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Abstract

On February 15th 2012, while the Italian Flagged MV EnricaLexie was sailing with on board an Italian Military Protection Detachment in transit along the Indian coast, close to the outer border of the Indian Contiguous Zone and within the Exclusive Economic Zone (*ZEE*) of India, the vessel Reported a piracy attack. The same day criminal investigations started in India for the alleged killing of two fishermen on board and Indian Ship. Once the Enrica Lexie entered the Indian Port of Kochi, having answered a request for cooperation by Indian authorities, two Italian service member were taken into custody, triggering a complex legal controversy between Italy and India. This paper was written before the Supreme Court has taken a definitive stand on the issue of jurisdiction and highlights some of the legal implications of the controversy without any intention to exhaust all legal issues, and focuses on include issues like the width of Coastal State's jurisdiction over their contiguous zone and their exclusive economic zone, relationships between domestic and international law, the relevance of the effects of an offence in order to establish the *locus commissi delicti* under international law and Indian domestic law, Flag State jurisdiction in respect of collisions and other incidents of navigation and finally immunity issues of foreign service members under customary international law.

Il 15 Febbraio 2012 la nave petroliera MV Enrica Lexie, battente bandiera italiana, denunciò un attacco pirata mentre stava navigando con a bordo il distaccamento di protezione naviglio, in transito lungo la costa indiana, vicino i confini esterni della Zona Contigua e all'interno della Zona Economica Esclusiva (ZEE) dell'India. Lo stesso giorno ebbero inizio in India le investigazioni criminali per la presunta uccisione di due pescatori a bordo di una nave indiana. Quando la Enrica Lexie entrò nel porto indiano di Kochi, avendo risposto alla richiesta di cooperazione da parte delle autorità indiane, i due membri italiani furono presi in custodia. Da quel momento si scatenò una complessa controversia legale tra Italia e India.
Il seguente contributo, scritto prima che la Suprema Corte prendesse una posizione definitiva in merito alla giurisdizione, sottolinea alcune implicazioni legali della suddetta controversia, analizzando in particolare l'estensione della giurisdizione dello Stato costiero sulla zona contigua e la zona economica esclusiva, le relazioni tra legge nazionale e internazionale, la rilevanza delle conseguenze di un reato al fine di stabilire il *locus commissi delicti* secondo l'ordinamento internazionale e quello nazionale indiano, la giurisdizione dello Stato di bandiera riguardo alla collisione e altri incidenti navali e infine l'immunità dei membri di servizio straniero secondo il diritto consuetudinario internazionale.

Keywords

Coast State Jurisdiction - United Nations Convention on the Law of the Sea (UNCLOS) - Exclusive Economic Zone (EEZ) - flag State jurisdiction - admiralty jurisdiction - immunity.

Giurisdizione dello Stato costiero - Convenzione delle Nazioni Unite sul diritto del mare (UNCLOS) - Zona Economica Esclusiva (ZEE) - giurisdizione dello stato di bandiera - giurisdizione della marina - immunità.

THE "ENRICA LEXIE CASE" AND THE LIMITS OF THE EXTRATERRITORIAL JURISDICTION OF INDIA

by Valeria Eboli and Jean Paul Pierini

Summary: 1. Premise. - 2. The nature of the duties carried out by Military Protection Detachments. - 3. The geographical context of the alleged event and the *UNCLOS*. - 4. The Convention on maritime terrorism? - 5. Applicability of Indian Penal Law and Extraterritorial Jurisdiction of Indian Courts. - 6. Immunity issues related with the Incident. - 7. Conclusions.

1. Premise

On February 15th 2012 while the Italian Flagged MV Enrica Lexie was sailing with on board an Italian Military Protection Detachment in transit along the Indian coast, close to the outer border of the Indian Contiguous Zone and within the Exclusive Economic Zone (*ZEE*) of India, the vessel Reported a piracy attack[1]. The event was reported through the "Mercury chat", linking together several Military Navies all over the world, to include the Indian Navy and was also sent to the *Maritime Security Centre Horn of Africa* (*MSCHOA*), seated in Northwood – United Kingdom, close to the Operation Headquarter (*OHQ*) of the European Union Counter Piracy Mission *EUNAVFOR Atalanta*. After the event the Vessel continued sailing on its scheduled route. When the Vessel had covered almost 38 Nautical Miles, the Vessel was apparently requested to enter Port Kochi to assist and identify suspected pirated which allegedly had been apprehended.

The vessel turned course and headed towards Kochi port where it arrived at about midnight of the same day.

Press releases and interviews of personnel of the Indian Coast Guard in key position suggests that the MV Enrica Lexie along with the Military Protection Detachment on board, was cheated (lured) in order to enter the Indian port of Kochi with the perspective of cooperating in the identification of pirates allegedly apprehended by the Indian coast guard, and much emphasis was put on the fact that this was a really smart move by the Indian Coast Guard[2].

The Master of the Vessel was subsequently informed that a *FIR* (First Information Report) on the file of the Circle Inspector, *Neendakara, Kollam* has been registered under section 302 (Murder) read with section 34 (Common Intent) of the Indian Penal Code (*IPC*). In the said *FIR*, filed under section 154 of the Indian Criminal Procedure Code (*ICrPC*), it is alleged that outside the territorial waters of India there was a firing from a ship. It is alleged that a fishing boat by the name of "St. Antony" was fired at by an Italian Cargo ship and that in the firing two fishermen were killed. The *FIR* reported that the fishing boat was fired at 22,5 nautical miles from the shore.

Even under the subsequent version, the alleged incident took place beyond the territorial waters of India. It is worth mentioning, for the purpose of subsequent consideration of jurisdictional issues, that the *FIR* refer exclusively to the offence under section 302 of the *IPC* and not to any "scheduled offence" under other Acts.

Two components of the Military Protection Detachment on duty that afternoon of the 15th were arrested and were subsequently produced before the Chief Judicial Magistrate *Kollam* and have been subsequently placed in custody until bail was granted in June 2012. The 18th of May 2012, the Kerala police has filed the charge sheet with reference to the following charges in furtherance of common intention (section 34): murder (section 302), attempt to murder (section 307), mischief (section 427) and also the offence under section 3 of the *Suppression Of Unlawful Acts Against Safety Of Maritime*

[1] http://en.wikipedia.org/wiki/2012_Italian_shooting_in_the_Arabian_Sea, retrieved the 23th of April 2012.
During the proofreading the examined judicial case has been subjected to important developments which this work has opportunely considered.

[2] Among others, T. RAMAVARMAN, *Coast Guard, Fisherman: smart move,* TNN – Chennai Edition, February 18, 2012.

Navigation and Fixed Platforms On Continental Shelf Act, *2002*, subject to the sanction by the Central Government which was not granted. During the phase aimed at the farming of the charges the Session Court's refusal to the translation of the witness statements from the Malayalam court language into Italian, moved the accused to ask the High Court to exercise its power to review under section 397 of the *ICrPC* deducing among other issues, a violation of internationally accepted fair trial standards under article 14 of the International Covenant on Civil and Political Rights (*ICCPR*), which is to be interpreted in the light of the "Kamasinski decision" of the European Human Rights Court[3].

The accused and the Government of the Republic of Italy have challenged the jurisdiction of Indian Court from the beginning and have initially filed a writ petition under Article 226[4] of the Constitution and section 482 of the *ICrPC*[5] with the High Court for the quashing of the *FIR* and all subsequent acts. A further petition has been filed under Article 32 of the Constitution before the Supreme Court challenging the Constitutionality of the ongoing detention, while the decision of the High Court was still pending. Once the High Court dismissed the petition brought under article 226 of the Constitution and asserted the jurisdiction of the Courts of India and the Government of the Republic of Italy and the accused submitted a "special leave petition" to the Supreme Court under article 136 of the Constitution of India. Leave was granted and the case was clubbed with the case filed under article 32 of the Constitution. When this paper was written the proceedings the Supreme Court had still to take a definitive stand on the issue.

Ancillary litigations on the incident were represented by Admiralty suits for the arrest of the ship and damages and petitions both under the writ jurisdiction of the High Court and the supervisory powers of the magistrate, by the relatives of the deceased fishermen for the arrest of the master. The "undeclared" arrest of the ship has moved the Bench Division of the High Court on appeal against the release decision, to impose to the ship owner to prior exploit remedies under the *ICrPC* (section 457). Also this decision has been challenged in front of the Supreme Court which finally ordered the release of the vessel as it was not material to the offence. The release was ordered with the condition of an undertaking by the Government of Italy as to the appearance of the other components of the military protection detachment if summoned in the criminal proceeding, provided that they can challenge the summon in an Indian Court.

2. The nature of the duties carried out by Military Protection Detachments

The protection of Italian Flagged merchant vessels through "military protection detachments" is part of the Italian efforts to protect its merchant marine by providing trained personnel under military discipline, command and control.

The employment of military personnel for the protection of Italian flagged vessels has been established under the law – decree 107/2011 later converted through Parliamentary Law n. 130/2011, containing the authorization for the Italian Ministry of Defense to participate to International Military Missions, or to launch Military Missions and operations which are exclusively national, like in the case of the NMPs (which stands for Military Protection Detachments in Italian). This means to protect national interests through the deployment of military personnel on board of National Merchant vessels has further become one of the "core tasks" of the Italian Military Navy due to a contemporary amendment (under article 111) of the "Armed Forces Code" adopted with the (delegated) legislative – decree 66/2010.

The Military Protection Detachments operations have been launched under a particular funding regime, which has given rise to a wrong perception of the guarding as being "private" or "commercial".

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3 Case of *Kamasinski v. Austria*, (Application no. 9783/82), decided on 19th December 1989.

4 Under article 226 of the Constitution of India, on which we would like to refer to DURGA DAS BASU, *Shorter Constitution of India*, reviewed by A. LAKSHMANAN, V. R. MANOHAR, B. PROSAD BANERJEE, 14 ed., 2011, II, 1185 ff., the *High Court* may, in order to protect fundamental rights under Part III of the Constitution, among which there is the right to liberty and security issue certain *writs*.

5 With an interim order dated the 27th of March 2012, the High Court, justice Gopinathan, has held that Section 482 had been wrongly invoked by the Petitioners and that the writ petition should be further dealt solely under article 226 of the Constitution.

Due to severe budget constraints and ceilings, afflicting not only Italy, but almost all NATO Member States, Ship owners are called up to contribute to the expenses by bearing entirely the so called "incremental costs" (costs exceeding the ordinary costs for the maintenance of the Military Detachment).

This approach to the protection of merchant vessels from the threat of piracy and armed robbery is far from being commercial in substance and replicates a model adopted by the British Army in the past which has been recalled in the past in Indian Case Law[6].

The decision has been to call up commercial entities to contribute to incremental costs has been taken by the Italian Government and upheld by the Italian Parliament based on the consideration that in times of economic crisis also those benefiting economically from the protection in terms of reduced expenses for Insurance should contribute and share the burden with all taxpayers.

The fact that ship owners are called up to contribute economically does not affect the intrinsically public and sovereign nature of the function.

