

Department of Political Science

Chair of International Law

The controversy Italy-India:

**The functional immunity of armed military personnel on board
a private vessel**

(Abstract)

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Reconstruction of the dispute; Legal matters; Functional immunity; Private company for maritime safety Piracy today; Conclusions

The aim of this thesis is to analyze the controversy which began in February 2012 between Italy and India. Though an examination of the conflict with different perspectives, a heightened understanding of the issues in this conflict will be acquired. First of all, we will overview the dynamics of the case; beginning with the incident up until current day, by retracing the crucial events in the development of the issue. The functional immunity norm in India is one of these norms which was affected by the involvement of Italy even though the issues has not been discussed in Indian courts. Closely related to the February 2012 incident, this norm is one that will become paramount as soon as the diatribe about the jurisdiction ends.

It also assesses the current role that maritime piracy currently holds, especially in the high risk waters of the Gulf of Aden or in the Indian Ocean. In these waters the main anti-piracy strategies used by international forces including the presence of both private and state armed forces on board of merchant vessels and they're legal status which is still under discussion today.

Reconstruction of the dispute

On the 15 of February 2012, Massimiliano Latorre and Salvatore Girone, two marines of the Italian navy belonging to the San Marco Battalion ("Rifles" or "Marò"), boarded the tanker *Enrica Lexie*, in order to protect it against possible pirates attacks. They fired against a vessel composed of eleven subjects who had been mistaken for pirates, causing the death of two Indian civilians.

In the aftermath, the Italian oil tanker resumed her route towards the Gulf of Aden. Subsequently, due to the requirements of the Indian Coast Guard, *Enrica Lexie* headed to the port of Kochi. The *locus commissi delicti* has long been controversial, and has now been identified around twenty and thirty miles from the coast of the State of Kerala, India.

While local authorities have said that the incident was held in the area under the jurisdiction of Kerala, the Italian defense has insisted that those involved at the time of the offense were not in the territorial waters of the State of India, consequently the Indian authorities could not have intervened in the affair.

On January 18th, 2013 with the criminal proceedings already on trial in the capital of Kerala, the Supreme Court of India issued an order ruling a lack of jurisdiction towards the proceedings that took place until then, and assigned it to the jurisdiction of a special court in New Delhi.

As later confirmed by the Italian Ministry of Foreign Affairs, the Supreme Court had formally

recognized that the incident occurred in non-territorial waters. Although there was a failure by the courts of Kerala, the trial cannot be transfer to the Italian institutions. It is transferred to a competent Indian court in order to judge over federal affairs. The issue on the legal status of the two Riflemen remains controversial, they are defined by the Supreme Court as mere contractors and not as state bodies, deemed so by the Italian authorities.

Legal Matters

The main issues to be addressed, following the reconstruction of the facts, concern (i) the jurisdiction and (ii) the regime of immunity provided by foreign state bodies.

In order to determine which is the competent institution to rule on the dispute in question we need to look at what legal regime applies to the conduct of an organ of the State that exercises its functions and when it can be defined as such. It will be necessary to analyze the standards related to the powers of the coastal State in the maritime zones, the powers of the States in the high seas and the resulting criteria for the allocation of jurisdiction. In addition, the *ratione personae* or *materiae* immunity of the individual-organ. A brief background will be useful in reference to the provisions aimed at combating the phenomenon of piracy.

Functional Immunity

According to a the rule of customary international law, established to safeguard the state organizations, "the conduct of any State organ shall be considered an act of that State"¹. According to Article 4 of the Draft Articles on State Responsibility of the International Law Commission (2001), moreover, is considered an act of a State the act of any organ of the State, carries it "legislative, executive, judicial or any other position in the organization of the State and whatever its nature as an organ of the central government or of a territorial unit of the State." It include, therefore, all the organs of the State authorized to represent the state in international relations or to express the will of the same².

Although functional immunity is an expression of a customary rule generally recognized by all States (an exception is provided for international crimes), the question still remains what is its legal nature in the doctrine. In particular, it provides the possibility to be considered as part of the category of (i) reasons for exclusion from a sentence (ie the causes which have as effect the non-application of the penalty, even in the presence of a fact of the crime); (ii) the causes of justification

1 Advisory Opinion of April 19th,1999 on the subject of immunity from the jurisdiction of a Special Rapporteur of the Commission on Human Rights, ICJ Recueil 1999, RDI, 1999: 783, par. 62 See also the 1996 project of the International Law Commission (art. 6).

2 T. Treves, *diritto internazionale*, Giuffrè, Milan, 2005.

(exercise of a right, fulfillment of a duty); (iii) the inability or criminal proceedings; or (iv) to consider it a form of removal from power of criminal coercion³.

