed against or on board of an Indian ship at the time of commission of the offence or against any ship in the territory of India including its territorial waters.<sup>247</sup> Finally, in the same act the jurisdiction of the Indian courts is established and these provisions read as follow:

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<sup>244</sup> “The Italian Marines, who shot dead the two Indian fishermen engaged in fishing in the EEZ are therefore liable to be dealt with under the Territorial Waters Act, 1976, IPC, CrPC and the SUA Act.”, in High Court of Kerala, judgment of 29<sup>th</sup> May 2012, *Massimiliano Latorre v. Union of India*, 252 KLR 794;

<sup>245</sup> The Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002, (Act n°69), 20<sup>th</sup> December 2002, article 3(1)(a);

<sup>246</sup> *Ivi*, article 3(1)(g)(i);

<sup>247</sup> *Ivi*, article 3(4)(a);

“no court shall take cognizance of an offence punishable under this section which is committed outside India unless-

- (a) such offence is committed on a fixed platform or on board a ship flying the Indian flag at the time the offence is committed;”<sup>248</sup>

At this point it might be stated that according to the High Court of Kerala the two Italian soldiers intentionally caused the death to the two Indian fishermen who were on board of an Indian vessel and, as it is provided by the SUA Act, they shall be punished with death. There is no doubt that this statement finds no ground for several reasons. First of all, the possibility of death penalty seems to be a sufficient issue for the State of Italy to strongly oppose the applicability of the SUA Act and, as a direct consequence, the jurisdiction of the NIA. Secondly, it is worth recalling that the St. Antony was not flying any flag when the incident occurred and, as it is established in the same SUA Act, the provisions of such law are applicable only to ships which actually fly Indian flag. Finally, the SUA Act is a domestic law which rules the disputes in domestic courts and it does not apply to disputes among sovereign States. It is useful to recall the well-established principle of international law presented also in this work according to which the conduct of a State organ in discharge of its official functions has to be considered as a conduct of the State. As a consequence, the responsibility that might arise from any unlawful action is not imputable directly to the person who committed it, but it is imputable to the State. In the relations among States the domestic law is not applicable and the only framework that can rule international relations is the one established by international law.

Consequently, the SUA Act finds no application in the case in question because only international treaties are applicable in the relations among members of the international community. Nevertheless, the SUA Convention does not establish a clear jurisdiction neither for Italy nor for India for the case in point. In fact, both States might claim their jurisdiction under the provisions of such treaty leading to another concurrency of jurisdiction which might find no solution. India might claim its jurisdiction because during the commission of the offence two Indian nationals were killed.<sup>249</sup> On the other hand, Italy might take measures necessary to affirm its

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<sup>248</sup> *Ivi*, article 3(8);

<sup>249</sup> Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigations (SUA convention), adopted on 10<sup>th</sup> March 1988 in Rome, entered into force on 1<sup>st</sup> March 1992, article 6(2)(2);

jurisdiction over the case in point because the offence started on board of a ship flying the Italian flag<sup>250</sup> and because the offence was committed by Italian nationals.<sup>251</sup> Furthermore, article 2 of the SUA Convention represents the intention of the contracting parties to exclude official State activities in the sea from the definition of terrorism.<sup>252</sup> Even if it is stated that commercial activities are not considered State activities, it seems that this provision has to be interpreted in the light of recent changes in the international conduct to counter piracy and, moreover, in the light of the ongoing international efforts to adopt a Comprehensive Convention on International Terrorism.

As a matter of fact, regarding the first assumption, it can be stated that the same rationale that excludes State activities in the maritime area from the provisions of the SUA Convention shall apply also to the international practice of the VPDs on board of commercial vessels to counter piracy in the High Risk Area. In fact, the decision to employ members of the national armed forces on board of private vessels to protect them from piracy attacks is, with no doubt, a result of the implementation of the State power. Besides this, the SUA Convention should be interpreted in the light of the provisions of the Comprehensive Convention on International Terrorism which is a draft proposal to absorb the thirteen United Nations Conventions on Terrorism, among which there is the SUA Convention. This draft treaty reflects the numerous changes in the world order and in international relations which gave rise to different practice. The main change that is worth presenting for the case in point is the expansion of the possible exclusions from the applicability of the new convention. In fact, it is affirmed that “the activities undertaken by the military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by the present Convention.”<sup>253</sup>

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<sup>250</sup> *Ivi*, article 6(1)(1);

<sup>251</sup> *Ivi*, article 6(1)(3);

<sup>252</sup> “This Convention does not apply to:

1. a warship; or
2. a ship owned or operated by a State when being used as a naval auxiliary or for customs or police purposes; or
3. a ship which has been withdrawn from navigation or laid up.

Nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes.”, article 2 of the SUA Convention;

<sup>253</sup> General Assembly resolution A/59/894, *Measures to eliminate international terrorism*, article 20(3);

What seems evident is that the conduct of the military forces of a State has not to be separated from the conduct of the State itself and, as a direct consequence, it might be stated that the practice of the SUA Convention seems in contrast with a more recent international treaty which, even if not into force, does represent the international thinking on the point and does reaffirm once more the principle of international law which establishes the responsibility of the State for the conduct of the members of its armed forces. Moreover, it seems clear that the SUA Act finds no application in the case in point because it is a domestic law. The NIA has, therefore, no competence or jurisdiction over the case in point. With the solutions until now adopted, the *Marò* case has found no settlement both because all the Indian courts that tried to sue the two Italian marines had no jurisdiction over the case and because the Indian courts and the Indian Government have never recognized a well-established and fundamental principle of international law which is evident in this case, and which has been reaffirmed in this work more than once: members of the military forces of a State in discharge of their official functions are covered by immunity *ratione materiae* and their conduct, even the acts committed *ultra vires*, have to be considered as the conduct of the national State. As a consequence, any unlawful act does not give rise to personal responsibility, but it gives rise to State responsibility which cannot be judged by domestic courts, but it can be ruled only through international law means.

## ***SECTION 2 – OTHER VIABLE SOLUTIONS***

SUMMARY: 38. Non-binding measures – 39. Settlement of disputes framework established in the UNCLOS – 40. Adjudicative means with binding power – 41. Difference between situations and disputes – 42. Conclusion

A solution to the case in question not only does it seem desirable for weakening the tensions between Italy and India, but also it seems necessary because it might represent an important occasion for the international community to reestablish, modify or introduce some principles of international law. For this reason, if the negotiations between the two States involved in this situation have not led to a clear solution, this does not mean that there are no other means to solve this question. However, as it was stated before, the settlement of any situation or dispute is bound to the willingness of the States involved in it. Without the consent of the parties there is almost no possibility to

solve a dispute. Nevertheless, apart from the instrument of negotiation, there are several other viable solutions to try to reach an agreement that might solve this situation which can be divided in two different types according to whether their solutions have or not a binding power. We can distinguish among judicial methods and diplomatic methods where the former will lead to a binding solution of the problem and where the latter is mostly based on the means expressed in the UN Charter, but it is not limited to them, thus the provisions of article 33 of the UN Charter does not constitute a close list of diplomatic means to solve international disputes.

### **38. Non-binding measures**

If the parties involved in a dispute do not find any solution through negotiations, the recourse to a third party might be necessary to avoid an impasse in that situation that could lead to no solution of the problem. This third party can be another State or an international organization or even a person and, on the basis of his or her involvement, it is possible to distinguish among good offices and mediation. In the former case, the role of the third party is limited to bringing the parties involved in a dispute into communication in order to facilitate a new negotiation. On the other hand, mediation implies a more active role of the third party. In fact, it is not unusual that it advances informal and non-binding proposals to solve the situation.<sup>254</sup> According to the Convention for the Pacific Settlement of International Disputes, which is into force for both Italy and India, “in case of serious disagreement [...] the Signatory Powers agree to have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly Powers.”<sup>255</sup> Moreover, a member party of this treaty might independently offer its good offices or mediation to the States involved in a dispute and the exercise of this right “can never be regarded by one or the other of the parties in conflict as an unfriendly act”<sup>256</sup>.

In situations or disputes where the main conflicting point is constituted by the determination of particular facts it might be useful an intervention of a third party which would impartially examine the facts at the basis of the problem. This involvement of a

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<sup>254</sup> G. ARANGIO-RUIZ, voce *Controversie Internazionali*, in *Enc. Dir.*, vol. X, Milano, 1970, pp. 398-399;

<sup>255</sup> Convention for the Pacific Settlement of International Disputes, adopted on 29<sup>th</sup> July 1899 in The Hague, entered into force on 4<sup>th</sup> September 1900, article 2;

<sup>256</sup> *Ivi*, article 3;

third party is usually more formal and it is constituted by a commission. We can distinguish between enquiry commissions and conciliation commissions. Both of them need the agreement of the parties involved in the dispute in order to exercise their duties. The result of their work is normally non-binding, although it can have an important influence on the settlement of the problem. The instrument of inquiry is seen as quite rigid in its fact-finding and more similar to an arbitration or a judicial settlement. For this reason it is difficult that Governments accept an inquiry commission to examine the facts at the basis of a dispute.<sup>257</sup>

On the other hand, the conciliation commission is slightly different and it might be presented as the instrument in between of enquiry and the binding solutions of arbitration and judicial settlement. The conciliation commissions have a double task: on one hand they have to examine the facts at the basis of the dispute and, on the other hand, they propose non-binding recommendation for solving the dispute to the parties involved.<sup>258</sup> The instrument of conciliation differs from enquiry both because the commission can add a proposal to solve the problem and because the fact-finding is less rigid. This means that a conciliation commission is preferable than an enquiry commission and the non-binding proposal might be a document with a momentous importance for solving the dispute.

Another mean that might be useful to solve the situation deriving from the incident between the “Enrica Lexie” and the “St. Antony” is the intervention of the United Nations organs, namely the Security Council, the Secretary General and the General Assembly. All these are empowered to intervene to solve a dispute by the provisions of the UN Charter. In fact, according to Chapter VI, “any Member of the United Nations may bring any dispute, or any situation [...] to the attention of the Security Council or of the General Assembly.”<sup>259</sup> This can be done without the consent of both States, thus creating a possibility for a solution of the ongoing situation between Italy and India. In fact, by resorting to this mean established by the UN Charter the Security Council might recommend appropriate procedures or methods of adjustment of the dispute to the parties involved.<sup>260</sup> Moreover, this organ of the UN might make recommendations to

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<sup>257</sup> G. ARANGIO-RUIZ, voce *Controversie Internazionali*, in *Enc. Dir.*, vol. X, Milano, 1970, pp. 400-401;

<sup>258</sup> *Ibidem*;

<sup>259</sup> Charter of the United Nations, article 35(1);

<sup>260</sup> *Ivi*, article 36(1);

the parties with a view to a pacific settlement of the dispute if all the parties to a dispute so request<sup>261</sup>, or it might take actions without the demand of the parties in order to investigate any dispute or situation.<sup>262</sup>

At this point, the *Marò* case seems to have a possible solution through the intervention of the Security Council as it is established in Part VI of the UN Charter. Nevertheless, the case analysed in this work does not seem to find a solution through this method because the intervention of the Security Council in accordance with the part of the pacific settlement of disputes of the UN Charter can be activated only if the dispute or the situation are likely to endanger the maintenance of international peace and security. As such, the situation created by the incident of the Italian crude oil tanker and the Indian trawler cannot be treated as a threat to international peace and security even if it created and still creates strong frictions between the countries involved. It cannot be considered a threat to peace and security also because it involves only two countries and the dispute is not going to expand to other States thus creating a domino effect which might raise tensions among other countries. For all these reasons it seems plausible to exclude the intervention of the Security Council as a third party in order to solve the problem between the State of Italy and the Union of India.