Furthermore, the purpose of deploying Military Personnel on board Italian flagged vessels was to maintain the State monopole for the use of force on the Seas and only where, due to personnel shortages, Military Protection is not available, Ship Owners will be allowed to embark private guards. Military Protection Detachments have been embarked on board Merchant vessels by several States to include those taking part to the European Union Counter – Piracy Operation *EUNAVFOR Atalanta* and the NATO Counter Piracy Operation "Ocean Shield".

The detachment of Military Personnel on board merchant vessels is not covered by guidelines issued by the International Maritime Organization (*IMO*) on private guards. This is mainly due to the fact that Military Personnel has mostly to be placed under uninterrupted military chain of command and cannot be answerable to the Master of a Merchant vessel. This is true also under the Italian Constitution whereas the Supreme Command belongs to the President of the Republic and the highest disciplinary authority is the Minister of Defense and military personnel can be answerable only to a military Command, except when it is called up to cooperate with police forces of carries out own law enforcement tasks and becomes answerable to the Prosecutor. The circumstance that military detachments are not dealt within IMO guidelines on private guards has been grossly misinterpreted by the counter parts in both the proceeding under the High court writ jurisdiction and the proceeding in front of the Supreme court. Military detachments are incidentally dealt in the *Best Management Practices* issued by the MSC (Maritime Security Committee), calling up ship owner, when considering armed guards, to evaluate the possibility to embark a military detachment, clearly expressing a preference for the later[7].

The team leader and the members of Military Protection Detachments are afforded with the powers and the duties, respectively of Law Enforcement Officer and Law Enforcement Agents, when they are to collect evidence of a crime of piracy or arrest pirates or armed robbers. These functions, as well as those related to the military defense of a Merchant Vessel from piracy and/or armed robbery, are intrinsically public.

3. The geographical context of the alleged event and the *UNCLOS*

The alleged shooting took place, based on the information contained in the *FIR* close to the beyond the territorial waters of India as defined under the "*Territorial Waters, Continental Shelf, Exclusive*

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[6] Madras High Court, *S. Gopalanv. State Of Madras*, (1958) 2 MLJ 117, adjudicating on fiscal matters and reproducing relevant part of the *"decision of the King's Bench, in China Navigation Company v. Attorney-General L.R. (1932) 2 K.B. 197, holding that the deployment of armed guards belonging to regular armed forces on board merchant vessels for the protection from piracy and with recovery of costs from the ship owners was "regulated by statute matters relating to the army remain within the prerogative of the Crown which could not be interfered with by the Courts and if in the exercise of such prerogative the Crown agrees to afford military assistance on payment such stipulation is perfectly valid".*

[7] *MSC Circ.1339, dated 14th September 2011.*

Economic Zone and Other Maritime Zones Act", 1976[8], within the "Contiguous Zone" of India whereas India claims such powers which are necessary not only with respect to immigration, sanitation, customs and other fiscal matters, but also with respect to "the security of India" (section 5(4) lett. *a* and *b* of the above Act)[9]. The alleged incident is not related with the territory of India and does not trigger the Indian jurisdiction established in respect of certain matters (*immigration, sanitation, customs and other fiscal matters*) for the repression or prevention of offences affecting the territory and the territorial waters of India.

The alleged shooting also took place within the Economic Exclusive Zone (*EEZ*) of India which extends beyond the territorial waters and up to 200 nautical miles (section 7 of the above Act).

The alleged incident is related with the rights, under article 97 of the 1982 *UNCLOS*, to which India is a signatory and also a contracting Party, granted to vessels not belonging to the Coast State and which applies, together with the other provisions contained in articles 88 to 115 of *UNCLOS* also in the Economic Exclusive Zone and in the Contiguous Zone of the Coast State (under article 58.2 and 86 of *UNCLOS*) when not specifically derogated without any interference from the authorities of such State and under the exclusive jurisdiction of the Flag State of the State the authors of an offence are nationals. Article 97 specifically dealing with "Penal jurisdiction in matters of collision or any other incident of navigation" states that «in the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, 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» and further 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».

The said provision applies to collisions and to "any other incident related to the navigation" irrespective of the fact that, an incident involves two or more ships. Nevertheless, the purpose of the reference to "any other incident related to navigation", which is to be read in conjunction with article 94 of *UNCLOS*[10], is questioned as to the possibility to include, due to the international resurgence of piracy and armed robbery such incidents which are related to the need to protect any vessel from piracy and armed robbery, which has become a daily practice and is currently dealt by the International Maritime Organization (*IMO*) and included in its Guidelines.

Article 97 of *UNCLOS* reproduces article 11 of the 2. Convention on the High Seas[11], which reflected the provision of the Draft Convention on Collisions and was enacted specifically in order to

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[8] *In this regards section 3 of the above Act reads under:*
Sovereignty over, and limits of territorial waters –
(1) The sovereignty of India extends and has always extended to the territorial waters of India (hereinafter referred to as the territorial waters) and to the seabed and subsoil underlying, and the air space over such waters.
(2) The limit of the territorial waters is the line every point of which is at a distance of twelve nautical miles from the nearest point of the appropriate baseline.
(3) Notwithstanding anything contained in sub-Section (2), The Central Government may, whenever it considers necessary so to do having regard to International Law and State Practice, alter, by notification in the Official Gazette, the limit of the territorial waters.
*(4) No notification shall be issued under sub-*Section *(3) unless resolution approving the issue of such notification are passed by both Houses of Parliament.*

[9] The provision has been quoted by GURPIS SINGH, Dean of the Dehli Law Faculty, whose opinion has been reported in the article "*India has the right to detain ship, say experts"*, The Hindu, April 22, 2012, p. 7, as an argument for Indian jurisdiction. The article does not any further detail how the incident relate to the security of India. Apart from the extension *ratione materiae* of the said provision in respect of the UNCLOS, the opinion does not further articulate why the incident which happened entirely in the contiguous zone is related with the territory and territorial waters of India and the need to prevent or repress a conduct affecting such territory or territorial waters. Additionally it should be observed that the provision contained in the Maritime Zone Act, 1976 is to be strictly related with offences under sections 121 to 130 of the *IPC.*

[10] On the issue of an Indian citizen which fall into the water on the high seas from a Bermuda flagged Ship, see Kerala High Court *K.Shyamala, W/O.Sreekandanv. The L.I.C of India* on 13 October, 2010. The question of the reach of provision recalling "any other incident of navigation" is implicitly resolved in favor of an extensive interpretation in the decision of the Nova Scotia Supreme Court, in *The State of Romania v. Cheng*, 1997nssc[118] in which the murdering of stowaways, left afloat in inflatable boats was considered, as stated by expert witness, under the "superior jurisdictional claim" of the flag State (p. 12). On the other side most of the issues dealt by in the decision are related with extradition rather than with maritime law.

[11] 450 U.N.T.S. 11.

prevent "multiple jurisdictions" and descending "conflicts of jurisdiction" in situations such as those brought to the attention to the International Permanent Court of Justice (*IPCJ*, now *ICJ*)[12] in the so called *Lotus Case*[13] which has been baldly invoked as "good law" in the present case. The decision in the Lotus Case and common misperceptions on its real meaning will be dealt in the context of the analysis of the applicability of Indian Law and Indian jurisdiction (*supra* para 5).

The alleged incident is not related with the sovereign rights of India in the Economic Exclusive Zone and does not trigger the Indian Jurisdiction under special provisions governing such sovereign rights embodied in the right to exclusive exploitation, exploration, prospecting and conservation of natural resources. Nevertheless, it is worth mentioning that in the current case, an interference due to the alleged shooting with the rights granted to subjects entitled under section 7(5), last sentence, of the *Exclusive Economic Zone and Other Maritime Zones Act*", 1976 to exploit natural resources in the Indian *EEZ*, has been claimed.

As to the legal regime of the Indian *EEZ*, India claims the traditional rights recognized under the United Nations Convention on the Law of the Sea (*UNCLOS*), but has also extended under section 7(7) by notifications certain Custom laws to designated areas within the Continental Shelf and the *EEZ* of India[14]. To this purpose, it should be observed that the extension of custom laws and enforcement of such laws within an *EEZ* was held by the International Tribunal for the Law of the Sea (*ITLOS*) in its decision on the "*Saiga2*"to be contrary to the principles of the *UNCLOS*[15]. Accordingly the coastal State has not sovereignty on the *EEZ* but only the faculty to exercise some sovereign rights, warships and merchant ships of all States enjoy freedom of navigation in this area, being subject to the exclusive jurisdiction of the flag state[16].

The Central Government has also notified in August 1981, one year before the adoption of *UNCLOS* and thirteen years before its entry into force[17] under section 7(7) of the Act, the extension of the whole *IPC* and the *ICrPC*, as such to the EEZ, through the "creation" of a specific Ghost section of the *ICrPC*, section 188A[18], which is not been incorporated in the Code nor referred in the official Code and therefore not executed, as a mean for the "adaptation" of the extended Codes. Such "extension", if valid under the rules applicable to legislative delegation under article 245 of the Constitution, shall in any case be read having regard to the "powers" of the Union in the *EEZ* under

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12 United Nations Conference on the Law of the Sea: "Convention on the High Seas". Document A/Conf.13/L.53 Official Records, Vol. II, p. 13ff..

13 Permanent Court of International Justice, twelfth (ordinary) session, *The Case of the SS Lotus*, *France v. Turkey*, Judgment n. 9 on 7th September 1927.

14 The Central Government issued Notification No. S.O. 429 (E) dated 18.07.1986 under Section 6(5)(a) and Section 7(6)(a) of the Act, by which certain areas were identified as which are more than 12 nautical miles away from the shore and are outside the territorial waters of India. By Notification No. 11/87-CUSTOMS dated 14.01.1987 issued under Section 6(6)(a) and Section 7(7)(a) of the Maritime Zones Act, 1976 extended the Customs Act and the Customs Tariff Act, 1975 to the designated areas. Subsequently by Notification No. S.O. 643 (E) dated 19.09.1996, further areas in the continental shelf and the exclusive economic zone where the installations, structures and platforms were located as were declared as designated areas. By a subsequent Notification No. S.O. 189 (E) dated 11.02.2002, the Customs Act and Customs Tariff Act were extended to the continental shelf of India and the exclusive economic zone of India with effect from the date of publication of the Notification in the Official Gazette. The purpose of the notifications is clarified by the Supreme Court of India *AbanLoyd Chiles Offshore Ltd. & ... v. Union Of India & Ors*, on 11 April, 2008, holding that «*the continental shelf land the exclusive economic zone are the parts of India in view of the provisions of* sections *6(6) and 7(7) of the Maritime Zones Act and for the purposes thereof and pursuant to notifications referred to in para 26 (Supra) the provisions of the Customs Act, 1982 were extended to such areas, consequently, the Oil Rigs proceeding to such areas or operating therein are not foreign going vessels under* section *2(21) of the Customs Act*». On transshipments to oil rigs see also Bombay High Court, *Pride Foramers Union Of India (Uoi) And Ors.* on 24 April, 2001, AIR 2001 Bom 332.