From the point of view of international law, the recognition of immunity is derived from the need to maintain diplomatic relations with foreign states, to guarantee a peaceful coexistence between peoples and to lead us to recognize in itself the mere restrictions on the exercise of judicial power⁴. This would be confirmed by the provisions of the UN Convention on Jurisdictional Immunities of States and Their Property (New York, December 2, 2004). However, this convention which, although has not yet been ratified by the Indian state and Italy is not being a Party petitioner, as stated in its preamble. If this convention applied to these two countries, it would codify certain principles of customary international law generally recognized⁵.

The functional immunity, therefore, it is considered as primary international source and, once recognized, should be applied regardless of the *locus commissi delicti*⁶. In this specific case, it wouldn't be necessary to clear if the event is occurred in the Exclusive Economic Zone, in the contiguous water or even in the territorial sea of the State, since the two Italian Marines, acting in the exercise of their functions, should enjoy immunity, ascertainable by the Indian authorities. The latter, although would not call into question the institution itself, until today, yet would have not been considered to be able to grant it to the Marò.

Once it is clear the institute of functional immunity in international law, therefore, it remains to analyze the case in reference to it, and thus make an assessment as to whether or not to believe the Marines of the Italian navy actually fulfilling public functions time of the event.

In a series of measures made in order to combat the phenomenon of piracy at international level, Italy has issued Decree-Law no. 107 of July 12th, 2011 (subsequently converted into Law no. 130 of August 2nd, 2011), in which is stated in the "International missions of the armed forces and police," in Article 5 "Further measures to combat piracy," provides:

(1) 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

3 Fiandaca G., E. Musco, Diritto Penale - General Part, Wadsworth Publishing Company, 2007.

4 M. Romano, Commentario sistematico del codice penale, Giuffrè, Milan, 2004.

5 With regard to the immunity of States, art. 5, states that: "A State enjoys immunity, in respect of his person and property, from the jurisdiction of the courts of a State subject to the provisions of this Convention." Moreover, as regards the arrangements for giving effect to immunity of the State, Art. 6, states that "A State shall give effect to immunity of the State in accordance with Article 5 refraining from exercising jurisdiction in a proceeding pending before its courts against another State and to this end will ensure that its courts ascertain automatically that the immunity of the other State in accordance with Article 5 is respected. "

6 In reference to immunity function, you can find several cases in international practice in which both were granted or refused, officers of the armed forces. For example, see the deal McLeod (1841), the Rainbow Warrior affair (1980), the case of Nicaragua v. United States (1986), the case Cermis (2000) and the recent deal Mavi Marmara (2010).

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.

(2) Il personale militare componente i nuclei di cui al comma 1 opera in conformità alle direttive e alle regole di ingaggio emanate dal Ministero della difesa. (...)⁷

In accordance with the provisions of the Decreto-Legge cited, with regard to the military teams, the Ministry of Defence has adopted a decree on September 1st, 2011 and the Shipowners' Association (Confitarma) concluded a protocol with the same Ministry on October 11th, 2011.

Under the rules of domestic law mentioned *ut supra*, arising from the needs of an international nature, the Italian government is firm in believing that the Marines, at the occurrence of the event, were in the exercise of its functions in representation and manifestation of the will of the same.

In contrast, the Indian state would seem, until today, to identify the two Fusiliers as mere contractors, belonging to private security services⁸. Consequently, Massimiliano Latorre and Salvatore Girone could not enjoy (and, in fact, have not enjoyed) the institute of functional immunity.

7 (1) The Ministry of Defence, as part of the international counter-piracy efforts in order to ensure the freedom of navigation of national commercial vessels may enter into accords with private Italian shipping companies and other subjects with specific power of representation of the above category conventions for the protection of vessels flying the Italian flag in transit in risk areas of international maritime piracy identified by the Minister of Defence, having consulted the Minister of Foreign Affairs and the Minister for Infrastructure and Transport, taking into account the periodic reports of the International Maritime Organization (IMO), by embarking upon request and at the expense of shipowners, Marines of the Navy (NPM), which can also make use of the staff of the other armed forces, and its armament planned for performance of the service.

(2) The military component of the NPM referred to in paragraph 1 operates in accordance with the directives and rules of engagement issued by the Ministry of Defence. (...)

8 In this regard, consider the reserve stamped by the Indian state to UNCLOS, which provides: "(...) 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 maneuvers, in particular those involving the use of weapons or explosives without the consent of the coastal State. "it should be noted that, with respect to such reserves, Italy has made a formal objection:" (...) the rights of the coastal State in the zone does not include the right to receive notification of military exercises or maneuvers or to authorize them. "There are no Italian notifications to Indian state, with regard to the Fusiliers on board Enrica Lexie, nor specific bilateral agreements in the field of piracy between the two states (on, Italy has deemed sufficient to comply with international regulations).