However, this does not mean that other UN organs might intervene in the case in point. The role of the Secretary General as a mediator in a dispute among countries is not unusual and there is no provision impeding this possible scenario. The role of this organ in finding solutions to disputes among States has evolved and developed during the years in an extensive practice<sup>263</sup>. In fact, the range of the activities that the Secretary General might exercise has expanded and now it includes good offices, mediation, facilitation in any dialogue processes among countries and even arbitration. Nevertheless, despite this important evolution of its functions, the intervention is still linked to disputes or situations which might threaten the maintenance of international peace and security in accordance with the Secretary General's opinion.<sup>264</sup> For this reason, a mediation of the Secretary General does not seem likely to happen in this case.

Finally, it is worth considering the possibility of an intervention of the General Assembly in the complex situation of the *Marò* case. As a matter of fact, the General

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<sup>261</sup> *Ivi*, article 38;

<sup>262</sup> *Ivi*, article 34;

<sup>263</sup> Information available at: [peacemaker.un.org](http://peacemaker.un.org);

<sup>264</sup> Charter of the United Nations, article 99;

Assembly might discuss any questions or any matters and can make recommendations to the Members of the UN on any of such questions or matters.<sup>265</sup> According to who is conducting this work, the main difference between the role of the General Assembly and the Security Council in their function of disputes settlement is constituted by the gravity of the dispute itself. In fact, the Security Council is the main organ competent for all the disputes or situations in general which are likely to constitute a threat to international peace and security. This position might be found in the same UN Charter, namely in article 24 which affirms that the UN Members “confer on the Security Council primary responsibility for the maintenance of international peace and security”.<sup>266</sup> As a further confirmation, the General Assembly should not make any recommendation with regard to a dispute which had been assigned to the Security Council<sup>267</sup> and, as it was stated above, this organ is competent for all the disputes or situation which are likely to present a menace for international peace and security. As a consequence, if the General Assembly should refer any case of threat for international peace and security to the Security Council, it might be stated that it is competent for disputes or situations which do not constitute such threat. This opinion is based on the fact that “the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations”.<sup>268</sup>

Any recommendation made by the General Assembly would have a non-binding nature. However, it would be with no doubt a document of a momentous importance for the solution of the *Marò* case as it would represent a fundamental step forward. The action through the General Assembly seems, at this point, the only viable possibility that the State of Italy has in order to protect its soldiers not *in* the Indian judgment, but *from* the Indian judgment. In fact, any sentence reached by an Indian court would represent a defeat for Italian diplomacy as it has not been able to affirm its exclusive jurisdiction. Moreover, the fact that the intervention of the General Assembly might be invoked unilaterally by the State of Italy is an element of fundamental importance because it could question all the aspects involved in the case in point and, by expressing its opinion on each aspect of international law, such as the possibility for a State to

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<sup>265</sup> *Ivi*, article 10;

<sup>266</sup> *Ivi*, article 24(1);

<sup>267</sup> *Ivi*, article 12(1);

<sup>268</sup> *Ivi*, article 14;

unilaterally pretend to have sovereignty out of the limits internationally recognized by the international community, or the condition of the institution of immunity *ratione materiae*, the General Assembly recommendation might constitute a confirmation or the starting point for a new development of international law.

### **39. Settlement of disputes framework established in the UNCLOS**

Before analysing the judicial settlements of a dispute that lead to a binding solution of the problem, it is worth mentioning the system for solving disputes set by Part XV of the UNCLOS. First of all, it is recalled that all States parties shall settle any dispute between them concerning the application of the UNCLOS by peaceful means and through peaceful instruments.<sup>269</sup> It is worth noting that among the non-binding means to settle a dispute the UNCLOS gives special attention to the instrument of conciliation. In fact, it is established that any State which is party to a dispute concerning the application of the UNCLOS may invite the other party or parties to submit the dispute to conciliation,<sup>270</sup> thus confirming the importance of this instrument at an international level. However, conciliation can be activated only after the agreement of all the parties to submit the dispute to such peaceful mean.

Even if the UNCLOS does not seem to provide an effective solution to the case in question until now, it does provide also compulsory procedures entailing binding decisions. As a matter of fact, when a dispute has found no settlement, it shall “be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction”<sup>271</sup>. The first example of a binding procedure established by the UNCLOS is the activation of a compulsory conciliation in accordance with Annex V of the convention. In fact, in section 2 of this Annex it is clearly established that any party to a dispute concerning the interpretation or the application of the provisions of the UNCLOS “may institute the proceedings by written notification addressed to the other party or parties to the dispute”. It continues by saying that any party to the dispute which received this written notification “shall be obliged to submit to such proceedings”<sup>272</sup>. This means that the activation of a conciliation commission might be activated unilaterally by the State of Italy and the Union of India would be bound to

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<sup>269</sup> United Nations Convention on the Law of the Sea, article 279;

<sup>270</sup> *Ivi*, article 284(1);

<sup>271</sup> *Ivi*, article 286;

<sup>272</sup> *Ivi*, Annex V, article 11;

submit to this instrument even if it does not reply to the notification of institution of proceedings.<sup>273</sup>

Any State member of the UNCLOS has the possibility to choose freely, through a written declaration, which is or which are the means for the settlement of disputes that it wants to use when a dispute arises. All these possible means are constituted by courts which would lead to a binding solution of the dispute. They are, namely, the International Tribunal for the Law of the Sea, the International Court of Justice, an arbitral tribunal or a special arbitral tribunal constituted for specific categories of disputes. If the parties involved in a dispute made such declaration establishing the competence of the same court, any party of that dispute might activate unilaterally the competence of that court. It is necessary to understand at this point whether this can be also the situation for Italy and India. In other words, it has to be noticed if both States made a declaration establishing the competence of any courts in accordance with article 287 of the UNCLOS.

The State of Italy made a declaration after ratification to the treaty in which it declared that “for the settlement of disputes concerning the application or interpretation of the Convention [...] 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.”<sup>274</sup> It is clear from this declaration that the State of Italy accepted the competence of those tribunals for the solutions of any dispute concerning the UNCLOS and they might be activated unilaterally by Italy if the same declaration was made by the other party of the dispute. Nevertheless, the Union of India has not made any declaration establishing the competence of any court listed in article 287 of the UNCLOS. On the contrary, it declared that “the Government of the Republic of India reserves the right to make at the appropriate time the declarations [...] concerning the settlement of disputes.”<sup>275</sup> At this point, it does not seem possible to Italy to activate unilaterally one of the compulsory procedures entailing a binding decision of the UNCLOS. However, the same framework instituted in article 287 establishes that “any State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII.”<sup>276</sup>

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<sup>273</sup> *Ivi*, Annex V, article 12;

<sup>274</sup> Information available at: [www.un.org](http://www.un.org);

<sup>275</sup> *Ibidem*;

<sup>276</sup> United Nations Convention on the Law of the Sea, article 287(3);

This means that the Government of Rome might unilaterally invoke either the institution of a compulsory conciliation commission or the constitution of an arbitration court which New Delhi would be bound to for the solution of the dispute regarding the *Marò* case. This position would be true only if there are no limitations or exceptions to the applicability of the provisions of articles 284 and 287 as established in Section 3 of Part XV of the UNCLOS. As a matter of fact, this part of the convention includes several limitations for a unilateral action of any member State that would lead to a binding solution of the dispute. This might be explained as a form of maintenance of the principle according to which the consent of all the parties to a dispute is necessary in order to activate a binding proceeding. However, the dispute settlement framework in Part XV of the UNCLOS includes several specific provisions regarding the EEZ. A very important example, which regards also the possible application of the above mentioned binding solutions of the problem, is represented by article 297 that reads as follow,

“disputes concerning the interpretation or application of this Convention with regard to the exercise by a coastal State of its sovereign rights or jurisdiction provided for in this Convention shall be subject to the procedures provided for in section 2 in the following cases:

- (a) when it is alleged that a coastal State has acted in contravention of the provisions of this Convention in regard to the freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines, or in regard to other internationally lawful uses of the sea specified in article 58;”<sup>277</sup>

The consequence of this article is that if a dispute arises on the interpretation or application of article 58 of the UNCLOS, this would be subject to the system settled in section 2 of Part XV regarding the compulsory settlement of disputes through binding methods. This part of the international convention of Montego Bay represents a crucial factor for the solution of the *Marò* case. As a matter of fact, this provision provides the possibility for third States to challenge and question the domestic legislation of coastal States which represents a violation to the freedoms assured in the EEZ, among which there is the freedom of navigation. As a direct consequence, this provision can be used to determine if the notification of the Union of India has to be considered as a lawful act deriving from its sovereignty over that area of the sea or, on the contrary, if it suggests a

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<sup>277</sup> *Ivi*, article 297(1)(a);

breach to the UNCLOS provisions of Part V on the EEZ and to international law in general.

#### **40. Adjudicative means with binding power**

After having analysed the framework for settling disputes established by the UNCLOS and after having understood that it might involve binding solutions deriving from judicial settlements, it seems fundamental to understand the possible solutions of the *Marò* case through either a court judgment or an arbitration award. The latter seems having paramount importance in the light of the provisions of articles 287 and 297 of the UNCLOS analysed above.

According to the definition of The Hague Convention for the Pacific Settlement of International Disputes, “international arbitration has for its object the settlement of differences between States by judges of their own choice, and on the basis of respect for law.”<sup>278</sup> Arbitration might be described in general terms as a consensual process among subjects of the international community for the submission of a dispute for a decision of a tribunal which is composed by one or more independent third parties. In making its decision, this tribunal has to follow certain basic requirements, such as to act fairly and impartially. The decision of the tribunal (the award) is final and legally binding on the parties.<sup>279</sup> With arbitration, like with any other judicial settlement, the dispute is no longer settled for the unique purpose of safeguarding peaceful relations and adapting the interests of the conflicting parties in a mutually acceptable way. In fact, a further goal is pursued with the attempt of solving the dispute on the basis of international law which is the maintenance of the legal system established and accepted by the members of international community. The arbitral court has the duty to examine both the facts at the basis of the dispute and the law governing such case. The arbitration agreement among the parties involved in a dispute and the binding effect of the award are the main elements that identify and differentiate arbitration from other peaceful means of solving disputes.<sup>280</sup>

The award of the court of arbitration is based on the same law applicable by the International Court of Justice as it is established in article 38 of its Statute. This article

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<sup>278</sup> Convention for the Pacific Settlement of International Disputes, article 15;

<sup>279</sup> P. CAPPER, *International Arbitration: a Handbook*, 3<sup>rd</sup> ed., LLP, London, 2004, pp. 2-3;

<sup>280</sup> G. ARANGIO-RUIZ, voce *Arbitrato, diritto internazionale pubblico*, in *Enc. Dir.*, vol. II, Milano, 1958, p. 975;

provides that the court shall apply “international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations; [...] judicial decisions and teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law”<sup>281</sup>.