15 *The M/V "SAIGA" (No. 2) Case* (*Saint Vincent and the Grenadines v. Guinea*), 1st of July 1999, para 60 ff..

16 A. L. KOLODKIN, V. N. GUTSULIAK, I. V. BOBROVA, *The World Ocean: International Legal Regime* (ed. and transl. by Butler), The Hague, 2010, p. 61-62. If restrictions on the *EEZ* other than those allowed by *UNCLOS* are imposed by the coastal State, they impact negatively on the maritime security of user States and in particular on their naval mobility and ability to undertake defensive operations. In this sense see BATEMAN, *Security and the Law of the Sea in East Asia: Navigational Regimes and Exclusive Economic Zone*, in D. FREESTONE, R. BARNES, D. ONG (eds.), *The Law of the Sea. Progress and Prospects*, Oxford, 2006, p. 365.

17 Notification S.O. 675(E) of the 27th of August 1981.

18 Section 188A reads as follows: "Offence committed in the Economic Exclusive Zone. When an offence is committed by any person in the Economic Exclusive 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 has been committed in any place in which he may be found or in such other place as the Central Government may direct under Section 1 of the said Act".

section 7(4) and (6)[19]. Later Acts, reference is to *The Maritime Zones (Regulation of Fishing by Foreign Vessels) Act, 1981*, contain specific reference to offences by foreign fishing vessels, their crew and owners (section 18ff.) which fit the said extension. The fact that the "extension" of the IPC and the *ICrPC* need to be construed in a very narrow way is conformed also by later pieces of legislation, to include the Suppression of Unlawful Acts Against Safety Of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002, which, in the respect of offences of utmost international concern, adopts a significantly more cautious approach (section 3). Nevertheless, the Government of the Union has taken the stand, in its Counter Affidavit filed in the article 32 cause, that the aforementioned notification provides authority to assert that the two marines[20] are amenable to Indian laws and subject to the jurisdiction of Indian local Courts. This stand, which contradict previous positions taken by the Government of the Union in aftermath of the adoption of the *UNCLOS* as to the need to interpret the notification restrictively and in full compliance with the Convention, was to some extent shared by the Kerala High Court which rejected the Italian claim for a lack of jurisdiction by India based on a mix of inchoate arguments, including also effects of the offence and references to the *SUA* Convention (See next paragraph).

To this purpose, it should be observed that under the Indian Constitution, whilst fostering the respect for international law is one of the duties of the State (art. 251) and the Union has the exclusive rights to enact legislation to implement international agreements and Conventions (Art. 253), in case of conflict between international law and domestic law, the later will prevail[21].

In particular, as far as the implementation of international law in India is concerned, international law norms cannot be invoked in Municipal Courts without being incorporated into domestic law[22]. According to Article 253, the exclusive power to enact laws to implement international agreements is up to the Parliament, but no mention is made to international customary law[23]**.** On the one hand, if a treaty is considered self-executing, it can become part of municipal law automatically, except where it requires an amendment to the Constitution or an existing law. On the other hand, customary international law is not considered to be self-executing and it should be expressly incorporated into domestic law. In this case, if there is a conflict between municipal law and customary international law, the former will prevail in the domestic sphere[24]. However, this does not mean that a domestic rule inconsistent with an international obligation prevails in the international sphere too. In this case, if a State does not comply, it breaches an international obligation. The Constitution contains no express provision settling the relation and status of international law in Indian Courts. Nevertheless, the Courts have played an active role in the implementation of India's international obligations as regards as both treaties and customary international law. Statutes should accordingly be interpreted in harmony with the international obligations of India[25]. Furthermore, International Covenants, dealing with fundamental

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19 This view is also confirmed by O. P. SHARMA, *The international law of the sea: India and UN convention of 1982*, Oxford, 2002, p. 149, according to whom there was no intention by India to vindicate rights exceeding those conferred by the *UNCLOS* and the extension was in support to other enactments to be extended and should read in conjunction with the *Maritime Zones (Fishing by Foreign Vessels) Act*, 1981 . Under Part II of the notification, any Court or other authority may, for its application construe the Act extender to the EEZ by Part I of the notification, in such manner, not affecting the substance, as may be necessary for its application. If difficulties arises, the Central Government may make any necessary adaptation.

20 The marines belong to the Italian Marine Infantry.

21 Supreme Court of India, *Gramophone Company Of India Ltd v. BirendraBahadurPandey & Ors*, on 21 February, 1984, 1984 AIR 667.

22 In the judgment in the case "*Xavier v. Canara Bank Ltd.*", the Kerala High Court affirmed that "*International Law per se or proprio vigore has not the force or authority of civil law, till under its inspirational impact actual legislation is undertaken"*, 1969 Ker L T 927. Similarly, the Supreme Court, in *Jolly George Verghese v. Bank of Cochin***,** AIR 1980 SC 470, adopted the same view. For an interesting case related to arrest of ship and the role of non-incorporated international law, Bombay High Court**,** *M.V. Mariner Iv, A Foreign Flag ... v. Videsh Sanchar Nigam Ltd.* on 15 December, 1997, 1998 (5) *BomCR* 312.

23 The Article reads as under: "253. Legislation for giving effect to international agreements – Notwithstanding anything in the foregoing provisions of this chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any conference, association or other body." The text of the Indian Constitution is available online at http://indiacode.nic.in/coiweb/coifiles/part.htm.

24 For an overview on the Indian Constitution, see M. P. JAIN, *Indian Constitutional Law* (2 Vols), Nagpur, 2010.

25 Supreme Court of India, *S. Jagannath v. Union Of India & Ors*, on 11 December, 1996.

rights, may be directly enforced by Indian Courts under Part III of the Constitution[26], but cannot limit access to Court or other fundamental rights[27].

As to the reach of Indian statutes, under article 245(2) of the Constitution, the mere fact that a law may determine extraterritorial operations does not make such law void[28]. Said this, it must be observed that the notification may be construed as to comply with obligations assumed by India when ratifying the UNCLOS.

4. The Convention on maritime terrorism

Invoking the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, done in Rome the 10th of March 1988[29], in order to assert Indian jurisdiction over the alleged shooting, has become a frequent topic in legal blog and analysis of the event.

The *Convention for the Suppression of Unlawful Acts against Navigation* (*SUA* Convention) is one of the currently thirteen United Nation Conventions against International Terrorism, which will hopefully be complemented soon, with the auspices of India, by a United Nations Comprehensive Convention against International Terrorism (*CCIT*).

Meanwhile the Convention continues to represent, with its Protocol on fixed Platforms and further Protocol, the milestone of the International Community in respect of the Suppression of International Terrorism at Sea. The Convention's aim was to overcome shortages in the international framework, in respect of international terrorism, as highlighted in the aftermath of the hijacking Italian Cruise Ship "*Achille Lauro*" by Palestinian Liberation Organization (*PLO*) members. Provisions on "piracy" under *UNCLOS* (already adopted at the time, by not yet in force) and the 1958 Geneva Convention on the High Seas, even if referring to illegal acts of violence, could not apply because the "two ships requirement" (piracy requires basically one ship using violence against another) were not fulfilled. Accordingly the Convention was aimed at dealing with situations in which there was only one ship involved. This does obviously not mean that the incident falls under the provision on piracy and that there was an act of piracy against the *St Antony*, because piracy requires under international law that the act is committed intentionally with *animus furendi* and for "private ends".

Article 2 of the *SUA* Convention contains an exclusion clause in respect of warships and ships owned by a State in order to be used by Customs and Police. The exclusion is evidence of the fact that it was the intention of the contracting States to exclude official State activities in the maritime environment from the definition of "terrorism". The reference was to warships and State owned ships only, as at the time the *SUA* Convention was adopted, it was by way of warships and State owned ships that States were present on the High Seas exercising their sovereign right. Nowadays, the same rationale should applies to Military Protection Detachments on board a merchant vessel and the exclusion cause should be construed broadly.

Furthermore, the Convention should be interpreted in the light of the ongoing international efforts to adopt a Comprehensive Convention on International Terrorism (*CCIT*) "absorbing" to some extent the *Convention for the Suppression of Unlawful Acts against Navigation* and the other twelve United Nation Conventions on Terrorism (*CCIT*), as draft proposals of such Convention exclude form the definition of international terrorism "official conduct" by State Officials which does not contravene to peremptory norms of international law (example given: genocide, crimes against humanity, war crimes) under article 20 (*United Nations General Assembly* document A/59/894).

Under article 3, of the Conventions the specific conducts listed under paragraph 1, letters *a* to *g*, and the corresponding inchoate offenses under paragraph 2, are to be committed "unlawfully" and "intentionally" whereas intention is mostly "to endanger the safety of the navigation of a ship" and even the killing of a person on board is regarded as a mean to attempt to such safety of the navigation.

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[26] Supreme Court of India, *People`S Union For ... v. The Union Of India And Another,* on 18 December, 1996.
[27] Supreme Court of India, *DaduTulsidas v. State Of Maharashtra,* on 12 October, 2000.
[28] Andhra High Court, *Dr. A.V.MohanRao And Another. v. KishanRao And Another,* on 1 March, 2000.
[29] I.M.O. Doc/Sua/Con15(1988) 27 I.L.M. 668.

Even if the ascertainment of the "intention" to endanger the navigation of a ship is mainly a matter of merits, it is nevertheless highly unlikely that the purpose of the defense of a Merchant Vessel from piracy and armed robbery, even under the perspective of an excessive use of force, may amount to an intentional attempt at the safety of navigation of another ship. Furthermore, the *FIR* does not refer to any specific intention to endanger the safety of navigation, which has a significant impact on Indian domestic substantive and procedural law.

It should also be mentioned that the International Maritime Organization considers the Convention applicable to pirates and armed robbers, but has never thought it could apply to armed guards on board ships. Under Article 6 of the Convention States are to establish their jurisdiction when the offence is committed: *a) against or on board flying the flag of the State at the time the offence is committed, or b) in the territory of such State to include its territorial sea, or c) by a national of that State*.

Further we will examine how and to what extent the provisions of the *SUA* Convention has been implemented in India.

5. Applicability to Indian Penal Law and extraterritorial jurisdiction of Indian Courts

The definition of the ambit of applicability of the *IPC* and specifically the circumstances under which the Code applies, emerges from sections 1 to 5 of the *IPC*.

The relevant provisions of the IPC

Section 1 establishes that the Act shall be «called the Indian Penal Code and shall extend to the whole of India except the State of Jammu and Kashmir». The definition of "India" is given by section 18 which specifies that "Indian" means the "territory" of India excluding the said States and does not encompass the "territorial waters" of India.

When the *IPC* was adopted, in 1860, Great Britain had yet to enact its *Territorial Waters Jurisdiction Act, 1878*, to «regulate the law relating to the Trial of Offences committed on the Sea within a certain distance of the Coasts of Her Majesty's Dominions» Territorial waters of India are now dealt under section 3 of the *Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976*[30].