Private company for maritime safety

We will now analyze the most controversial, but also most interesting issue that is the so-called "private option": the ability to take on board the merchant ship private security guards in order to insure the security of the navigation of companies specialized in the fight against piracy.

The current law puts private companies in an auxiliary role to the armed forces. In other words, the shipowner may rely on this hypothesis only in the case where the NPM military protection service is not available. The owner must then submit an application to the Ministry of Defense for the availability of an NPM and only in the case of negative response he may contact a private company for maritime safety. The provision of the law, as it is currently structured, prevents the use of EU security firms (leaders in security services on board merchant ships) to carry out their services on board of Italian ships. Also excluding all security companies outside Europe, which constitute the vast majority of the market for private security armed services.

It seems clear that the very technical question it is extremely delicate and worthy of specific regulatory interventions, indispensable at present, in order to make applicable the possibility of being able to get on board private security personnel. The aspects to be clarified, as seen, are numerous and range from weapons, training, requirements, to diplomatic clearance.

We believe that the adoption of a revised and proper regulatory framework, mostly clear and enforceable can be a valuable strategic objective that might even promote and encourage the registration of the new entry with the Italian flag ship, reporting to Italy those ships which, although traceable to national interests, currently fly the flags of other countries with a more flexible and effective legislation.



Piracy today

The phenomenon of maritime piracy in recent years has shown a remarkable, progressive spread, affecting a large portion of the Indian Ocean, from the coasts of Somalia and the Gulf of Aden is spreading eastward to the coast of India; the main strategic hub of international maritime trade is located in the Gulf of Aden and the Indian Ocean where they develop two-thirds of the world's oil traffic, half the world's container traffic, a third of the trade of goods in bulk, and it is the area within 1300 ships flying the Italian flag transit annually, for an average of almost 4 per day, with peaks of up to 10 ships;

Between 2011 and 2012, there were four Italian ships attacked and boarded by pirates: the oil tanker "Savina Caylyn", with 22 crew members, boarded on February 8 by Somali pirates off the coasts of Yemen and released on December 21, 2011; the cargo ship "Rosalia D'Amato", with 22 crew members, boarded April 20 in full Arabian Sea and released November 25, 2011; the oil tanker "Enrico Ievoli", with 18 crew members, boarded in the waters off the Somali coast Dec. 27 and released April 23, 2012 following an operation conducted by the Navy and the tug-platform "Asso 21" picked up in the night between 23 and 24 December 2012 off the coast of Nigeria, from which they were abducted four seamen, currently held by pirates and whose fate nothing is known yet.

Conclusions

In light of the facts of the dispute and reconstruction of the relevant legal issues analyzed, it seems reasonable to draw the following conclusions.

In reference to the question of jurisdiction, in the event that you accept the interpretation of the Convention that in contiguous waters and in the EEZ, except for the matters specifically covered by the same Convention, subject to the sovereignty of the coastal State, the international waters regime is effective. The hypothesis of concurrent jurisdiction can therefore be envisaged, both by the Italian state or the Indian state. If, otherwise, we admit an extension of the application of criminal matters in India, to areas in which the event could have occurred between the outer limit of the territorial sea and 200 miles from the shorelines, the jurisdiction may be exercised by the Indian state⁹.

Recognizing finally the functional immunity of the Marines, which, organs of the Italian State and under which exercised their duties at the time of the offense, the court can in no case be exercised by India, regardless of the *locus delicti commissi* (this was identified in the EEZ or in the waters adjacent to the Indian coast). Welcoming the latter case, the functional immunity should be recognized by the Indian authorities and transferred to the jurisdiction of the competent Italian courts.

⁹ Under Article. 287 of UNCLOS: "At the time of signing, ratifying or acceding to this Convention or at any time thereafter, a State is free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention: (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI; (b) the International Court of Justice; (c) an arbitral tribunal constituted in accordance with Annex VII; a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories specified therein. "In this regard, the statements made in Italy and confirmed to ratification, states that:" In implementing Article. 287 of the United Nations Convention on the Law of the Sea, the Italian Government has the honor to declare that, for the settlement of disputes relating to the application and interpretation of the Convention (...), choose the General Court of the Sea and the International Court of Justice, without specifying that one takes precedence over the other (...). "In contrast, the Indian state at the time of ratification of the Convention, stated that it reserved to exercise at a later date provided for by the law. 287 above, so that each "state is free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention." Finally, note that, in reference to the powers exercisable by the International Court of Justice, the Indian state has declared its intention to exclude the binding jurisdiction of the same for the cases "concerning the interpretation or application of a multilateral treaty unless all the parties to the treaty are also parties to the case before the Court or Government of India specially agree to jurisdiction".