However, there are many elements of contacts between arbitration and a court judgment and in recent times the distinction among them has become formal.<sup>282</sup> First of all, in the most cases both means need an agreement among the parties involved in a dispute to submit it to a binding solution. Secondly, both the court judgment and the arbitration award are final and legally binding on the parties. The main differences between the two systems consist in the fact that the arbitrators are chosen by the parties involved and the arbitral tribunal is usually created to deal with a particular dispute or class of disputes. Finally, arbitration is more flexible than a system of compulsory jurisdiction with a standing court. Nevertheless, in the case here analysed we are facing the possibility of a unilateral submission of the dispute to an arbitral tribunal in accordance with the provisions of the UNCLOS. Even if the compromise among the parties involved is the normal solution because they can decide the procedure of the tribunal, in the application of Annex VII of the UNCLOS the same arbitral tribunal shall decide its procedure in the absence of an agreement.<sup>283</sup>

Even if the possibility of a unilateral submission of the dispute to an *ex novo* arbitral tribunal from part of the State of Italy in accordance with the provisions of the UNCLOS seems to be an effective mean to solve this problem, it presents some doubts. As a matter of fact, the institution of this arbitration would imply an award confined within the interpretation and application of the UNCLOS, leaving apart the other problems that characterize the *Marò* case, such as the recognition of immunity *ratione materiae* to the two Italian soldiers and the violation of India to the Vienna Convention on diplomatic relations for the detention of the Italian Ambassador.

Another possibility for solving this dispute is the recourse to a tribunal competent to pronounce its judgment over the case here analysed. In this sense, the only two courts

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<sup>281</sup> Statute of the International Court of Justice, adopted on 26<sup>th</sup> June 1945 in San Francisco, entered into force on 24<sup>th</sup> October 1945, article 38;

<sup>282</sup> I. BROWNLIE, *Principles of Public International Law*, pp. 672-673;

<sup>283</sup> United Nations Convention on the Law of the Sea, Annex VII, article 5;

that might exercise their jurisdiction in accordance with article 287 are the International Court of Justice (ICJ) and the International Tribunal for the Law of the Sea (ITLOS). Starting from the latter, it is worth noting that the submission of a dispute to the ITLOS occurs only after the conclusion of an agreement among the parties involved in such dispute. This represents the problem presented above: in the ongoing situation of tense relations between the Governments of Rome and New Delhi, the conclusion of an agreement to submit the case to a court for a binding solution does not seem a possible event. For this reason, the contentious function of the ITLOS seems to find no possibility of application in this case. However, what might find application is a pronouncement of the tribunal according to its advisory function. In fact, as it is established in the rules of the tribunal, the Tribunal may give an advisory opinion on a legal question. The decision coming from an advisory opinion has both pros and cons. As a matter of fact, on one hand it does not have binding force and, for this reason, the States involved can be more willing to address their case to the tribunal. Secondly, the judgment would be given in accordance with the principles of international law and so there would be a consolidation of the rules of the sea.

On the other hand, the tribunal would express only on the application of the UNCLOS and the other rules related to the law of the sea. In this way, as in the case of an arbitration according to Annex VII of the UNCLOS, there would not be any submission to the tribunal of other matters, such as the recognition of immunity *ratione materiae*. Moreover, we do not have to forget that even for the advisory opinion of the ITLOS the parties involved should reach an agreement for the submission of their dispute to such tribunal and such agreement would be far from easy to reach in the situation between Italy and India.

In order to have a general opinion on the case analysed in this work, the only tribunal that seems competent is the ICJ. As a matter of fact, a submission of the *Marò* case to this tribunal might question not only the application of the provisions of the UNCLOS in determining which State has jurisdiction, but it can also involve questions related to the institution of immunity or the recognition of a violation of the Vienna Convention on diplomatic relations from part of the Union of India. The ICJ, as all other courts which lead to a binding solution, can be activated through an agreement among the parties involved, which apparently means another impasse for the solution of this case. However, the same Statute of the Court provides that

“the states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

- a) the interpretation of a treaty;
- b) any question of international law;
- c) the existence of any fact which, if established, would constitute a breach of an international obligation;
- d) the nature or extent of the reparation to be made for the breach of an international obligation.”<sup>284</sup>

At this point it is important to consider different points. First of all, if Italy and India made any declaration recognizing the competence of the ICJ in solving disputes. Then, it is worth considering if such declarations might find application in the case here analysed thus representing a possible solution for the State of Italy to unilaterally submit the *Marò* case to the ICJ. As it was presented above<sup>285</sup>, the State of Italy recognized the competence of the International Court of Justice for all the disputes concerning the application or interpretation of the UNCLOS and, as such, the recognition from part of the State of Italy seems evident. Even if it is not a declaration made in accordance with article 36 of the Statute of the Court, the effect should be considered the same.

What assumes great importance at this point is the fact that the Union of India made a declaration in the respect of the above mentioned article of the ICJ Statute recognizing the jurisdiction of the Court as compulsory.<sup>286</sup> Although at this point it seems evident that thanks to this declaration each State might address the case in question to the ICJ, this is not possible. In fact, the same declaration excludes from the jurisdiction of the Court disputes concerning or relating to the status of the Indian territory or its territorial sea, the continental shelf, the exclusive economic zone and other zones of national maritime jurisdiction. The *Marò* case is, therefore, excluded as it concerns contrasting positions on the status of the Indian territory and on the lawful or unlawful extension of domestic jurisdiction over the exclusive economic zone.

Nevertheless, this does not represent a complete bar from any action that the State of Italy might take. In fact, it is worth recalling that along with the main problems of the

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<sup>284</sup> Statute of the International Court of Justice, article 36(2);

<sup>285</sup> See, footnote 273;

<sup>286</sup> “The Government of the Republic of India [...] accept, in conformity with paragraph 2 of Article 36 of the Statute of the Court, [...] as compulsory *ipso facto* and without special agreement, and on the basis and condition of reciprocity, the jurisdiction of the International Court of Justice”, available at: [www.icj-cij.org](http://www.icj-cij.org);

recognition of jurisdiction and the grant of immunity *ratione materiae*, another tense situation arose in the evolvments of the *Marò* case. The reference is made to the events which involved the Italian Ambassador Mancini in India. As a matter of fact, the prohibition to leave the Indian territory made by Indian authorities clearly and evidently constituted a breach to the Vienna Convention on diplomatic relations. What is relevant in the case in point and that is interlinked with this convention is the Optional Protocol concerning the compulsory settlement of disputes which was ratified by both States involved in this ongoing situation. This protocol provides that “disputes arising out of the interpretation or application of the convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a party to the present protocol.”<sup>287</sup>

Accordingly, the State of Italy has the right to unilaterally submit this dispute to the ICJ for its settlement. It is true that this question represents a secondary element in the whole dispute involving the Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone of the San Marco Regiment of the Italian Navy. Nevertheless, it might constitute an effective instrument to find an agreement for a comprehensive solution of all the situations in this unique and complex case.

#### **41. Difference between situations and disputes**

At this point, it seems necessary to analyse another aspect of the events developed after the incident of 15<sup>th</sup> February 2012 between the Italian vessel “Enrica Lexie” and the Indian trawler “St. Antony”. It seems useful to understand if all these events should be considered as establishing one or more disputes among the State of Italy and the Union of India, or, on the other hand, if they constitute situations which imply tense relations, but which do not have the elements of an international dispute. This is a question of great importance if we consider that the jurisdiction of international judicial tribunals, like the International Court of Justice, usually extends only to the events that constitute an international dispute. However, this does not impede the application of Chapter VI of

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<sup>287</sup> Optional Protocol concerning the Compulsory Settlement of Disputes, adopted on 18<sup>th</sup> April 1961 in Vienna, entered into force on 24<sup>th</sup> April 1964, article 1;

the UN Charter in which the term “situation” is largely used. It can be affirmed that while all disputes are at the same time situations, not all situations are disputes.<sup>288</sup>

Even if a situation might involve more tension than a dispute, it does not seem to present the fundamental elements of the latter. It can be a moment of high tensions among States or among entities that are not considered as subjects of international law. In this case, there would not be the subjective element that characterizes the institution of international dispute. Another example might be the absence of strong opposition over the matter of the situation. In this case, the concept of dispute differs from the one of situation because it is not necessary that a State expresses its feelings of injustice and injury towards another member of the international community, it is necessary that these feelings are formulated into a specific claim which is manifestly opposed by the other party. The main reason to add the concept of “situations” in the UN Charter seems to be the extension of possible intervention of the organization in those cases where there are high tensions among two entities, but there are not all the elements that characterize an international dispute. This position finds great evidence if we consider the case that follows. In the Statute of the League of Nations the concept of “situation” was excluded, while in the UN Charter it was largely used in the provisions of the articles of Chapter VI. In the first years that followed this innovation, more precisely between 1946 and 1958, among the 32 cases submitted by the Member States of the UN to the organs of the organization, only five were presented as disputes.<sup>289</sup>

However, a situation might be constituted by a more complex case. In fact, it might be characterized by several conflicts over different issues which may represent one or more disputes. This does seem the case of the events analysed in this work. As a matter of fact, the ongoing situation between the State of Italy and the Union of India is composed of different issues of contrast among the parties involved. The main points of disagreement between the Governments of Rome and New Delhi regard the attribution of the jurisdiction and the recognition of immunity *ratione materiae* to the two Italian soldiers. Even though these two elements have been always present in all the debates regarding the events of 15<sup>th</sup> February 2012, it might be argued that the contrasting points of view concerning the jurisdiction do not constitute a dispute. In fact, no competent courts of India officially excluded the Italian jurisdiction over the case and

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<sup>288</sup> G. ARANGIO-RUIZ, voce *Controversie Internazionali*, in *Enc. Dir.*, vol. X, Milano, 1970, pp. 412-413;

<sup>289</sup> *Ivi*, p. 414;

this aspect is now analysed by the NIA court. The only aspect that was made sure in the judgment of the Supreme Court of India of 18<sup>th</sup> January 2013 is that the federate State of Kerala has no authority to prosecute the two members of the Italian Navy. There has not been, until now, any manifest opposition by the Union of India regarding the recognition of Italian authority over the case because this issue is still pending. If the NIA court in its judgment establishes Indian jurisdiction and, as a consequence, it denies any involvement of Italian authorities, it would be considered as a manifest opposition to the Italian position, thus completing the necessary elements that give rise to a dispute.

The situation of the recognition of the institution of immunity *ratione materiae* is slightly different. In fact, even if there has not been any denial to the grant of functional immunity to the Italian members of the VPD, this issue should be considered as a dispute according to the person who is conducting this work. In fact, as it was presented in Chapter 4, the members of the armed forces enjoys immunity *ratione materiae* when they discharge official functions either if they are fulfilling *acta iure imperii* or *acta iure gestionis*. In fact, there is no reasonable ground to separate the two types of actions as they both express the possibility to exercise its authority. Furthermore, there are several pieces of evidence of international jurisprudence which constitute a coherent body which clearly express the necessity of granting immunity *ratione materiae* to the members of armed forces in the discharge of their official duties as it was the case of the two Italian marines.

The fact that all the Indian courts which passed their decisions on this case did not stop prosecuting the two Italian soldiers as a direct and unique consequence of their immunity clearly indicates that no Indian institution recognizes immunity *ratione materiae* to them. Despite there has not been a clear denial which indicates that the two Italian marines do not enjoy immunity from part of any Indian authority, the only fact of the continuity of the proceeding against them clearly indicates that this behaviour implies a denial of immunity *ratione materiae*, thus creating a contrasting and opposed position between the State of Italy and the Union of India. For this reason, it can be stated that these facts contains the elements necessary to be considered an international dispute.