Section 2 of the *IPC* reads as follows «every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within India». The Supreme Court of India has developed a jurisprudence asserting that there the corporal presence of the accused is not required for holding an accused liable for committing an offence, provided all the ingredients of the offence occur within the municipal territory of the country trying the offence[31]. This jurisprudence will be discussed later in order to verify if and to what extent said the case law may suggest the idea that the place where the "effects" occurred is relevant under

[30] Curiously in the decision by the Kerala High Court, *Raymund Gencianeov. State Of Kerala* on 26 June, 2003, 2004 *CriLJ* 2296, in the case of an attempt to commit murder by a Philippine sailor on board a Japanese vessel some 850 miles away from the Indian Coast, the definition of territory of India as including "*its ports and harbors, the mouths of its rivers, and its landlocked bays*" and that … "*by the usage of nations the territorial jurisdictions extend also to a marine league seawards. This belt of sea is known as territorial waters*" has been inferred from the *Law Lexicon*. The Law Commission of India in its 42nd Report, issued in 1971 on the *Indian Penal Code*, asserts that the inclusion of territorial waters into the territorial extent of the Penal Code, dates back to a Presidential Proclamation dating the 30th of September 1967, 1.11, In the said Report, Admiralty Jurisdiction is not mentioned. In the 41st Report, of 1969 on the Indian Criminal Procedure Code 1898, while discussing the reach of the said Code, the Law Commission of India quotes, p. 4, as the earliest reference to territorial waters, the *Indian Fisheries Act, 1897, Sec. 4,* which at the relevant time applied to "British India". Other quotations include Sec. 2(2) of the *Merchant Shipping Act*, 1958, the *Customs Act, 1962*, Sec 2.27. Interestingly the Law Commission of India, pretends to argument the application of the *ICrPC* to the territorial waters, based on the reference in Sec. 23 of the *Extradition Act,* 1962 to any offence "committed on board any vessel on the High Seas or any aircraft while in the air outside India or the territorial waters of India", as such an offence … could otherwise be deemed to be territorial. Further, the Law Commission in suggesting that the local jurisdiction extends to such portion of the sea adjacent the coast, asserts the need for a clear provision in that sense.

[31] RATANLAL&DHIRAJLAL, *The Indian Penal Code*, 32 ed., 2011, edited by V. R. MANOHAR, S. 2, p. 47 - 48.

Indian Penal Law or, as we believe such references are rather non-technical to include generic "negative effects" of the crime in situations where part of the "conduct" took in any case place in India.

The subsequent section 3, establishes that «any person liable by any Indian law, to be tried for an offence committed beyond India shall be dealt with according to the provisions of this Code for any act committed beyond India in the same manner as if such act had been committed within India». This very useful and clearly states section of the *IPC* does not by itself establish liability under Indian Penal Code or jurisdiction for any conduct outside and beyond India[32]. Section 3 absolves also the fundamental function, in the Indian penal system, of determining, when its two pre-conditions are fulfilled (commission of an offence beyond India and liability under an Indian law) the applicability all ancillary provisions of the code. Further under a "conflict of laws" in criminal matters perspective, under section 3, foreign laws are not taken into consideration as the offence does not need to be punishable in the Country in which it has been committed nor foreign law imposing a less severe penalty is taken into consideration based upon the *lex mitior* principle. Nevertheless as in most modern criminal law systems, also Indian Courts when required to apply Indian penal law to offences beyond India show certain terms related to company, insurance and family laws and so on, are determined by reference to foreign non criminal law. Section 3, in any case, requires "another" Indian law establishing liability under Indian Penal Law[33].

Extraterritorial offenses are dealt under section 4 of the *IPC* reads as follows: «the provisions of this code apply also to any offence committed by: 1) any citizen of India in any place without and beyond India 2) any person on any ship or aircraft registered in India wherever it may be 3) any person in any place without and beyond India committing offence targeting a computer resource located in India».

Under section 4 letters *b*) the person committing the offence must be "on board" the Indian ship[34] and the provision may not be read as to comprehend the situation in which such person is not on board such ship[35]. The Union of India has at this purpose taken a twofold stand in its Counter Affidavit filed in the Supreme Court in the article 32 cause. The Union has relied on the "objective territoriality principle" as the offence has allegedly produced its effect on the Indian ship. Having regard to the specific concept of territoriality reflected in the *IPC*, it appears that the argument is rather referred to an "objective extra-territoriality" principle, as its result would be to bring the offence within the Indian extraterritorial jurisdiction. The second contention of the Union of India is that section 4(2) should reflect the "passive personality principle", which has not been, since now, recognized in Indian statutes.

Said this, the provision under no.1) has been interpreted as to exclude the conduct of an Indian citizen on board a foreign vessel on the High Seas[36]. Further the provision under section 4 (3) shows that, despite the jurisprudential widening of the ambit of section 2, computer crimes, resulting in the targeting of systems located in India, are and remain extraterritorial in purpose, even if conduct and/or more probably the event could have occurred in India. The said newly inserted provision has not been replicated in section 188 of the *ICrPC* and extraterritorial computer offenses may be tried in India without prior Sanction of the Central Government.

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[32] Kerala High Court, *Samarudeen v. Assistant Director Of Enforcement* on 9 December, 1995, *CriLJ* 2825, clarifies that «Section 3 IPC deals with any person liable by any Indian law to be tried for an offence committed beyond India. It does not deal with the power of the Indian police to investigate a crime committed outside India. It should also be remembered that Sections 3 and 4 of the IPC are provisions of the substantive law, and they have nothing to do with the procedural law».

[33] Against the wording and the sense of Section 3 of the *IPC* the provision has nevertheless been directly relied upon as a legal base in order to trial the two Italian service members in India, by T. ASAF ALI, Director General of Prosecutions and State Public Prosecutor, whose opinion is reported in *ASG's Submissions Unwarranted, DGP: "*Centre only a formal party in case*"*, in *The Hindu,* April 22, 2012, p. 7.

[34] See Law Commission of India, 42nd Report on the *IPC*, p. 6ff. highlighting the drafting history of Section 4 and the provision under n. 2, which was inserted by *The Offences on Ships and Aircraft Act, 1940*, and specifically para 1.12 on the extension of Indian Penal Law to the persons on board the Ship. The same Report contains, after having recalled the *Draft Convention on Jurisdiction* proposed in 1935 by the Harvard Research in International Law, in supplement to *AJIL*, 1935, pp. 435-638, para 1.13, a proposal for the reform of Section 4 which, by referring to aliens does not specifically widen the purpose of the provision.

[35] On the circumstances of such presence, see Gujarat High Court, *M.G. Forests Pte Ltd. v. "M.V. Project Workship"*, on 24 February, 2004.

[36] Bombay High Court, *Manuel Philip v. Emperor*, AIR, 191, Bom 280.

Finally section 5 of the *IPC* «nothing in this Act shall affect the provisions of any Act for punishing mutiny and desertion of officers, soldiers, sailors and airmen in the service of the Government of India or the provision of any special or local law».

The jurisprudence of the Supreme Court of India

Whilst jurisprudence on extraterritorial offenses related with section 4 and offences committed on board do not deal with the *locus commissi delicti*[37], case law under section 2 shows, as mentioned, a trend for the widening of the concept of guiltiness within India and a corresponding erosion of situations otherwise dealt under section 4(1) and episodically also section 4(2)[38].

The said jurisprudence follows, to a certain extent, the jurisprudence of British Courts on specific offences (cheating, obtaining by false presence or similar offenses), based also on the way the offenses are construed under section 32 of the *Larceny Act (1916)* whereas the applicability of the provision has been linked with the place where the illicit advantage has been obtained[39]. Similarly Indian Courts has developed a jurisprudence asserting amenability under Indian Law in case of conspiracy to commit an offence in India.

Nevertheless, the Supreme Court of India has developed a specific line of reasoning departing from its decision in the so called *Mobarik Ali* case[40] which marked an express departure from earlier decisions, suggesting that criminal jurisdiction cannot extend to "foreigners outside the State" as such decisions were rendered "at a time when the competence of the Indian Legislature was considered somewhat limited" and "under the influence of decisions like those of the Privy Council in the Macleod's case restricting extraterritoriality[41]. In *Mobarik Ali* the accused was charged with cheating and evidence showed that he, though at Karachi, made representations to the complainant through letters, telegrams and telephone talks, sometimes directly, and sometimes through an accomplice in India, he was therefore found "guilty within India" under section 2 of the *IPC*. The same line of reasoning is followed in latter decisions of the Supreme Court of India in subsequent cases[42]. In the above quoted

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37 An exception is perhaps represented by Supreme Court of India *Central Bank Of India v. Ram Narain*, on 12 October, 1954, 1955 AIR 36 dealing with the issue of a person accused of an offence under the Indian Penal Code and committed in a district which after the partition of India became part of Pakistan cannot be tried for that offence by a Criminal Court in India after his migration to India and acquiring thereafter the status of a citizen of India. Similarly, in the case of an offence committed by "native Indian Subjects of his Majesty" (Section 4(1) as it stood at the time, committing an offence outside "British India", see Madras High Court *In Re: A.B. Tonse And Ors. v. Unknown* on 26 November, 1948, AIR 1950 Mad 22. The Supreme Court of India, *Fatma Bibi Ahmed Patel v. State Of Gujarat & Anr*, on 13 May, 2008, held further that when at the time of the Commission of the offence the accused person is not a citizen of India, then the provisions of Section 4 have no application whatsoever.

38 In the High Court of Andhra Pratesh at Hyderabad, *P. Nedumaran v. Union of India,* decided on 14th of June 1993, the Court held that the accused, captured after their Honduran registered vessel not displaying any flag was intercepted on the high seas, diverted and later on sunk by an Indian Warship some 16 miles away from the coast, could be tried in India "if such offence had been committed at any place within India at which they will be found" (para 46). In the said case the ship was affirmed to be sailing towards the coast of India carrying approx 100 tons of explosives and it was accordingly deemed that the intent was to cause disruptive, subversive and terrorist activities in the Indian territory.

39 Among others, *Reg. v. Ellis (1898) 19 Cox. C.C. 210*.

40 Supreme Court of India, *Mobarik Ali Ahmed v. State of Bombay* on 6 September 1958, 1957 Cri LJ 1346; the Appellant, charged for "cheating and dishonestly inducing delivery of property" under Section 420 of the *IPC*, was a Pakistani national, who, during the entire period of the Commission of the offence never stepped into India and was only at Karachi. He was nevertheless charged jointly under Section 34 of the *IPC* (Common Intent) with other individuals staying in Bombay during the offence, and he was later brought over from England, where he happened to be, by virtue of extradition proceedings in connection with another offence, the trial for which was then pending in the Sessions Court at Bombay. In the circumstance the Court overruled its previous decision in *ShreekantiahRamayyaMunipalli v. The State of Bombay*, 1955 Cri LJ 857, to the effect that it is "not" essential that the accused should join in the "actual doing" of the act and not merely in planning its perpetration.

41 [(1891) A.C. 455. Restrictive views were also taken by the Privy Council in *Liangsiriprasert v. The United States*, Appellant and Government of the United States of America and Another, Respondents [1991] 1 A.C. 225 The basic principle is that a foreign national is not answerable to English criminal jurisdiction for an act done totally outside England, and neither on a British ship nor within British territorial waters. The exceptions are well recognized and are based on international law, and include piracy, hijacking and other offences against aircraft.