Furthermore, there are other events that might constitute a dispute between Italy and India and which are considered as secondary compared to the main issues of jurisdiction and of recognition of immunity *ratione materiae*. By presenting these events in a

chronological order, the first episode that might be considered as a dispute is the hot pursuit conducted by the Indian Coast Guard against the “Enrica Lexie” the same day of the incident. As it was presented before in this work<sup>290</sup>, international law, both customary and conventional, establishes that hot pursuit might be performed by the coastal State only respecting certain phases which are cumulative. In addition, the pursuit can only be undertaken if there has been a violation of the rights of a specific area of the sea. In other words, hot pursuit can start in the contiguous zone only if the coastal State has sufficient evidence to believe in a breach of its customs, fiscal, immigration or sanitary domestic laws. On the other hand, hot pursuit can start in the EEZ if a foreign vessel commits a breach to the sovereign rights of the coastal State which are only of economic nature. None of these rights, neither the ones of the contiguous zone, nor the one of the EEZ seem to be involved in the *Marò* case. In fact, even the Indian authorities do not claim any breach of these rights from part of the Italian vessel. As such, if the hot pursuit episode is confirmed, it would represent a clear breach of the provisions of the UNCLOS and, if the parties involved strongly opposed each other theory, it might represent another dispute between the State of Italy and the Union of India that should be inserted in the wider and more complex situation of the situations regarding the jurisdiction over the case and the recognition of immunity *ratione materiae* to the Italian marines.

Finally, the episode of the restriction of movement of the Italian Ambassador Mancini in India should be considered as another situation that might constitute an international dispute between Rome and New Delhi. The decision of the Supreme Court of India was based on the theory that the announcement of the Italian Minister of Foreign Affairs to hold the two Italian marines in Italy represents a breach to the *affidavit* that was given by the same Ambassador Mancini to the Supreme Court. However, this act cannot be treated as a waiver of immunity for the Ambassador. In fact, according to the Vienna Convention on Diplomatic Relations, any diplomatic agent shall not be liable to any form of arrest or detention and the receiving State shall take all appropriate measures to prevent any attack on his person and freedom<sup>291</sup>. As a consequence, any restriction of movement such as the one imposed by the Supreme

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<sup>290</sup> See Part I, Chapter 2, paragraph 4.1;

<sup>291</sup> Vienna Convention on Diplomatic Relations, adopted on 18<sup>th</sup> April 1961 in Vienna, entered into force on 24<sup>th</sup> April 1964, article 29;

Court of India to Mr. Mancini represents a gross violation to one of the fundamental conventions which regulate the life among the members of the international community.

The State of Italy immediately reacted to the Court's official statement by addressing a note verbale from the Embassy of Italy in New Delhi and by a statement of the Government of Italy. Both documents expressed the fullest concern and the absolute certainty that "any restriction to the freedom of movement of the Ambassador of Italy to India including any limitation to his right of leaving the Indian territory, will be contrary to the International Obligations of the receiving State to respect his person, freedom, dignity and function."<sup>292</sup> After having proposed the submission of the case to a court of arbitration and after having received no answer from part of the Union of India, the State of Italy declared that the *Marò* case should be treated as an international dispute between the two States.<sup>293</sup> These declarations seem sufficient to constitute the strong opposition which is a necessary element for the identification of an international dispute. In other words, the events that followed the decision of the Supreme Court of India to impede the Italian Ambassador from leaving the Indian territory without its permission have enough ground to represent another dispute between Italy and India in the already complex case of the Italian marines.

#### **42. Conclusion**

An international order without any dispute among its members is difficult to imagine because it is simply impossible. Disputes are the product of the relations among nations. The more tight these relations are the more possibility there would be for the raise of disputes. If the rise of disputes is not a by-product of international relations, all the provisions establishing the settlement of disputes in international treaties would be totally useless. Aiming at a global order with no dispute seems quite utopian. For this reason the most important thing is to establish an international order which is based on solid grounds, represented by international law. Like in every national society, the role of law is to regulate the life of its members and when some problems arise, the parties involved do not resort to the state of nature but to common or civil law. The same rationale can apply to international law and international community. In fact, international law regulates the life in the international system with some differences with any domestic laws. International law is established, developed and modified by the

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<sup>292</sup> Embassy of Italy in New Delhi, note verbale n° 100/685 of 15<sup>th</sup> March 2013;

<sup>293</sup> Information available at: [www.esteri.it/MAE/IT](http://www.esteri.it/MAE/IT);

same members of the community which submit to it. As such, they decide which principles have to be considered right or wrong and, in the case of a breach of any law, they decide which means and principles apply.

After the Second World War, a new principle began to gain more and more grounds and nowadays it represents one of the basic elements of any dispute settlement provision. This foundation is well represented by Chapter VI of the UN Charter for the peaceful settlement of disputes which is also established in its basic purposes and principles. Every member of the international community should settle its dispute through peaceful means and this was also the path followed by Italy and India. However, the method adopted has led the two States in a diplomatic impasse and, until now, no significant steps forward have been done. With no doubt, the solution adopted through negotiations is the most immediate and the easiest because it stems in direct dialogue between the parties involved. On the other hand, if the parties do not find common ground for a solution, the problem might be unresolved.

The fact that until now this situation is still unsettled does not mean that it has no solutions. In fact, as it was presented in this chapter, several actions might be taken in order to find a determination of the events and a possible agreement among the parties involved. The range of possibilities to solve the situation of the Italian marines can be divided in different categories according to their binding or non-binding result and according to their submission through an agreement among the parties or through a unilateral action. In the variety of non-binding methods for the settlement of disputes it is necessary the intervention of a third party. In fact, in all remaining means a third entity is required with different duties. For the good offices the role of the third party is to encourage the Governments of Rome and New Delhi to negotiate a new solution to the dispute. A more active role for the third party is envisaged in the case of a mediation. In the cases of an enquiry or a conciliation the third entity would be a commission of experts with the main duty to reconstruct the events of the incident. The difference between these two means is that while an enquiry commission would limit its duties in the fact-finding, a conciliation commission would formulate a proposal for the settlement of the dispute on the basis of the reconstructed events.

It is true that all these peaceful methods of settlement of disputes might have no concrete result because they all lead to a non-binding solution. For this reason, an adjudicative method seem to be more appropriate. Nevertheless, in the majority of the cases any court with binding power can be activated only through an agreement among

the parties involved in a dispute. This is the case for the submission of the *Marò* situation to the ITLOS or to the ICJ. In fact, the unilateral declaration recognizing the jurisdiction of the ICJ as compulsory made by the Union of India, does not involve cases of disputes regarding the Indian EEZ. For this reason an agreement for the submission of the dispute to the ICJ is necessary. The same agreement is needed for the creation of an arbitral tribunal whose procedure can be established by the State of Italy and the Union of India. The recourse to arbitration is fostered in the Indian Constitution<sup>294</sup> and it seems a viable solution for this dispute.

However, after the diplomatic fallout that followed the Italian decision to hold the *Marò* after the second license, any agreement for a binding solution to this situation seems far from being settled, but this does not mean that there are no methods for solving this dispute. As a matter of fact, several means for the pacific settlement of disputes can be activated unilaterally by the State of Italy. These means involve instruments that can produce either binding or non-binding decisions. Starting from the latter, if Italy brings the case to the attention of the General Assembly, the UN organ has the power to make recommendations for the peaceful adjustment of any situation which might include an analysis of all the elements that constitutes this ongoing and complex situation. Another possibility for a unilateral submission of the dispute through a peaceful mean is established in Annex V of the UNCLOS which involves the compulsory submission to conciliation procedure. This commission shall report within 12 months from its constitution and this document would not have binding force on the parties.<sup>295</sup> Although it does not assure a solution to the dispute, the recourse to a conciliation commission represents a great chance for an objective reconstruction of the events that gave rise to all this tense situation.

In order to have a certain conclusion to the *Marò* case, a binding decision seems necessary. The State of Italy might unilaterally submit the case to an arbitration court according to the provisions of the UNCLOS regarding the compulsory procedure for the settlement of disputes as it was presented in this chapter. The recourse to arbitration through a unilateral action seems to be slightly different from the creation of an arbitral court through an agreement. In fact, the former would be involve in a judgment which

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<sup>294</sup> “The State shall endeavour to [...] encourage settlement of international disputes by arbitration.”, in the Constitution of India, adopted on the 26<sup>th</sup> November 1949, entered into force on the 26<sup>th</sup> January 1950, article 51(d);

<sup>295</sup> United Nations Convention on the Law of the Sea, Annex V, article 7;

concerns the interpretation and the application of the UNCLOS, thus leaving apart all the questions that do not concern the jurisdiction. Nevertheless, the problem of jurisdiction over the case represents a paramount issue in this case and, as such, a solution that involves only this aspect would not represent a defeat. On the contrary, it would be a great chance to clarify which are the provisions of the law of the sea applicable in the EEZ. Although the question of immunity *ratione materiae* seems to find no solution without the will of the parties to submit this issue to either a commission or a court, the scenario concerning the violation of the Vienna Convention on Diplomatic Relations is different. In fact, the Government of Rome might resort to the ICJ without the consent of New Delhi in accordance with the Optional Protocol concerning the Compulsory Settlement of Disputes. The Court would consider the events of the restriction of the freedom of movement of the Italian Ambassador Mancini and its judgment would recognize whether the Union of India committed a violation to the international principles related to diplomatic relations. If the ICJ would give a positive answer on this question, the Union of India might be bound by the Court to provide reparation for the unlawful act.

In conclusion, a clarification of the events of the incident between the “Enrica Lexie” and the “St. Antony” seems to be the priority in this case. In order to do so, the UNCLOS provides a useful framework to settle this situation in its Part XV. However, there is a sort of reluctance to unilaterally invoke the means to adjust international disputes provided by the convention of Montego Bay. This might be explained if we consider that such action represents an operation that normally does not form part of international practice to solve disputes. Moreover, it might be seen as an unfriendly act, thus put at risk the general relations with that State and, in the case in point, the economic relations between Italy and India represents an important element for both countries. By considering only the import-export activities between these two countries, these have a value that exceeds 7 billion euro every year.<sup>296</sup> A solution of the *Marò* case is as desirable as difficult to reach. In fact, if on one hand there might be the will to impose the respect of international law even through unilateral actions, on the other hand there is the possibility to deteriorate important relations with that State. In trying to solve this complex situation, it should be taken into consideration these aspects in order to choose the most reliable pacific mean for the settlement of disputes which could

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<sup>296</sup> Information available at: [www.infomercatiesteri.it](http://www.infomercatiesteri.it);

represent a good solution of the problem and, at the same time, it would not put at risk the relations between the two countries.

## 9. CONCLUSION

The crime of piracy is as old as the maritime trade. This phenomenon characterized and grew along with international maritime trade, changing shapes and transforming its main elements. In recent times piracy developed in a new form off the coast of Somalia influencing the trade routes of one of the main corridors for international trade: the Gulf of Aden. Despite piracy activities were present in the Somali territory before 2008, this year represented a turning point for the treatment of this phenomenon from part of the international community, thus spreading great concern among its members. In order to better understand the role of this phenomenon, it is worth considering the evolution of Somali piracy which can be broken in three periods: pre-2008, 2008 to the end of 2010, and 2010 to the present. The first period corresponds to the development of piracy from a local and disorganized business to an organized and structured activity. The second period reflects the development of new competitors in this business, while the third period refers to the union of piracy activities with other illegal organized networks which provide sponsorships for piracy activities.<sup>297</sup>

This phenomenon has not only a huge impact on all the region of the Horn of Africa, but it also creates enormous losses for maritime trade at an international level. We live in a world where more than 80% of global goods are traded through the seas. In this world an unchallenged phenomenon of piracy would menace not only the political stability of that area, but it would also endanger international security and global growth prospects. The World Bank estimated that piracy activities in the Indian Ocean have a yearly cost of an average of US\$ 18 billion loss to world trade<sup>298</sup>. This impressive number can be divided in direct and indirect costs. Paradoxically, the amount of money paid for the ransoms represents the lowest part of this loss. As a matter of fact, in 2011 when the total ransoms paid reached its peak, this amount was between US\$ 151.10 million and US\$ 155.67 million<sup>299</sup>. The rest of this massive loss can be explained if we think about the growing prices of insurances for cargo and crew members sailing the risky waters of the High Risk Area. Furthermore, as it was explained before in this work, an average value of the cargo of an oil crude tanker is 60 million euro and this

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<sup>297</sup> World Bank; United Nations Office on Drugs and Crime (UNODC), Interpol, *Pirate Trails: tracking the illicit financial flows from pirate activities off the Horn of Africa*, Washington D.C., World Bank, 2013, p. 29;

<sup>298</sup> *Ivi*, p. 33;

<sup>299</sup> *Ivi*, p. 41;

means that if one of these vessels is hijacked, the shipmasters would suffer an indirect loss represented by the impossibility to use that ship for trading.

In order to contrast this phenomenon, the members of the international community, both States and international organizations, started creating and developing numerous significant operations to prevent and suppress any pirate attack. First of all, the creation of the High Risk Area permitted to identify the limits of the risky waters and the creation of the IRTC provided a secure navigation through the Gulf of Aden. This area is patrolled by the warships of the different States involved in various military operations which are held by the NATO with Operation Ocean Shield, by the EU with Operation EUNAVFOR-Atalanta and by independent States which organized a multilateral naval force: the CMF. Not all the operations developed to counter piracy have military nature. In fact, one of the most significant actions adopted by the international community is the creation of the CGPCS, a permanent forum to discuss the best practices to prevent and suppress the phenomenon of piracy in the Indian Ocean. This organization created five Working Groups with different tasks in order to better challenge pirate's activity in all its aspects. The first Group, chaired by the UK, is responsible for facilitating effective naval operations and coordinating international efforts to support the construction of a better judicial, penal and maritime capacity of the States in the region of the Horn of Africa.<sup>300</sup> The second Group, chaired by Denmark, involves regional and international organizations along with independent States. The main duty of this Group is to study the legal aspects of counter-piracy and inform all the participants to contribute to a common approach. Moreover, this Group reached an agreement thanks to which pirates can be prosecuted and sentenced in one country and then serve their sentences in a prison in Somalia.<sup>301</sup> While the third Group, chaired by the Republic of Korea, discusses which are the best actions that should be used to protect vessels from hijacking in the High Risk Area, the fourth Group, chaired by Egypt, focuses on the diplomacy aspects of combating piracy.<sup>302</sup> The last Group, chaired by Italy, is focused on the economic and financial aspect of piracy. In fact, it tries to discover the networks used by pirates for money laundering<sup>303</sup> through informal

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<sup>300</sup> Information available at: [www.thecgpcs.org](http://www.thecgpcs.org);

<sup>301</sup> *Ibidem*;

<sup>302</sup> *Ibidem*;

<sup>303</sup> *Ibidem*;

value transfer systems where one of these methods, and probably the most used, is known as “Hawala system”<sup>304</sup>.

By considering the dimensions of the High Risk Area and the growing attacks of pirates even at a distance of more than 300 nautical miles from the coast, it is understandable why different countries decided to defend each vessel flying its flag with the use of private contractors or VPDs. Despite initial concerns for the use of armed guards on board of private ships, in the implementation of the BMP the same IMO expressed its preference for the VPDs rather than private contractors<sup>305</sup>. The State of Italy is not the only country which adopted and established a domestic legislation for this solution. The main role of the members of the Army constituting a VPD is to deter pirates from attacking the private vessel where they are deployed. Most of the VPDs started being used in the last part of 2011 and, for the case of Italy, from the beginning of 2012. In 2012, the number of pirates’ attacks significantly decreased and in 2013 there had not been cases of hijacked commercial vessels in the High Risk Area.<sup>306</sup> The role of VPDs on board of private commercial vessels seems to be important for the protection of these risky waters and the reduction of piracy attacks. There is no doubt that it is not the only decisive element in the global action to counter piracy, but its role has not to be underrated. Although the number of attacks consistently dropped in the last two years, they did not disappeared. As a matter of fact, in 2012 there had been 23 attacked vessels and 7 pirated,<sup>307</sup> and at the centre of the *Marò* case analysed in this work there is a mistaken pirate attack.

On 15<sup>th</sup> February 2012 the Italian crude oil tanker “Enrica Lexie” was transiting the Laccadive Sea off the Indian coast of the State of Kerala in its route from Singapore to Egypt. This portion of the Indian Ocean is part of the High Risk Area in which the members of the international community which domestically established the use of VPDs on board of their vessels can deploy such teams. The State of Italy ruled the use of these armed guards with its domestic law n° 130/2011 and on board of the “Enrica Lexie” there was a team of six members of the Italian Navy. The members of this military team saw an unidentified boat which would have caused a collision course with

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<sup>304</sup> Personal interview with General Marcello Ravaioli, member of the Italian finance police, on 11<sup>th</sup> March 2013;

<sup>305</sup> See footnote 215;

<sup>306</sup> Information available at: [www.icc-ccs.org](http://www.icc-ccs.org);

<sup>307</sup> Information available at: [www.shipping.nato.int](http://www.shipping.nato.int);

the Italian vessel. At this point the VPD on board started implementing the BMP by using light signals as a first step. Having no result and with the boat approaching the crude oil tanker, the Chief Master Sergeant Massimiliano Latorre of the San Marco Regiment thought of a piracy menace. The next step was the use of the general alarm and the fog horn, while the members of the Italian armed forces fired warning shot in the water. At that point, the Indian trawler changed its course and, according to the Italian VPD, the suspected pirate attack was disrupted.

Nevertheless, an Indian trawler, the “St. Antony”, docked at the port of Kochi in the State of Kerala later that day with two fishermen who had been shot dead. The “Enrica Lexie” was intercepted and asked to change its course of navigation in order to dock at the port of Kochi. The two masters on board of the Italian ship referred this request to their superiors: the master of the vessel communicated with the shipowner, while the master of the VPD communicated directly with the Ministry of Defence. Their reports had opposite solutions. In fact, while the shipowner recommended docking at the port of Kochi, the Ministry of Defence suggested continuing the course of navigation. The former decision was implemented and the “Enrica Lexie” arrived at the Indian port later that evening. The police of the district of Kollam patrolled the crude oil tanker and the Italian members of the VPD were informed that two fishermen lost their life on board of the “St. Antony”.

After few days, on 19<sup>th</sup> February, the Chief Master Sergeant Massimiliano Latorre and the Sergeant Salvatore Girone, both of them members of the San Marco Regiment of the Italian Navy, were accused of murder, attempt to murder, mischief and common intent. Since then, the two Italian soldiers are waiting for a resolution of this unique and complex situation which became even more tense after the events of March 2013. In fact, during the second licence conceded to the Italian soldiers to return to Italy for some weeks, the decision of the former Italian Minister of Foreign Affairs Giulio Terzi to hold the Marò represented a collapse of the situation and a diplomatic fallout. As a response to this act, the Union of India reacted very strongly but in violation of the Vienna Convention on Diplomatic Relations. The Supreme Court of India, in fact, after the decision of Minister Terzi, ordered the Italian Ambassador Mancini not to leave the Indian soil without its permission, thus infringing international customary law on diplomatic relations established in the Vienna Convention. Although the situation eased after the return to India of the Italian marines, an agreement between Italy and India seems hard to reach now.

Since the beginning of this complex situation, two main questions have arisen: which State has the right to claim its jurisdiction for prosecuting the two Italian soldiers and whether immunity *ratione materiae* has to be granted to the two Marò. After almost two years from the day of the incident between the two vessels, these questions are still unresolved. For what concerns the first issue, international law establishes some principles to decide which State can exercise its authority over a case. The foundation for the claim of jurisdiction at an international level is based on the territorial principle and on the nationality principle. Both of them present an active and passive aspect. In other words, we might divide in active and passive territorial principle and in active and passive nationality principle. According to the former, the active territorial principle indicates the *locus* where the action or the omission which gave rise to an unlawful act took place, while the passive aspect identifies the territory where the unlawful act produced its effects. Regarding the active and passive aspects of the nationality principle, these indicate, respectively, the person or people who committed (active) and suffered (passive) the unlawful act.

Before in this work it was stated that the passive aspects of both territoriality and nationality principles should be considered as less justifiable than the active situations. We might better understand this position if we consider the situation of the global order. The international system is based on an international community formed mainly by independent States which autonomously shape the rules of this system through the drafting of international treaties or through their behaviours that might give rise to international customs. In such system, each State is willing to maintain the highest degree of control over its nationals and over its territory. However, this is not possible in an era of growing relations and growing movements of people and goods. This has an effect on the principles governing States jurisdiction because it puts more emphasis on the control of the territory rather than a strict control over people. The result is an international system which is mainly based on the territoriality principle. As a consequence, the planet is divided into specific areas in which different States have the right to exercise their authorities. In this way, no portion of the world suffers from a vacuum of jurisdiction. Each State has the duty to maintain order into its territory and, in order to do so, it has the authority to exercise its jurisdiction over the unlawful acts committed in it, even from part of people who are not its nationals. This is the rationale of the active territoriality principle and, along with the active nationality principle, it seems to follow the aim of the world order established by the international community.

“Sovereignty in its full sense, imports the supreme, absolute, and uncontrollable power by which an independent state is governed. Every state has accepted restrictions on its own liberty of action under treaties, compacts, and membership in international organizations. A more accurate definition of sovereignty is that it is the residuum of power which a state possesses within the confines laid down by international law.”<sup>308</sup>

The case here analysed is absolutely unique for its complexity and for the variety of matters of international law that involves. Both Italy and India claimed its jurisdiction according to different principles based on different interpretations of international norms. The case concerns a firing incident which started in the territory of one State (the “Enrica Lexie” was flying Italian flag) and produced its effects on the territory of another State (India) in an area of the sea which is considered *sui generis*: the EEZ. This area extends until a maximum of 200 nautical miles and, when it is claimed by a coastal State, it superimposes on the contiguous zone. This innovation established with the UNCLOS, presents a legal and jurisdictional framework which is different both from the one of territorial waters and the one of the high seas. As it was presented before in this work<sup>309</sup>, the rights and duties both of coastal States and third States in the EEZ are clearly established. In the EEZ the main rights that a coastal State might enjoy have an economic nature.