42 Supreme Court of India, *Lee Kun Hee and Ors. v. Respondent: State of U.P. and Ors*, on 1 February 2012. The accused were non-Indian nationals residing outside of India, charged with dishonest misappropriation of property (Section 403 *IPC*), criminal breach of trust (Section 405 *IPC*), cheating (under Sections 415, 418 and 420 *IPC*). The Court, after extensively quoting the *Mobairik Ali* decision held, based on a rather jurisdictional and procedural argument that «a perusal of Section 182 (extracted above) reveals that the said provision

Mobarik Ali case, the Supreme Court of India has construed and distinguished the relevant provisions of the *IPC*[43].

Interestingly the decision quotes the *Lotus* decision of the *IPCJ* through early commentaries. At this purpose, it should be mentioned that the decision was heavily limited by the extent of special agreement between the Governments of the French and the Turkish Republics and by the circumstance that the Turkish decision remained a mostly "unknown" element in the underlying discussion, on which the majority of the Court made its speculations. The Court finally considered, in the absence of any proof on the contrary that the exercise of its jurisdiction by Turkey following a collision on the high seas between a French and a Turkish ship in which eight Turkish citizens on board the later died, did not violate international law. At this purpose, it should be pointed out that, apart from the no longer actual issues under the *Lausanne Convention*[44], the decision of the *IPCJ* does not set a principle establishing by itself jurisdiction under the so called "protection principle", nor the relevance of the "effects" of the crime and the place where such effects took place, in order to assert jurisdiction. The *IPCJ* rather asserted that a State which establish its jurisdiction under the principle of protection, based on its domestic law, does not violate international law, whilst the reference to the "effects" was an attempt to "stretch" the ordinary territoriality principle[45] in order to encompass a situation in which the concerned State has made use of the protection principle[46]. This said, the decision of the *IPCJ,* in the *Lotus* case, does not provide directly jurisdictional link, nor any rule in order to establish "where" an offence can be deemed to have been committed, nor does not sustain the so called "event" criteria and such aspects have to be established in accordance with Indian penal law … which does not overlap, as will be shown, with Turkish penal law as applicable at the given time.

Finally and in order to avoid a possible misunderstanding, it must be considered that what is currently labeled as "*Lotus principle*"[47] and is, from time to time recalled by the International Court of Justice (ICJ) mainly in its "advisory opinions" from the legality of the use of threat to use nuclear weapons, Construction of the wall in the occupied territories or independence of Kosovo, has really nothing to do with jurisdiction, *locus commissi delicti* and so on. The current "*Lotus rule*" is the "second life" of the "pumped up" *Lotus rationale* as a matter of relationship between legality and absence of international prohibition.

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can be invoked to determine jurisdiction in respect of a number of offences which include cheating as a component. When acts of fraud/dishonesty/deception, relatable to the offence(s), contemplated Under Section 182 aforementioned, emerge from communications/messages/letters etc., the place(s) from where the communications/messages/letters etc. were sent, as also, the places at which the same were received, would be relevant to determine the court of competent jurisdiction».

[43] «Section 3 and 4 deal with offences committed beyond the territorial limits of India and Section 2 obviously and by contrast refers to offences committed within India" and further "this recognizes the general principle of criminal jurisdiction over persons with reference to the locality of the offence committed by them, being within India … the use of the phrase "every person" in Section 2 as contrasted with the use of the phrase "any person" Section 3 as well as Section 4(2) of the Code is indicative of the idea that to the extent that the guilty for an offence committed within India can be attributed to a person, every such person without exception is liable for punishment under the Code» (para 39).

[44] Article 15 of the *Lausanne Convention* stated: «En toutes matières, sous réserve de l'article 16, les questions de competence judiciaire seront, dans les rapports entre la Turquie et les autres Puissances contractantes, réglées conformément aux principes du droit international».

[45] At this purpose, see the dissenting opinion of judges Finlay, para 195 and 204, and Nyholm, para 214 ff.

[46] As mentioned above, the decision of the *IPCJ* was unluckily adopted without considering the Turkish judgment and its legal reasoning by simply looking at the exterior appearance of the fact and the exercise of the jurisdiction by Turkey. Nevertheless, the text of the relevant Turkish provision (art. 6 of the penal code) as follows: «Any foreigner who, apart from the cases contemplated by Article 4, commits an offence abroad to the prejudice of Turkey or of a Turkish subject, for which offence Turkish law prescribes a penalty involving loss of freedom for a minimum period of not less than one year, shall be punished in accordance with the Turkish Penal Code provided that he is arrested in Turkey. The penalty shall however be reduced by one third and instead of the death penalty twenty years of penal servitude shall be awarded. Nevertheless, in such cases, the prosecution will only be instituted at the request of the Minister of Justice or on the complaint of the injured Party. If the offence committed injures another foreigner, the guilty person shall be punished at the request of the Minister of Justice, in accordance with the provisions set out in the first paragraph of this article, provided however that:

(1) the article in question is one for which Turkish law prescribes a penalty involving loss of freedom for a minimum period of three years;
(2) there is no extradition treaty, or that extradition has not been accepted either by the government of the locality where the guilty person has committed the offence or by the government of his own country.

[47] At this purpose we would like to refer to H. HANDEYSIDE, *The Lotus Principle in ICJ Jurisprudence: was the Ship ever Afloat?*, in *Michigan Journal of Intern. Law*, 2008, p. 71 ff..

The reasoning of this *Mobarik Ali* decision of the Supreme Court, also quoted and distinguished *Reg. v. Keyn* (Franconia's case)[48] in the sense that the Supreme Court of India has rejected the conclusion of the majority judgment, circumscribes the main debate in that case[49] and finally affirms the relevant principle of criminal jurisdiction for the purpose of case *sub iudice* to have been enunciated in the minority judgment of *Amphlett, J.A*. at page 118: «it is the locality of the offence that determines the jurisdiction» implying, by contrast, that it is not the nationality of the offender. As a result of the decision, *Reg. v. Keyn* is the case referred by is up to 2012[50] in Supreme Court cases and other not British Admiralty cases[51]. *Reg v. Keyn* is certainly a "legal kaleidoscope" and looking inside its almost 170 pages it is possible to find, argue and counter-argue almost everything.

Nevertheless, it should be noted that judge *Amphlett* contends the ground that, the death of the party injured through criminal negligence having occurred on board an English vessel, the offence was in law committed there, and therefore, by the law of nations, on English territory, holding that such principle as expressed in a previous decision[52]is founded … « upon a convenient fiction, and binding no doubt upon a British subject, but not in respect of a foreigner who committed the offence while he was de facto outside the English territory, and could not be made amenable to English law». The said principle seems us to reflect the interpretation of section 4(2) of the *IPC*, as distinguished by the Supreme Court in its jurisprudence from section 2, in the sense that the "effects" principle may be applied to crimes committed within India, but not in order to widen the purpose of "extraterritorial offenses" under the *IPC* or under the residual Admiralty jurisdiction in respect of offences (*infra*).

There is some additional remark on the said jurisprudence. The "effects" theory, as developed by the Supreme Court, seems to refer to elements of the conduct (receipt of letters, cables and talks) rather that to the offence as such (misappropriation). In the original *Mobarik Ali* case, the conduct could have been deemed as committed within India, based on the presence of accomplices and the direct delivery by some of them of letters in India.

It is also worth mentioning that the said jurisprudence in recalling *Reg. v. Keyn* does not distinguish the circumstances of the underlying facts from intentional offences, as for example, judge Moore did in his dissenting opinion in the *Lotus* case.

We have already observed that the Indian jurisprudence follows, to a certain extent, the jurisprudence of British Courts on specific offences (cheating, obtaining by false presence or similar offenses) and conspiracy. It is nevertheless still open to what extent British and Common Law jurisprudence may influence the outcome of the instant case. Early comments quoted wrongly the *Lotus* case as providing "good law" and also *Rex. v. Coombes*[53], deciding an issue of venue. An American case also quoted on the web in order to assert the jurisdiction, *U.S. v. Davies*[54] only apparently reproduces the

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48 (1876) 2 Ex D 63.

49 Whether the sea up to three mile limit from the shore is part of British territory or whether in respect of such three mile limit only limited and defined extraterritorial British jurisdiction extended which did not include the particular criminal jurisdiction under consideration. In respect of this question, as a result of the judgment, the Parliament had to enact the *Territorial Waters Jurisdiction Act, 1878.*

50 *Lee Kun Hee and Ors. v. Respondent: State of U.P. and Ors.*

51 Reference is to *Reg. v. Lewis* (1857) *7 Cox. C.C. 227*, in which s(a) sailor was beaten on board a US Vessel and later died on land as a consequence of the injuries and the Admiralty jurisdiction was denied; and *Reg. v. Armstrong* (1875) B Cox. C.C. 184, in which a sailor throw the master of a vessel in foreign territorial waters overboard and death intervened in foreign territorial waters as a consequence of "conduct" on board the ship. Later decisions, are represented by *R. v. Nillins*, 1884, 53 L. J. 157 and *R. v. Godfrey*, L. R. 1923, 1 K. B. 24. On the development of Indian Admiralty Law, see S. D. NANDAN, *Admiralty jurisdiction in India: pre and post Elizabeth*, in *IndLIJ*, 2007, p. 81 ff..

52 *Rex. v. Coombes*, 1 Leach Cr. C. 388.

53 *Rex. v. Coombes*, cit. A person fired from the shore against a boat with a revenue officer on board. The issue in that case was if the offence would fall under the jurisdiction of the Admiralty of under the jurisdiction of the local County Court. The jurisdiction of the admiralty was asserted as the crime must be, for the purpose of determining the venue, held to have been committed on the English ship where the death occurred.

54 *United States v. Davies*, Circuit Court, D. Massachusetts. May Term, 1837. A gun was fired from an American ship, lying in the harbour of *Raiatea*, one of the Society Isles and a foreign government, by which a person on board a schooner, belonging to the natives and lying in the same harbour, was killed. Held, that the act was, in contemplation of law, done on board the foreign schooner, where the shot took effect, and that jurisdiction of it belonged to the foreign government, and not to the courts of the United States.

same *rationale* of *Rex v. Coombes*, as its outcome was heavily influenced by applicable statutory provisions[55].

In a later U.S. decision, *Simpson v. State*[56], the issue of "cross-border" shooting was resolved based on the "effects" of the bullets, shoot in South Carolina striking the water within the State of Georgia. Nevertheless the said decision quoted an earlier decision[57] stating that «where the question is not regulated by statute, or where the statute merely provides that offenses shall be tried in the county where the offense is committed, it is generally held that the indictment is properly brought in the State and county where the blow was struck»[58]. Referring to the said substantive argument, it must be observed that those ancient English statutes declaring that murder or manslaughter were to be trailed «in the county where the stroke was given if the party died out of the realm .. or where the death occurred, if the stroke was given out of the realm»[59], never applied to India and that the *Indian Penal Code* in 1860 adopted in respect of murder and manslaughter a clearly different wording. On the other side, it has also been pointed out[60] that ancient English cases decided under common law linking the place were the trial was to be held to the place were the death occurred reflects the ancient role of jurors (which were to be knowledgeable on the facts of the offence) and were applicable exclusively to jury trials.