In fact, it has the sovereign rights for exploring and exploiting all natural resources of the zone, whether they are living or non-living or whether they involve other economic activities such as the production of energy. Along with these sovereign rights, the coastal State might exercise its jurisdiction in the EEZ with regard to the establishment and use of artificial islands or installation, marine scientific research and the preservation of maritime environment. Because for the first 12 nautical miles the EEZ is superimposed to the contiguous zone, in this area the coastal State enjoy from the rights and duties regarding the contiguous zone. In other words, along with the rights and duties expressed in article 56 of the UNCLOS, in the first 12 nautical miles from the limit of the territorial waters a coastal State which claimed an EEZ has also the control and the jurisdiction to punish any infringement of its customs, fiscal, immigration or sanitary laws and regulations. This control might be done even through the hot pursuit of a suspected vessel in the respect of the provisions of article 111 of the

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<sup>308</sup> T. OEHMKE, *International Arbitration*, CBC – Clark, Boardman, Callaghan, New York, 1990, pp. 213-214;

<sup>309</sup> See Part III, Chapter 7;

convention of Montego Bay. In fact, according to this article, a coastal State might start a pursuit only if there has been a violation of its domestic rights and regulations related to that specific area of the sea.

The Union of India extended its penal code and its code of criminal procedure to its EEZ and this is at the basis of the Indian claim for its jurisdiction over the case in point. However, this extension through a domestic act of the Parliament does not seem lawful. In fact, it does not involve any rules regarding the rights according to which a coastal State is sovereign in its EEZ. The practice of extending part of its domestic legislation that does not involve economic rights in the EEZ is not unusual. On the other hand, as it was presented, this practice is not spread enough to talk about the formation of a new international custom. Moreover, this claims of coastal authority do not enjoy support in the international community<sup>310</sup>, thus leading to a breach of international law. If legislative jurisdiction is beyond lawful limits, then any consequent enforcement jurisdiction is unlawful.<sup>311</sup> At this point, it is clear that Indian law is not applicable in the case in point and the only legal framework that should solve this complex situation is international law both because the incident did not happen in the Indian territory and because the prosecuted people are officials of the State of Italy.

The fact that two State officials are involved in a domestic trial represents a violation of the principle *par in parem non habet iurisdictionem*. This can be maintained because it is widely recognized that any act performed by a State organ in the discharge of its official duty has not to be considered as a personal act, but an action of the State. As a direct consequence, any responsibility deriving from such act should not be imputable personally to the State official, but it is attributable to the sovereign State itself. The members of armed forces, including the ones involved in countering piracy on board of private vessels, enjoy immunity *ratione materiae* as they are State organs. As such, any activity conducted for their missions is not attributable directly to them, but to their national State.

The only limitation to the grant of immunity is represented by the gross violation of human rights or humanitarian law or the gross violation of the territorial sovereignty of another State. The lack of bilateral or multilateral agreements that establish the situation in which immunity is granted does not seem a limit for the application of this institution

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<sup>310</sup> D. J. ATTARD, *The Exclusive Economic Zone in International Law*, Clarendon Press, Oxford, 1987, pp. 51-52;

<sup>311</sup> I. BROWNLIE, *Principles of Public International Law*, p. 308;

which is considered to establish a clear rule of international law since the *McLeod* case. The fact that the case here analysed involves a firing incident, thus recalling criminal jurisdiction, is not a bar from the application of immunity *ratione materiae*. In fact, the conduct covered by such principle does not have to be lawful to attract immunity.

Finally, it is worth recalling that a State organ which is performing an act *iure gestionis* which is attributable to the State is indeed acting in the discharge of its official capacity and it would enjoy immunity *ratione materiae* for that act<sup>312</sup>. The decision to use VPDs on board of Italian merchant vessel is clearly a decision which is attributable to Italy and every action taken by the members of this military teams was or would be conducted in the discharge of their functions to prevent and suppress piracy in the High Risk Area. All the examples of jurisprudence given in Chapter 5 of this work have to be considered as a confirmation of this basic principle and they reaffirm once more the importance and the relevance of the institution of immunity *ratione materiae* in international law and in the framework of international relations.

A jurisprudential precedent might be useful to understand which principles should find application in the *Marò* case. The judgment that was more recalled is the important sentence of the Permanent Court of International Justice regarding the *Lotus* case. Nevertheless, the principles established in that important judgment seem to be replaced by the well-established principle of the law of the flag which is clearly stated in article 97 of the UNCLOS and which form part of international customary law. Accordingly, the State of the flag is responsible for all the events and for all the people on board of any ship flying its flag. This principle “supersedes the territorial principle, even for purposes of criminal jurisdiction of personnel of a merchant ship, because it is deemed to be a part of the territory of that sovereignty whose flag it flies”<sup>313</sup>.

The necessity of a settlement of this complex and unique case at an international level and not through domestic courts has several reasons. First of all, this situation involves numerous aspects of international law which need to be clarified, for example the role of interpretative declarations, or the recognition of the principles for claiming jurisdiction, or the recognition of immunity *ratione materiae* to the members of armed forces, or the “case in the case” which involved Ambassador Mancini. All these aspects need to be settled by an international organ and not by a domestic court. Any domestic

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<sup>312</sup> General Assembly resolution A/CN.4/596, *Immunity of State officials from foreign criminal jurisdiction*;

<sup>313</sup> U.S. Supreme Court, judgment of 6<sup>th</sup> January 1953, *Lauritzen v. Larsen* – 345 U.S. 571;

judgment to this case might endanger the development or the crystallization of fundamental principles of international law. A domestic sentence which recourses to domestic law would be misleading and biased because in any case involving State organs immunity *ratione materiae* has to function as a bar for the domestic judgment in order to protect the fundamental principle *par in parem non habet iurisdictionem*.

After the recourse to negotiations between Italy and India in order to find a solution of this situation and after the slow and limited results, at this point the problem does not rely on the absence of international means to solve disputes. The real problem is the nearly absent possibility to reach an agreement between the parties involved to submit the case to a third party. However, this does not mean that there is not a possible solution to the *Marò* case. On the contrary, there are several viable methods which can be activated in order to have a clarification over the case in question. Apart from all the peaceful means which would lead to a non-binding decision, the State of Italy might unilaterally submit the case in point to a court of arbitration for a binding solution in accordance with the framework of the settlement of disputes established by the UNCLOS. Moreover, a binding settlement of the “case in the case”, the events that involved Ambassador Mancini, might be discussed by the ICJ. As it was presented before, the Government of Rome might unilaterally invoke the application of the Optional Protocol concerning the Compulsory Settlement of Disputes for the Vienna Convention on Diplomatic Relations.

It is worth noting that the submission of the *Marò* case to arbitration does not impede the submission of the Mancini case to the ICJ and vice versa. These actions might be taken at the same time to settle the situations concerning the violation of the diplomatic immunity from part of the Union of India, through the ICJ, and regarding the application or interpretation of the UNCLOS, through arbitration. Nevertheless, an important aspect would remain unresolved through this solution. In fact, because the court of arbitration which is unilaterally invoked through Part XV of the UNCLOS would sentence only matters related to the interpretation or application of this convention, the question concerning the recognition of immunity *ratione materiae* to the members of armed forces would not be analysed in the award.

To conclude, some final considerations have to be made. First of all, the practice of the deployment of VPDs on board of commercial vessels to counter piracy attacks in the High Risk Area has proved to be an important tool. The reduction of the number of attacks and of pirated ships clearly indicates that the presence of armed personnel on

board of private ships served as a good deterrent against pirates. However, the activity and the role of these armed forces is scarcely regulated at an international level or it is not regulated at all.<sup>314</sup> The best solution would be an international convention on this matter, even if the complexity of the phenomenon might rise different points of view among the members of the international community. The *Marò* case could be the starting point for a reflection over the mistakes that is necessary to avoid in the future.

Secondly, the question of jurisdiction in the EEZ and the question regarding the Indian notification have to find a conclusive answer. “No principle of general law is more universally acknowledged than the perfect equality of nations. The largest and the smallest have equal rights, whatever their relative power. The result from this equality is that no one nation can rightfully impose a rule on another”.<sup>315</sup> The EEZ is an area of the sea which is beyond and adjacent to the territorial sea, but it cannot be considered as part of the territorial waters. As such, no one State can extend its jurisdiction over this area out of the relevant provisions expressed in the UNCLOS. “*Ce régime juridique [...] a un fondement exclusivement fonctionnel et se décompose en droits et titres de juridiction pour l’État côtier et en droits et libertés pour les autres États.*”<sup>316</sup> [this legal system has exclusively functional grounds and it can be divided into rights and titles of jurisdiction for the coastal State and into rights and freedoms for third States].

By following the provisions of the UNCLOS, more precisely article 58, it is undeniable that the flag State principle finds application in the EEZ. Accordingly, in the *Marò* case the only State which has jurisdiction is the Republic of Italy, even if the events between the “*Enrica Lexie*” and the “*St. Antony*” are not considered an incident of navigation. In fact, the cardinal principle of the exclusive jurisdiction of the flag State is reestablished different times in the UNCLOS<sup>317</sup>. Thanks to the provisions of article 58, all these articles regarding the high seas find application also in the EEZ. The direct result is the extension of the flag State principle also to the EEZ. As a consequence, the Indian notification thanks to which the Government of New Delhi extended its penal code and its code of criminal procedure has no power in the Indian EEZ, but it can operate within the limits of the territorial waters.

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<sup>314</sup> 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. 23;

<sup>315</sup> T. OEHMKE, *International Arbitration*, p. 214;

<sup>316</sup> P. DAILLIER, A. PELLET, *Droit International Public*, p. 1129;

<sup>317</sup> United Nations Convention on the Law of the Sea, articles 92, 94, 97;

Thirdly, the question of immunity should be analysed and interpreted in the light of recent development made by the International Law Commission. The most relevant documents are the UN Convention on Jurisdictional Immunities of States and their Property of 2004 and the analysis on immunity of State officials from foreign criminal jurisdiction produced in 2008. According to the ILC, the most relevant aspect in the need for armed forces to enjoy immunity is the fact that they have to act in an apparent official capacity or under colour of authority<sup>318</sup>. No other element is essential to attract immunity. In fact, even in cases of acts committed *ultra vires* the State organ enjoys immunity. In other words, immunity *ratione materiae* has to be granted for any act which does not represent a gross violation of a territorial sovereignty of another State, which constitutes an infringement of humanitarian law or which can be considered an international crime. Some doubts might rise in the distinction between *acta iure imperii* and *acta iure gestionis*. However, by recalling the position of the ILC, “there would be reasonable grounds for considering that a State organ performing an act *iure gestionis* which is attributable to the State is indeed acting in his or her official capacity and would therefore enjoy immunity *ratione materiae* in respect of that act”.<sup>319</sup>

The same rationale has to apply to the case of VPDs on board of commercial vessels. It is true that their main duty is to defend a private ship and its crew from pirate attacks. However, they do not lose their status of members of armed forces because the choice to deploy members of the national Army on board of private vessels is a decision deriving from the State authority. The VPDs are performing official acts even if they are on board of private ships and, therefore, the institution of immunity *ratione materiae* has to be extended also to their acts. The institution of immunity represents a basic pillar of international law and international relations in general and it finds its roots since the *McLeod* case, thus representing one of the most important principles of international customary law. The modern practice to adopt bilateral or multilateral agreements, such as the SOFAs, does not erase this custom, but it simply indicates a practice of the members of the international community to fix the rules for granting immunity to foreign organs.

Finally, it seems undeniable that immunity *ratione materiae* has to be granted to the members of armed forces of a State which are in discharge of their official functions. As such, every act committed, even conduct *ultra vires*, does not give rise to personal

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<sup>318</sup> See footnote 144;

<sup>319</sup> See footnote 147;

responsibility of the single member of the Army, but it gives rise to State responsibility. As a direct consequence, following the principle *par in parem non habet iurisdictionem*, no domestic courts are entitled to judge the conduct of foreign States. The only way to solve the situation is at an international level. In this work it has been presented different ways that might be used to find an adjustment of the *Marò* case both through non-binding methods and binding ones. However, the complexity of the case indicates that it should be settled through a judicial mean in order to have a final and binding decision that encompasses all the elements of the situation.