Admiralty Offences and Jurisdiction

The Indian Admiralty Jurisdiction is an intrinsically complex subject as it is the result of the extension of British Admiralty Jurisdiction to the Colonies, the Indian determination to continue to apply certain statutes despite its independency, the consequential British determination to "accept" the maintaining such legislation in force by India and finally its re-shaping following the adoption by India of its own statutes[61].

The Admiralty jurisdiction of India wasn't originally nor subsequently overlapping with the Admiralty Jurisdiction of England and Wales and certain of its latter developments[62]. This implied that all those provisions related to "a British subject … found within her Majesty's dominion"[63] didn't apply to the Admiralty jurisdiction of India.

An "exterior" description of the Admiralty Jurisdiction affirms it to extend to a) offenses committed on Indian ships on the high Seas; b) offenses committed on board foreign ships in Indian territorial waters; c) piracy - Admiralty jurisdiction should also extend to Indian ships on spot were the municipal authorities of a Foreign Country may exercise concurrent jurisdiction[64].

In the present case it was asserted that the incident is punishable in India under the *Admiralty Offences (Colonial) Act, 1849*[65]and that the said Act could complement section 3 of the *IPC* by attributing

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55 Crimes act of 1790, c. 36, para 12 [1 Story's Laws, 85; 1 Stat. 115, c. 9].

56 Supreme Court of Georgia, *Simpson v. State*, 1910**,** *1S93. 92 Ga. 41, 17 S. E. 984.*

57 *State V. Carter*. 27 N. J. Law, 499 (1859). Recently see also Supreme Court of Alaska, *Totemoff v. State*, *S-6151,* decided on August 7, 1995.

58 At this purpose, see E. S. STIMPSON, *Conflicts of Criminal Laws*, The Foundation Press Inc., 1936, p. 36.

59 Statute 2 George II, c. 21 and more than hundred years later the *Offences against the Person Act (1861).*

60 At this purpose, see the critique contained in the reasoning of the Supreme Court of Michigan, *People v. Duffield*, *Decided May 4, 1972*.

61 At this purpose, see Law Commission of India, Report n. 5 on *British Statutes applicable to India*, 1957, which identifies, p. 8 as a traditional matter for Acts of the Imperial Parliament, external relations, extra-territorial jurisdiction, extradition, Merchant shipping, piracy offences on the high Seas and admiralty. The enduring applicability of British statutes to India after the independence of India, relies – on the British side – on the *India (Consequential Provisions) Act*, *1949*, Sec. 1, which made such statutes open the be retained or repealed on the India.

62 At this purpose, see G. MARSTON, *Crimes by British Passengers on board Foreign Ships on the High Seas: The Historical background to* Section *686(1) of the Merchant Shipping Act* 1894, in *CLJ,* 1999, p. 171 ff..

63 E.g.: *Merchant Shipping Amendment Act, 1855*, 18 and 19 Vic, c. 91. Section 21 on which see Calcutta High Court, *Queen-Empress v. Barton* on 7 February, 1889, (1889) ILR 16 Cal 238.

64 RATANLAL, DHIRAJLAL, *The Indian Penal Code*, cit., S. 4, p. 61.

65 Section 1 of the *Admiralty Offences (Colonial) Act, 1849*, reads as follows: «If any person within any colony shall be charged with the commission of any treason, piracy, felony, robbery, murder, conspiracy, or other offence of what nature or kind so ever, committed upon the sea, or in any haven, river, creek, or place where the admiral or admirals have power, authority or jurisdiction, or if any person charged with the commission of any such offence upon the sea, or in any such haven, river, creek, or place, shall be brought for trial to any colony,

the cognizance of the said Offences to ordinary criminal Courts, whilst the High Court's succeeding to the Supreme Courts have the same jurisdiction as the High Court of Admiralty as it stood in 1823[66].

Moving beyond the said "exterior description" of the Admiralty, the *Admiralty Offences (Colonial) Act, 1849*, is clearly an ancient piece of colonial legislation inherited by India and proposed for repeal[67], except for those provisions related with the repression of piracy[68]. As pointed out in the Law Commission of India Report n. 151 on *Admiralty jurisdiction*, the jurisdiction under the said act is over offences committed at sea as they were under the admiralty jurisdiction in 1860.

The recent "re-discovery" of Admiralty jurisdiction in respect of piracy is substantially the combined result of the *Admiralty Offences (Colonial) Act, 1849* and the subsequent *Admiralty Jurisdiction (India) Act, 1860* recalling the early *Offenses at Sea Act, 1536*, and does not apply to situations like those of the instant incident.

Further, sections 1 and 3 of the *Admiralty Offences (Colonial) Act, 1849*, are not self-explaining provisions don't establish and express by themselves the real reach of the admiralty jurisdiction over offenses committed at sea. Case law on the *Admiralty Offences (Colonial) Act, 1849* shows that the reference to offenses committed upon the sea does have a very narrow meaning within the tradition of Admiralty jurisdiction and was (and still is as the Act is not open to integration with latter pieces of legislation) limited to the Admiral's jurisdiction in Britain – at the time - which "*does not extend as regards the open sea beyond territorial limits which are some three miles from low water mark*"[69].

Apart from the said "objective" limitation of the Admiralty jurisdiction under the 1849 Act, the provisions of the said act have been deemed to apply solely to subjects belonging to the Colony whose

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then and in every such case all magistrates, justices of the peace, public prosecutors, juries, judges, courts, public officers, and other persons in such colony shall have and exercise the same jurisdiction and authorities for inquiring of, trying, hearing, determining and adjudicating such offenses, and they are hereby respectively authorized, empowered, and required to institute and carry on all such proceedings for the bringing of such person so charged as aforesaid to trial, and for and auxiliary to and consequent upon the trial of any such offense wherewith he may be charged as aforesaid, as by the law of such colony would and ought to have been had and exercised or instituted and carried on by them respectively if such offence had been committed, and such person had been charged with having committed the same, upon any waters situated within the limits of any such colony, and within the limits of the local jurisdiction of courts of criminal justice of such colony». The subsequent section 3 (section 2 has been repealed) of the *Admiralty Offences (Colonial) Act, 1849*, reads as follows: «Where any person shall die in any colony of any stroke, poisoning, or hurt, such person having been feloniously stricken, poisoned, or hurt upon the sea, or in any haven, river, creek or place where the admiral or admirals have power, authority, or jurisdiction, or at any place out of such colony, every offence committed in respect of any such case, whether the same shall amount to the offence of murder, or after the fact to murder or manslaughter, or of being accessory before the fact to murder, or after the fact to murder or manslaughter, may be dealt with inquired of, tried, determined, and punished, in such colony, in the same manner and in all respects as if such offence had been wholly committed in that colony; and if any person in any colony shall be charged with any such offence as aforesaid in respect of death of any person who, having been feloniously stricken, poisoned, or otherwise hurt, shall have died of such stroke, poisoning, or hurt upon the sea, or in any haven, river, creek, or place where the admiral or admirals have power, authority, or jurisdiction, such offence shall be held for the purpose of this Act to have been wholly committed upon the Sea».

66 At this purpose, see Bombay High Court*, Kashibai And Anr. v. The Scindia Steam Navigation Co. ...* on 5 August, 1960,AIR 1961 Bom 200. For jurisdiction criminal matters, see the *Admiralty Jurisdiction (India) Act, 1860*, n. 23 of 1860, and section 106 of the *Government of India Act, 1915*. It must be observed that the Supreme Court of India in *M.V. Elisabeth And Ors vs Harwan Investment and Trading*, decided on 26 February 1992, in 1993 *AIR*, 1014, excluded that the Admiralty jurisdiction of the High Court in civil matters was "frozen" at 1890 when the *Colonial Courts of Admiralty Act, 1890* was adopted, as such Act was not to incorporate any particular English Statute into Indian law for the purpose of conferring admiralty jurisdiction, but to assimilate the competent courts in India to the position of the English High Court in exercise. Accordingly the Supreme Court of India, overruling the decision of the *Privy Council* in *The Yuri Maru v. The Woron,* 1927 AC 906, held that section 6 of the Admiralty Court Act, 1861, limiting the jurisdiction of the Admiralty Courts to claims respecting inward cargo, even if applicable in 1890, as later repealed in England in by the *Administration of Justice Act 1920*, was no longer a limit to the Admiralty jurisdiction of the High Court in India.

67 Clause 21 of the "Admiralty Bill 2005" «unless an amendment to the law relating to criminal justice like the Indian Penal Code and the Criminal Procedure Code is brought about to deal with piracy cases about the High Seas» (33. Clause 21.1 and 33.3 Cause 21(2)). The draft *Admiralty Bill*, which was intended to modernize the Indian Admiralty laws and which has not yet been passed, is on the specific point not aimed at innovate the admiralty jurisdiction in respect of criminal offences, but rather assesses the current ambit of applicability of the *Admiralty Offences (Colonial) Act, 1849*, which applies certainly only to piracy on the high seas.

68 The Act was included in the List Annex I, reproduced in the Law Commission of India Report n. 5 on British Statutes Applicable to India, as "British Statutes applicable or of possible application to India", together with the *Admiralty Jurisdiction Act, 1860* and the *Colonial Courts Act, 1874.*

69 High Court of Bombay, *Punja v. Guni,* (1918) 20 BOMLR 98.

Courts are to exercise jurisdiction, under the further requirement that the offence should be punishable also under English law[70].

If the "original" reach of the *Admiralty Offences (Colonial) Act, 1849,* is very limited, section 1 should in its final part actually read as to recalling the applicable laws of the colony (to say the Indian Penal Code, 1860) and also the "*limits of the local jurisdiction of the courts of criminal justice of such colony*". The latter reference should be read as a reference to section 4, as modified by *The Offences on Ships and Aircraft Act,* 1940, and all sections establishing offences of the *IPC*, and section 188 of the *ICrPC,*[71] with the conclusion that the Act does not currently add anything to the said provisions, except for the punishment of piracy on the High Seas[72].

Another pieces of ancient admiralty law once applicable to India, the *Merchant Shipping Act 1894* and its sections related to offences committed on ships (684 and 687), have been repealed in its application to India by the *Merchant Shipping Act, 1958*, which does not contain any longer such provision, which are currently dealt by section 4(2) of the *IPC* and by sections 2[73] and 436 ff. of the said *Merchant Shipping Act, 1958.* By the way, even under the now repealed *Merchant Shipping Act, 1894,* relevant case law[74] show that the term "British Ship" herein could not be interpreted as to bring under the same meaning a ship belonging to a natural born Indian subject.