On the other hand, we saw that an agreement between the parties involved that is necessary to submit the case to a court is far from being reached. The only solution for the State of Italy seems to unilaterally invoke the constitution of an arbitral tribunal in accordance with provisions of article 287 of the UNCLOS and, at the same time, to unilaterally submit the events that involved Ambassador Mancini to the ICJ for the violation of diplomatic relations. Along with these two actions, the Government of Rome might submit the case to the General Assembly which can make a recommendation. The aim of this action is to have an opinion on the issues which cannot be settled through the ICJ and arbitration invoked thanks to the UNCLOS. In fact, the judgment of these judicial courts would be bound, respectively, to the determination of the norms governing diplomatic relations and the interpretation and application of the provisions of the Convention of Montego Bay, leaving apart the fundamental matter of the recognition of the status of immunity for armed forces. In this way, all the aspects of this complex situation would find an interpretation and the *Marò* case would be closer to a solution.

Nevertheless, in my opinion this path should be taken only if there is no other means to solve the situation. It is highly probable that these actions would have strong consequences on the relations between Italy and India, mainly on the economic relations. In the last two decades, the commercial trade between the two countries has grown until 1,200% , and this data is estimated to grow in the following years.<sup>320</sup> For this reason it is necessary to find a solution which does not seem enforced. Conciliation might be the solution. The form of conciliation has a semi-judicial aspect because the commission has to clarify the facts, it might hear the parties and it must make a proposal

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<sup>320</sup> Information available at: [www.infomercatiesteri.it](http://www.infomercatiesteri.it);

for a settlement which does not bind the parties.<sup>321</sup> The State of Italy might unilaterally invoke the application of compulsory conciliation through Annex V of the UNCLOS, but the commission would only judge issues related to the interpretation and application of the Convention. The recourse to a conciliation commission would delineate once for all the events at the basis of the *Marò* case. Moreover, it does not involve a “win or lose” conclusion because, even if it should make proposals for settling the situation, these are not binding.

An agreement for the creation of a conciliation commission between Italy and India might be easily reached if the Government of Rome would inform its possibility to resort to binding solutions which can be unilaterally invoked. In fact, if the Union of India has to choose between a judicial settlement with a binding solution and a method which leads to a non-binding proposal, it seems quite clear that the Government of New Delhi would choose the latter. In this way, the conciliation commission activated through an agreement would be able to clarify every single situation that composes the complex and unique case here analysed. After this fact-finding, the proposal would be given and we could assist of two opposite scenarios.

On one hand, the proposal of the conciliation commission is accepted by both State and the *Marò* case would find an end. On the other hand, the recommendation is rejected, leading to another impasse for the solution of the case. On the basis of what has been written in this work, the only State that has exclusive jurisdiction over the two Italian soldiers is the State of Italy, both because it is established in this way in Part V of the UNCLOS regarding the EEZ, and because of the necessity of granting immunity *ratione materiae* to the members of armed forces of other States in discharge of official functions. As a consequence, the solution of the conciliation commission would establish the Italian jurisdiction and the Union of India might not accomplish to the recommendation. If this is the case, the State of Italy will still have the possibility to unilaterally resort to the General Assembly recommendation, the ICJ judgment regarding the Ambassador Mancini events and to an arbitral court for the issues concerning the interpretation and application of the UNCLOS, namely: the status of jurisdiction in the EEZ and the recognition of the principle of the flag State.

It is absolutely fundamental to reach a solution to the *Marò* case because it involves some of the most important principles not only of international law, but of international

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<sup>321</sup> I. BROWNIE, *Principles of Public International Law*, p. 672;

relations in general. The solution of the *Marò* case can be a unique opportunity to reaffirm and crystalize pillars of international law such as the sovereign equality of States or the division of the spaces for State jurisdiction. In order to have this development this judgment must be given by an international organ and not by a domestic court. The *Marò* case is a big challenge for international law. Its resolution through Indian domestic courts would represent a weakening of the international legal framework, thus the judgment would represent a precedent for the violation of diplomatic relations, of immunity *ratione materiae* and of the limits for the jurisdiction of States out of the territorial waters as established in the UNCLOS. There would be, therefore, the violation of exclusive jurisdiction and of the principle of *par in parem non habet iurisdictionem*. On the other hand, the settlement of the *Marò* case at an international level represents the occasion for international law to strengthen these basic assumptions which maintained and still are maintaining order in the international system and to clarify the international fight to counter piracy.

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#### **IV. Web sites**

- The official website of the Italian Ministry of Foreign Affairs: [www.esteri.it/MAE/IT](http://www.esteri.it/MAE/IT);
- The official website of the Italian Ministry of Home Affairs: [www.interno.gov.it](http://www.interno.gov.it);
- The official website of the Indian Ministry of External Affairs: [www.mea.gov.in](http://www.mea.gov.in);
- The official website of the United Nations: [www.un.org](http://www.un.org);
- The official website of the North Atlantic Treaty Organization: [www.nato.int](http://www.nato.int);
- The official website of the Supreme Court of India: [www.supremecourtfindia.nic.in](http://www.supremecourtfindia.nic.in);
- The official website of the International Court of Justice: [www.icj-cij.org](http://www.icj-cij.org);
- The official website of the United Kingdom Hydrographic Office: [www.ukho.gov.uk](http://www.ukho.gov.uk);
- The official website of the Italian Institute of International Affairs: [www.iai.it](http://www.iai.it);
- The official website of the European Union: [europa.eu](http://europa.eu);
- The official website of the Combined Maritime Forces: [www.combinedmaritimeforces.com](http://www.combinedmaritimeforces.com);
- The official website of the European Union Naval Force mission: [www.eunavfor.eu](http://www.eunavfor.eu);
- The official website of the Italian Navy: [www.marina.difesa.it](http://www.marina.difesa.it);
- The official website of the International Chamber of Commerce – Commercial Crime Service: [www.icc-ccs.org](http://www.icc-ccs.org);
- The official website of International Maritime Organization: [www.imo.org](http://www.imo.org);
- The official website of the Italian Government: [www.governo.it](http://www.governo.it);

- The official website of the Peace Palace Library: [www.peacepalacelibrary.nl](http://www.peacepalacelibrary.nl);
- The official website of the Maritime Security Centre - Horn of Africa: [www.mschoa.org](http://www.mschoa.org);
- The official website of the US Department of Transportation – Maritime Administration: [www.marad.dot.gov](http://www.marad.dot.gov);
- The official website of the Lloyd’s newspaper for the maritime industry: [www.lloydslist.com/ll](http://www.lloydslist.com/ll);
- The official website of the Italian Senate: [www.senato.it](http://www.senato.it);
- The official website for the access to the European Union law: [eur-lex.europa.eu](http://eur-lex.europa.eu);
- The official website of the US Supreme Court: [supreme.justia.com](http://supreme.justia.com);
- The official website of the Italian Parliament: [www.parlamento.it/home](http://www.parlamento.it/home);
- The official website of the Lowy Institute for International Policy: [www.lowyinstitute.org](http://www.lowyinstitute.org);
- The official website of the International Code of Conduct for Private Security Service Providers: [www.icoc-psp.org](http://www.icoc-psp.org);
- The official website of the Information Sharing Centre of the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia: [www.recaap.org](http://www.recaap.org);
- The official website of the NATO Shipping Centre: [www.shipping.nato.int](http://www.shipping.nato.int);
- The official website of the Singapore Ministry of Defence: [www.mindef.gov.sg](http://www.mindef.gov.sg);
- The official website of the Contact Group on Piracy off the Coast of Somalia: [www.thecgpcs.org](http://www.thecgpcs.org);
- The official website of the Indian Coast Guard: [indiancoastguard.nic.in](http://indiancoastguard.nic.in);
- The official website of the International Criminal Court: [www.icc-cpi.int](http://www.icc-cpi.int);
- The official website of the Food and Agriculture Organization of the United Nations: [www.fao.org](http://www.fao.org);
- The official website of the United Nations Peacemaker: [peacemaker.un.org](http://peacemaker.un.org);
- The official website of the Italian Ministry of Foreign Affairs for International Trade: [www.infomercatiesteri.it](http://www.infomercatiesteri.it)
- The official website of the US Energy Information Administration: [www.eia.gov](http://www.eia.gov);
- The official website of the Press Information Bureau of the Government of India: [pibmumbai.gov.in](http://pibmumbai.gov.in);
- The official website of the European Union External Action: [eeas.europa.eu](http://eeas.europa.eu);

- The official website of the blog of the European Journal of International Law: [www.ejiltalk.org](http://www.ejiltalk.org);
- The official website of the Directorate General of Shipping of the Indian Ministry of Shipping: [dgshipping.gov.in](http://dgshipping.gov.in);
- The official website of the United Nations Treaty Collection: [treaties.un.org](http://treaties.un.org);
- The official website of the Indian National Investigation Agency: [www.nia.gov.in](http://www.nia.gov.in);

## V. Documents of International Organizations

### A) European Union

- Council Decision 2008/918/CFSP on the launch of a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta), 8th December 2008;

### B) United Nations

- Reports of International Arbitral Awards, *Delimitation of the maritime boundary between Guinea and Guinea-Bissau*, judgment of 14<sup>th</sup> February 1985, vol. XIX, pp. 149-196;
- General Assembly resolution A/RES/2625(XXV), *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*;
- General Assembly resolution A/RES/62/66/, *Report of the International Law Commission on the work of its fifty-ninth session*;
- General Assembly resolution A/CN.4/596, *Immunity of State officials from foreign criminal jurisdiction*;
- General Assembly resolution A/59/49, *Official Records of the General Assembly, Fifty-ninth Session, Supplement N° 49*;
- General Assembly resolution A/CN.4/614, *Fourteenth report on reservations to treaties, by Alain Pellet, Special Rapporteur*;
- General Assembly resolution A/CN.4/614/Add.1, *Fourteenth report on reservations to treaties, by Alain Pellet, Special Rapporteur*;
- General Assembly resolution A/CN.4/614/Add.2, *Fourteenth report on reservations to treaties, by Alain Pellet, Special Rapporteur*;