The unsatisfactory status of Admiralty laws is clearly remarked in the Law Commission of India, Report n. 151 of 1994 on "Admiralty Jurisdiction". In a Report, the Law Commission of India[75], while analyzing the topic of extraterritorial jurisdiction in respect of hijacking of a vessels, refers exclusively to the *IPC* and not to the Admiralty jurisdiction. Finally, in order to overcome the lack of substantive provisions on "piracy" and also to extend the application of the *IPC* and the *ICrPC* to maritime piracy, the Indian Government introduced the 23 of April 2012, the "*Piracy Bill, 2012*" in the *Lok Sabha*.

Offences under the SUA Act, 2002 and jurisdiction of Indian Courts in respect of such Offences

The *Suppression of Unlawful Acts Against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act*, *2002*, has been enacted to give effect to the International Maritime Organization Convention for Suppression of Unlawful Acts Against the Safety of Maritime Navigation, and the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, and for matters connected therewith (Preamble). Under section 1 the Act shall apply to "the whole of India including the limit of the territorial waters, the continental shelf, the exclusive economic zone or any other maritime zone of India within the meaning of section 2 of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976 (80 of 1976)", and «to a ship, if that ship is navigating or scheduled to navigate into, through or from waters beyond the outer limits of the territorial waters of India, or the lateral limits of its territorial waters with adjacent States».

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70 In its analysis the Law Commission of India, Report n. 5 on *British Statutes Applicable to India*, considers, p. 42 ff. the Admiralty Offenses (Colonial) Act, 1849, to be applicable to offences committed on the high Sea in the Courts of the Colony to which the offender belongs, as if such offence was committed within the territorial waters of such Colony. Besides the requirements related to the person of the offender, which would make the 1849 Act residually applicable to complement a narrow interpretation of Section 4(1) of the *IPC* where an offence has been committed by an Indian citizen on board a non-Indian ship on the High Seas (Bombay High Court, *Manuel Philip v. Emperor*, A.I.R., 1917, Bom 280), the Law Commission raises also the question that the offence must be punishable under English law even if finally Indian law is to apply, setting basically a "double criminality" requirement.

71 Gujarat High Court, *M.G. Forests Pte Ltd. v. "M.V. Project Workship"* on 24 February, 2004, suggests a «conjoint reading of provisions of Section 4 of the Indian Penal Code and Section 188 of the Cr.P.C. it becomes clear that even for the purpose of exercise of admiralty jurisdiction in relation to acts which constitute an offence under the Indian Penal Code a person can be tried by a criminal court only if the act is committed within territorial limits of Indian Courts and such person is found within the territorial limits of the criminal courts».

72 At this purpose, see Privy Council, *In re Piracy jure gentium*, [1934] A.C. 586,

73 Under section 2(2) of the Merchant Shipping Act, 1958, «unless otherwise expressly provided, the provisions of this Act which apply to vessels other than those referred to in sub- section (1)[registered in India, to be registered in India or wholly owned by an Indian subject] shall so apply only while any such vessel is within India, including the territorial waters thereof».

74 High Court of Bombay, *Punja v. Guni*, 1918.

75 Report n. 156 of 1997, on *IPC,* Vol. 1, p. 186.

Section 3 of the Act implements article 3 of the Convention by adding the punishment for each of the offenses under the Convention. Specific reference to killing is made in section 3, 1, letter *g*) (i) in the course of the commission of or in attempt to commit, any of the specified offences listed in clause (a), referring to the specific intent to "endanger navigation".

Under section 3, (4), : «*where any act referred to in sub - section 1 is committed,*

(a) against or on board

(i) an Indian ship at the time of commission of the offence; or

(ii) any ship in the territory of India including its territorial waters;

(b) by a stateless person, such act shall be deemed to be an offence committed by such person for the purposes of this Act».

The above provision completes the provisions establishing specific offenses, by establishing the substantive reach of the offenses, also for other purposes under the Convention. Jurisdiction of Indian Courts is dealt under section 3 (8) which reads as follows: «*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;

(b) such offence is committed on board a ship which is for the time being chartered without crew to a lessee who has his principal place of business, or where he has no such place of business, his permanent residence, is in India; or

(c) the alleged offender is a citizen of India or is on a fixed platform or on board a ship in relation to which such offence is committed when it enters the territorial waters of India or is found in India».

The said jurisdictional links are more restrictive that those under the Convention and exclude, from jurisdictional criteria or links, offences committed "against an Indian Ship", by circumscribing it to offences committed "on board such a ship". The exclusion of the former criteria is an argument against the possibility to construe section 3(8) as to include any act committed "against" an Indian ship, whilst the reference to the commission of the offence on board an Indian ship should be construed in accordance with the criteria highlighted in respect of section 4(2) of the *IPC*.

It should be noted that the *FIR* in the Enrica Lexie case does not refer to any offence under the *SUA Act*, but refer exclusively to the Offence of murder under section 302 of the *IPC.* The High Court in rejecting the petition of the accused and Italian Government and asserting the jurisdiction of the Courts of Indian (decision currently appealed and pending in front of the Supreme Court) incidentally refers to the *SUA Act* .

Jurisdictional provisions in the ICrPC and requirements for Offences under the SUA Act, 2002

The prime provision in respect of "Offenses committed outside India" is section 188 of the *ICrPC* which, in respect of the "Extraterritorial Offences" referred by section 4(1) and (2) (but not also in respect of the offenses targeting from outside India Computer resources in India), establishes that per person committing the offence "may be dealt in respect of such offence as if it had been at any place within India at which he may be found" and "provided that, notwithstanding anything in any of the preceding sections of this chapter, no such offence shall be inquired into or tried in India except with the previous sanction of the Central Government".

The verb inquired is to be referred to "inquiries" which encompass any fact finding activity of a magistrate other than trial (section 2(*g*) *ICrPC*) but does not overlap with investigations and does not bar the issuance of a warrant for the judicial custody of the accused.

The prevalence clause over other sections in the same Chapter XIII of the *ICrPC* clarifies that sections 177 to 187 may eventually determine which local Court is competent to try the Offence, but in respect of the offenses referred to in section 188, such provisions may not elide the need for the previous sanction of the Central Government[76].

[76] The *non obstante* clause was inserted in Sec. 188 of the *ICrPC* 1898, and subsequently transferred in the 1973 Code, by the Code of Criminal Procedure Amendment Act, 1923 and justified with the preference for a "certificate" in any case to be inquired or trialed.

Certain of the provisions on jurisdiction of local Courts, and specifically section 179 of the *ICrPC,* which recalls the "consequences" of the offences and to some extent the "effects principle, have been relied upon in situations of offences within India under section 2 of the *IPC,* in situations in which the accused acted from outside the territory of India[77]. Nevertheless, section 179 which relates with venue rather than with jurisdiction does not create liability under the *IPC* and presumes such a liability "within India". Additionally, section 179 as sections, 180, 181, 182, 183, 186 but not section 188, refer to "local Jurisdiction"[78] which is defined in section 2(*j*) as «the local area within which the Court or Magistrate may exercise all or any of its or his powers under this Code and such area may comprise the whole of the State, or any part of the State, as the State, as the State Government may, by notification, specify» and may not apply to "extraterritorial offences".

It must also be observed that under section 12 of the *SUA* Act, prosecution for one of the offences under section 3 requires sanction by the Central Government. The reference to "prosecution" in section 12, and correspondingly the situations in which prior sanction is required under section 197 (Prosecution of Judges and Public Servants), has an apparently wider reach than the requirement under section 188 of the *ICrPC*, whereas the reference is to inquiry and trial. The question of the "sanction" is ordinarily construed under section 197 as to be raised at any time after the cognizance. This said it necessary to refer briefly to the investigative power in respect of under the *SUA* Act. Under section 4 of the Act «the Central Government may, by notification in the Official Gazette, confer on any gazetted officer of the Coast Guard or any other gazetted officer of the Central Government powers of arrest, investigation and prosecution exercisable by a police officer under the Code». Other Police Officers are only empowered to assist the Officer of the Central Government for the purposes of the Act. Under section 5 of the Act, the speedy trial is to be held in front of a Court designated by the State Government with the concurrence of the Chief Justice of the High Court.

Offences under the *SUA* Act have been listed as "Scheduled offences" under the *National Investigation Agency Act, 2008* (*NIA* Act) which establish a specific procedure for the exercise of investigative powers (section 6). Under such procedure, upon receipt of information of the Offence (under section 154 of the *ICrPC*) the police officer has to forward the report to the State Government, and this has to forward it, as expeditious as possible, to Central Government, which has to determine within fifteen days from the receipt of the report if the offence is a "scheduled offence" and direct the Agency to investigate[79]. The *NIA* Act states, under section 10, that « save as otherwise provided in this Act, nothing contained in this Act shall affect the powers of the State Government to investigate and prosecute any Scheduled Offence or other offences under any law for the time being in force». The said provision does not confer investigative powers to State Government, was lacking such powers under the *SUA* Act. The *NIA* Act has not affected the requirements for sanction of the Central Government in order to prosecute *SUA* Offenses under section 12 of the *SUA* Act. As observed previously, in the instant case, the *FIR* does not refer to a scheduled offence under the *SUA*/*NIA* Acts, and the investigations have been conducted exclusively by the Kerala State Police. The above considerations are

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[77] *Mobarik Ali Ahmed v. State of Bombay* , cit. in which the following assertion is made in quoting the finding of the appealed judgment of the High Court «the jurisdiction of the court to try him for the alleged offence relying on Section 179 of the Code of Criminal Procedure which provides as follows: "When a person is accused of the commission of any offence by reason of anything which has been done, and of any consequence which has ensued, such offence may be inquired into or tried by a Court within the local limits of whose jurisdiction any such thing has been done, or any such consequence has ensued. … Even upon the footing that the representations were made, or the deception was practiced by the appellant, while he was in Pakistan, the consequence of the deception, namely, the delivery of the property, took place in Bombay"». The reasoning of the Supreme Court, is further analyzed in the Law Commission of India 41st Report on the *ICrPC*, of 1969, para 15.36 (p. 91), where it is suggested that in case of cheating the offence should in no be considered to be committed in the accused person's end.

[78] Supreme Court of India, in *Lee Kun Hee and Ors. v. Respondent: State of U.P. and Ors*, cit. held that: "under section 179 of the Code of Criminal Procedure, even the place(s) wherein the consequence (of the criminal act) "ensues", would be relevant to determine the court of competent jurisdiction. Therefore, even the courts within whose local jurisdiction, the repercussion/effect of the criminal act occurs, would have jurisdiction in the matter (para 13)".

[79] Under section 6 (5): "where any direction has been given under sub-Section (4) or sub-section (5), the State Government and any police officer of the State Government investigating the offence shall not proceed with the investigation and shall forthwith transmit the relevant documents and records to the Agency". Finally section 6 (7) reads as follows: «for the removal of doubts, it is hereby declared that till the Agency takes up the investigation of the case, it shall be the duty of the officer-in-charge of the police station to continue the investigation».

evidence of the fact that irrespective of the references made to the *SUA* Convention in order to assert jurisdiction, such jurisdiction may be asserted under domestic law only if certain procedural steps are completed.