- General Assembly resolution A/CN.4/624, *Fifteenth report on reservations to treaties, by Alain Pellet, Special Rapporteur*;
- General Assembly resolution A/CN.4/624/Add.1, *Fifteenth report on reservations to treaties, by Alain Pellet, Special Rapporteur*;
- General Assembly resolution A/CN.4/624/Add.2, *Fifteenth report on reservations to treaties, by Alain Pellet, Special Rapporteur*;
- General Assembly resolution A/59/894, *Measures to eliminate international terrorism*;
- General Assembly resolution A/RES/375(IV), *Draft Declaration on Rights and Duties of States*;
- Resolution S/RES/1814(2008), adopted by the Security Council at its 5893<sup>rd</sup> meeting on 15<sup>th</sup> May 2008;
- Resolution S/RES/1816(2008), adopted by the Security Council at its 5902<sup>nd</sup> meeting on 2<sup>nd</sup> June 2008;
- Resolution S/RES/1838(2008), adopted by the Security Council at its 5987<sup>th</sup> meeting on 7<sup>th</sup> October 2008;
- Resolution S/RES/1846(2008), adopted by the Security Council at its 6039<sup>th</sup> meeting on 12<sup>th</sup> December 2008;
- Resolution S/RES/1851(2008), adopted by the Security Council at its 6046<sup>th</sup> meeting on 16<sup>th</sup> December 2008;
- Resolution S/RES/1897(2009), adopted by the Security Council at its 6226<sup>th</sup> meeting on 30<sup>th</sup> November 2009;
- Resolution S/RES/1918(2010), adopted by the Security Council at its 6301<sup>st</sup> meeting on 27<sup>th</sup> April 2010;
- Resolution S/RES/1950(2010), adopted by the Security Council at its 6429<sup>th</sup> meeting on 23<sup>rd</sup> November 2010;
- Resolution S/RES/1970(2011), adopted by the Security Council at its 6491<sup>st</sup> meeting on 26<sup>th</sup> February 2011;
- Resolution S/RES/1973(2011), adopted by the Security Council at its 6498<sup>th</sup> meeting on 17<sup>th</sup> March 2011;
- International Law Commission, *Guide to Practice on Reservations to Treaties*, in *Yearbook of the International Law Commission*, vol. II, part 2, 2011;

- International Law Commission, *Draft Articles on Diplomatic Protection*, in *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10)*

### **C) International Maritime Organization**

- MSC/Circ.622/Rev.1 on *Recommendations to Governments for preventing and suppressing piracy and armed robbery against ships as it may be revised*, 19<sup>th</sup> June 1999;
- MSC/Circ.623/Rev.3 on *Guidance to shipowners and ship operators, shipmasters and crews on preventing and suppressing acts of piracy and armed robbery against ships as it may be revised*, 29<sup>th</sup> May 2002;
- Current Awareness Bulletin, vol. XX – n° 9, November 2008
- Resolution C/102/14, *Protection of Vital Shipping Lanes, Sub-regional meeting to conclude agreements on maritime security, piracy and armed robbery against ships for States from the Western Indian Ocean, Gulf of Aden and Red Sea areas*, 3<sup>rd</sup> April 2009;
- MSC/Circ. 1406 on *Interim recommendations for flag States regarding the use of privately contracted armed security personnel on board ships in the High Risk Area*, 23<sup>rd</sup> May 2011;
- MSC.1/Circ.1339 on *Piracy and armed robbery against ships in waters off the coast of Somalia, implementing the Best Management Practices for protection against Somalia based piracy*, 14<sup>th</sup> September 2011;
- MSC/Circ. 1405/Rev. 1 on *Revised interim guidance to shipowners, ship operators, and shipmasters on the use of privately contracted armed security personnel on board ships in the High Risk Area*, 16<sup>th</sup> September 2011;
- MSC/Circ. 1405/Rev. 2 on *Revised interim guidance to shipowners, ship operators, and shipmasters on the use of privately contracted armed security personnel on board ships in the High Risk Area*, 25<sup>th</sup> May 2012;
- Piracy and Armed Robbery against ships – annual report (1<sup>st</sup> January – 31<sup>st</sup> December 2012);
- MSC.4/Circ.193/Annex - 2 on *Reports of acts of piracy and armed robbery against ships – Annual Report 2012*, 2<sup>nd</sup> April 2013;

## **VI. International Jurisprudence**

### **A) Permanent Court of International Justice**

*Mavrommatis Palestine Concessions (Greece v. United Kingdom)*, P.C.I.J., 1924, (Series. A), n° 2;

*Exchange of Greek and Turkish Populations*, P.C.I.J., 1925, (Series. B), n° 10;

*S.S. "Lotus" (France v. Turkey)*, P.C.I.J., 1927, (Series. A), n° 10;

*Greco-Bulgarian communities case*, P.C.I.J., 1930, (Series. B), n° 17;

*Treatment of Polish Nationals and other persons of Polish origin or speech in the Danzing Territory*, P.C.I.J., 1931, (Series. A/B), n° 44;

### **B) International Court of Justice**

*North Sea Continental Shelf cases (Federal Republic of Germany v. Denmark/Federal Republic of Germany v. Netherlands)*, judgment of 20<sup>th</sup> February 1969;

*Fisheries Jurisdiction cases (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, judgment of 25<sup>th</sup> July 1974;

*Nuclear tests case – Australia v. France*, judgment of 20<sup>th</sup> December 1974;

*Case concerning maritime delimitation and territorial questions between Qatar and Bahrain (Qatar v. Bahrain)*, merits, judgment of 16<sup>th</sup> March 2001;

*Case concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, judgment of 4<sup>th</sup> June 2008;

*Maritime delimitation in the Black Sea (Romania v. Ukraine)*, judgment of 3<sup>rd</sup> February 2009;

### **C) International Criminal Tribunal for the Former Yugoslavia**

*Prosecutor v. Blaškić*, (Case n° IT-95-14), Appeals Chamber, Judgment on the Request of the Republic of Croatia for the review of the decision of Trial Chamber II of 18<sup>th</sup> July 1997;

#### **D) European Court of Human Rights**

*Case of Al-Adsani v. United Kingdom*, Application N° 35763/97, Judgment of 21<sup>st</sup> November 2001

#### **E) Court of Justice of the European Union**

*Joined Cases 89/85, 114/85, 116-117/85, 125-129/85, A. Ahlström Osakeyhtiö v. Commission (Wood Pulp)*, judgment of 27<sup>th</sup> September 1988;

#### **F) International Tribunal for the Law of the Sea**

*The M/V “Saiga” case, Saint Vincent and Grenadines v. Guinea*, judgment of 1<sup>st</sup> July 1999, n°2;

### **VII. National Legislation and Jurisprudence**

#### **A) National Legislation**

##### **India**

- Indian Penal Code, adopted on the 6<sup>th</sup> October 1860, entered into force on the 1<sup>st</sup> January 1962;
- The Constitution of India, adopted on the 26<sup>th</sup> November 1949, entered into force on the 26<sup>th</sup> January 1950;
- Code of Criminal Procedure, Act n° 2 of 1974, adopted on 25<sup>th</sup> January 1974, entered into force on 1<sup>st</sup> April 1974;
- The Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976, (Act n° 80), 28<sup>th</sup> May 1976;
- The Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002, (Act n°69), 20<sup>th</sup> December 2002;
- The National Investigation Agency Act, 2008, (Act n° 34), 31<sup>st</sup> December 2008;

##### **Italy**

- Codice penale, adopted with R.D. 19<sup>th</sup> October 1930, n° 1398;
- Codice Penale Militare di Pace, adopted with R.D. 20<sup>th</sup> February 1941, n° 303;
- Codice di Navigazione, adopted with R.D. 30 marzo 1942, n° 327;

- Costituzione della Repubblica Italiana, adopted on 22<sup>nd</sup> December 1947, entered into force on the 1<sup>st</sup> January 1948;
- Decreto legge 1 dicembre 2001, n° 421, regarding “*Disposizioni urgenti per la partecipazione di personale militare all'operazione multinazionale denominata "Enduring Freedom"*”, in G.U. n° 282, 4<sup>th</sup> December 2001;
- L. 31 gennaio 2002, n° 6, regarding “*Disposizioni urgenti per la partecipazione di personale militare all'operazione multinazionale denominata "Enduring Freedom". Modifiche al codice penale militare di guerra, approvato con regio decreto 20 febbraio 1941, n. 303*”, in G.U. n° 28, 2<sup>nd</sup> February 2002;
- L. 24 febbraio 2009, n° 12, regarding “*Partecipazione italiana a missioni Internazionali*”, in G.U. n° 47, 26<sup>th</sup> February 2009;
- Decreto legge 15 giugno 2009, n° 61, regarding “*Disposizioni urgenti in materia di contrasto alla pirateria*”, in G.U. n° 137, 16<sup>th</sup> June 2009;
- L. 29 dicembre 2009, n° 197, regarding “*Proroga degli interventi di cooperazione allo sviluppo e a sostegno dei processi di pace e di stabilizzazione, nonche' delle missioni internazionali delle Forze armate e di polizia*”, in G.U. n° 303, 31<sup>st</sup> December 2009;
- L. 2 agosto 2011, n° 130, regarding “*Misure antipirateria*”, in G.U. n° 181, 5<sup>th</sup> August 2011;
- Decreto del Ministro della Difesa, regarding “*Individuazione dell'Area a Rischio Pirateria*”, in G.U. n° 12, 12<sup>th</sup> September 2011;
- Protocollo di Intesa tra Ministero della Difesa e Confederazione Italiana Armatori (CONFITARMA), Roma, 11th October 2011;
- Convenzione tra il Ministero della Difesa e l'Armatore, allegato al “Protocollo di Intesa Difesa-CONFITARMA”, Roma, 11th October 2011;

#### **Other Italian documents**

- Senato della Repubblica, *Informativa del Ministro degli Affari esteri sull'uccisione di un cittadino italiano rapito in Nigeria e sull'arresto di due militari in India e conseguente discussione*, 13th March 2012, pp. 7-8;
- Embassy of Italy in New Delhi, note verbale n° 100/685 of 15<sup>th</sup> March 2013;
- Camera dei Deputati, XVII Legislatura, Resoconto stenografico della seduta del 26 marzo 2013, pp. 15-18;

## **B) National Jurisprudence**

### **India**

- Supreme Court, judgment of 4<sup>th</sup> February 1980, *Jolly George Verghese & Anr. v. the Bank of Cochin*, 1980 AIR 470, 1980 SCR (2) 913;
- Supreme Court, judgment of 26<sup>th</sup> February 1992, *M.V. Elisabeth and Ors. v. Harwan Investment and Trading*, 1993 AIR 1014, 1992 SCR (1)1003;
- High Court of Kerala, judgment of 29<sup>th</sup> May 2012, *Massimiliano Latorre v. Union of India*, 252 KLR 794;
- Supreme Court, judgment of 18<sup>th</sup> January 2013, *Republic of Italy thr. Ambassador & Ors. v. Union of India & Ors.*; SLP(C) NO. 20370 of 2012
- Supreme Court, note of 14<sup>th</sup> March 2013, n° 4/2013;

### **Italy**

- Constitutional Court, judgment n° 223 of 27<sup>th</sup> June 1996, “*Venezia*” case;
- Tribunal of Trento, judgment n° 161 of 13<sup>th</sup> July 1998, *Incidente del Cermis*;
- Court of Cassation, judgment of 19<sup>th</sup> June 2008, *Procuratore Generale della Repubblica v. Mario Luiz Lozano*, section I, n° 31171/2008;

### **United Kingdom**

- High Court of Justiciary of Scotland, judgment of 5<sup>th</sup> January 1906, *Mortensen v. Peters case*, 8F. (JC), 93
- England and Wales High Court, judgment of 29<sup>th</sup> July 2011, *Bat v. Investigating Judge of the German Federal Court*, Case No: CO/3672/2011 and CO/1655/2011, EWHC 2029;
- House of Lords, judgment of 14<sup>th</sup> June 2006, *Jones (Respondent) v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Appellants); Mitchell and others (Respondents) v. Al-Dali and others and Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Appellants); Jones (Appellant) v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Respondents) (Conjoined Appeals)*, UKHL 26;

## **United States**

- U.S. Supreme Court, judgment of 24<sup>th</sup> February 1812, *The Schooner Exchange v. McFaddon* – 11 U.S. 116;
- U.S. Supreme Court, judgment of 6<sup>th</sup> January 1953, *Lauritzen v. Larsen* – 345 U.S. 571;