As mentioned earlier, the charge sheet has been filed the 18th of May 2012 by the Kerala police, asserting that sanction is requested solely for the offence under section 3 of the *SUA* Act, relying for offences under the *IPC* on the "notification" extending the entire *IPC* and *ICrPC* to the EEZ.

6. Immunity issues related with the incident

The nature of the tasks, discharged by the components of the Military Protection Detachment embarked on board the MV Enrica Lexie, has already been described. The said Military Protection Detachment is by itself a "structured" "Military Force" of a State, engaged abroad in a Military Operations aimed at countering the international threat posed by piracy and armed robbery, which has been recognized since 2008 by the United Nations Security Council as a threat to international peace and security and dealt by under Chapter VII of the United Nations Charter.

After the incident the vessel, carrying the said military force, has been "lured" in order to have it entering an Indian Port and the circumstance has been praised as a "smart move". There are reasons to believe, based on the prior reporting of the incident which was extended to Indian authorities, that the vessel was cheated with the knowledge of the fact that on board there was a military force of Italy. The invitation to enter the Port of Kochi in order to have the military force and the crew of the vessel cooperating in the identification of apprehended pirates, an international obligation under article 100 of the *UNCLOS*, tantamount to an invitation to a foreign military force to enter the territory of India while in transit and for a short stay.

Despite the "vanishing" character of the concept of "absolute immunity" in current international practice, if there is a situation in which "absolute immunity" has still a strong rationale, then it is the situation in which military forces engaged in an operations in respect of a context amounting, like in the case of international piracy, to a recognized threat to international peace and security, have been invited within the territory of a Coastal State.

A military force in transit, even if small in dimension, is an organized entity with a military structure and cannot be "diverted" from its function by the territorial sovereign (whose territorial jurisdiction they have entered with its consent), nor a military force can legitimately be "beheaded" and neutralized with the purpose of exercising the territorial jurisdiction. The principle is expressed by the U.S. Supreme Court in *The Schooner Exchange vs. McFaddon* in 1821[80]. The principle has been subsequently recalled by several decisions of U.S. Courts[81] and distinguished by the *Privy Council* which it was held that "*an express license to enter foreign territory would not be presumed*"[82], and by the Supreme Court of India[83].

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[80] 11 U.S. 7 Cranch 116 (1812). The relevant paragraph reads as follows: «A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is where he allows the troops of a foreign prince to pass through his dominions. In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining».

[81] US Supreme Court in *Tucker v. Alexandroff* 183 U.S. 424 (1902), Supreme Federal Court of Canada, *Antonsen v. Canada (Attorney General)* [1943] S.C.R. 483, 80 C.C.C. 161, US Supreme Court in *Wilson v. Girard*, 354 U.S. 524 (1957). A similar rationale is expressed in U.S. Supreme Court, *Dow v. Johnson*, 100 U.S. 158 (1879), in respect of non friendly visits by armed forces: «whilst serving in the enemy's country during the rebellion, was not liable to an action in the courts of that country for injuries resulting from his military orders or acts; nor could he be required by a civil tribunal to justify or explain them upon any allegation of the injured party that they were not justified by military necessity. He was subject to the laws of war, and amenable only to his own government».

[82] *Chung Chi Cheung v. The King* , in *AIR* 1939 Privy Council 69.

[83] In *Harbahajan Singh Dhalla v. Union of India*, 1987 AIR, 9 1987 SCR (1) 114, the rationale of *The Schooner Exchange v. McFaddon* is associated with the two principles on which sovereign immunity rest, the principle expressed in maxim *par in parem non habet jurisdictionem*… and the principle of non-intervention in the internal affairs of other states. In the said case, the principle was circumscribed "in the days of international trade and commerce, international interdependence and international opening of embassies, in granting sanction the growth

The said jurisprudence has been effectively criticized based on the assumption that "any immunity of a foreign State must be traced to a waiver – express or implied – of its jurisdiction on the part of the territorial State[84]. The subject matter of consent has been dealt in international conventions – reference is to the "*Bustamente Code*" – under which consent to enter territory implies, unless otherwise agreed, waiver of jurisdiction by the territorial State[85].

Additionally, the critique of the *Exchange vs. McFaddon* rationale applies only in respect of the exercise of territorial jurisdiction and, as pointed out in the preceding paragraphs, India may not claim "territorial" jurisdiction and event extraterritorial jurisdiction remains highly questionable. Furthermore, apart from the exception of the international crimes, the criminal jurisdiction of the State can be founded on the principles of nationality and territoriality[86]. Furthermore, the passive personality principle and the protective or security principle are sometimes invoked[87]. In the first case the State assumes jurisdiction over aliens for acts abroad harmful to national of the forum. According to the security principle, the jurisdiction is assumed over acts done abroad which affect the security of the State. These two legal bases for jurisdiction are both discussed, being the passive personality principle "the least justifiable, as a general principle, of the various bases of jurisdiction".[88].

Besides the dimension related to immunity, the arrest of the two Italian service members, following the luring of the military force within India, is to be regarded as carried out in breach of trust in respect of a Foreign State in friendly relations with India and requires a prompt restoration of *status quo ante* and the release of the Italian Marines as a matter of reparation in the form of "restitution"[89]. If the obligation to restore the *status quo ante* is the consequence of the "entrapment" of a military force, the grant of absolute immunity is the "procedural" mean by which such restitution may be obtained, based on the fact that India acknowledged immunity under the provisions of the Code of civil procedure[90].

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of a national law in this aspect has to be borne in mind". Nevertheless, it should be born in mind that the circumstances of the underlying case were very different. More recently, see also *M.V. Elisabeth And Ors v. Harwan Investment And Trading*, 1993 AIR 1014, 1992 SCR (1)1003.

84 H. LAUTERPACHT, *The problem of jurisdictional immunity of Foreign States*, in *BYIL*, 1951, p. 229.

85 Convention on International Private Law, adopted the 3 of February in Havana, Cuba, by the Panamerican Conference, with its attached "International Private Law Code. Article 299 of the Code reads as follows: «Tampoco son aplicables la leyes penales de un Estado a los delitos cometidos en el perímetro de las operaciones militares, cuando autorice el paso por su territorio de un ejercito de otro Estado contratante, salvo que no tengan relación legal con dicho ejército». The subsequent article 300 extends the rule to offences committed in territorial waters, airspace or on board warships.

86 In the judgment on the Woodpulp cases, it was held that these are the only two legal bases of criminal jurisdiction in international law. See European Court of Justice**,** *Judgment of the Court (Fifth Chamber) of 31 March 1993. - A. AhlströmOsakeyhtiö and others v Commission of the European Communities.* - Concerted practices between undertakings established in non-member countries affecting selling prices to purchasers established in the Community. - Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61985J0089(01):EN:HTML**,** For a comment, M. HAYASHI, *Objective Territorial Principle or Effects Doctrine? Jurisdiction and Cyberspace,* in *In. Law* n. 6 (2006) p. 285.

87 I. BROWNLIE, *Principles of public International law*, Oxford, 1998, 306.

88 *Ibid.*

89 The inter State dimension of the incident, in respect of which Italy has claimed immunity for its official amount to an international controversy. Consequences of internationally wrongful acts and the ambit for State responsibility have been pointed out in the "Draft Articles on State Responsibility for internationally Wrongful Acts which have been presented to the United Nations General Assembly and adopted with Resolution 56/83. (A/56/10). The report, which also contains commentaries on the draft articles, appears in the *YILC, 2001*, vol. II, Part Two. Article 31 establishes that «The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act». Article 35 established that a «State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution» is not impossible or excessively burdensome. Under the Draft Articles, State Responsibility does not prejudice individual responsibility under international law (article 58). The said "safety clause" refers only to those situations in which international law established directly individual responsibility for those crimes which have become "international crimes" (genocide, crimes against humanity, war crimes, the crime of aggression and based on an extensive interpretation also "conventional offences" imposing the punishment of the individual) but does not extend to "ordinary" crimes established only under domestic law.

90 At this purpose we would like to refer to the Law Commission of India, *Report n. 54 of 1973 on the Code of Civil Procedure*, 1908, pp. 58 ff. in which the *ratio* of section 86 concerning the immunity from local courts of the Ruler of a foreign State is explained based also on the U.S. Supreme Court decision in *The Schooner Exchange v. McFaddon*. The immunity is also explained as a consequence not to be derogated from, of the grant of the permission to visit the State. The Law Commission of India further recalls, p. 60, LAUTERPACHT's view in respect of immunity to be granted in respect of the executive and administrative acts of a foreign State within its territory. The Law Commission finally suggests a change in the wording of the section as States rather than their Rulers are immune and personal jurisdiction is a consequence of State immunity.

Additionally, the consequences of the false representation and luring, may be relevant under domestic and Constitutional law as an abuse of a judicial proceeding[91]. Abuse of process and the subsequent discretionary stay of the proceeding has been used by English Courts in cases in which the way the accused was brought within the jurisdiction of the Courts was detrimental to the integrity of the proceeding[92]. The said jurisprudence has been recently recalled by the Supreme Court of India[93].

Alternatively, if the Indian authorities, making the invitation to enter an Indian Port, are to be held bound by such invitation by estoppels, the presence of the Italian military force in India should be governed by the spirit of *Agreement between the Italian Government and the Government of the Republic of India on Defense Co-operation,* signed the 3d of February 2003, and in force since 2009. Accordingly, once a specific co-operation activity is mutually established, Italy, as a sending State, submits exceptionally its forces to the legislation of the host State, but retains priority in the exercise of its jurisdiction in respect of «violations resulting from acts or omissions, committed intentionally or out of negligence in the performance of or in connection with service» (Article 8.2 lett. *b*). In such cases, unless the sending State waives its jurisdiction, Courts in the host State cannot proceed.

One issue, concerning the legitimacy of the "original" presence of the military protection detachment in the EEZ of India, and perhaps the subsequent invitation to enter an Indian port, is related with the contention that such presence was not properly notified to Indian Authorities. The argument is evidently misplaced as such notification was requested only for "private guards"[94] and was *post facto* adapted to regular armed forces embarked for the protection of merchant vessels[95].

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91 Abuse of process issues are examined by the Supreme Court of India in *K.K. Modi v. K.N. Modi & Ors*, decided on 4 February, 1998. In *Advocate General, State Of Bihar v. Madhya Pradesh Khair Industries,* decided on 5 March, 1980, 1980 AIR 946, the Supreme Court has examined the relationship between "contempt of Court" and "abuse of judicial process" by one of the parties. In *Zandu Pharmaceutical Works Ltd. & Others v. Mohd. SharafulHaque & Another* (2005) 1 SCC 122, the Supreme Court observed that «It would be an abuse of process of the Court to allow any action which would result in injustice and prevent promotion of justice … In exercise of the powers, Court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice». English case law on "abuse of process" and also powers of Court to make orders under section 482 *ICrPC*, are further discussed in *Inder Mohan Goswami & Another v. State Of Uttaranchal & Others* decided on 9 October, 2007 and in *Central Bureau Of Investigation v. K.M. Sharan*, decided on 21 February, 2008, 2008 BLJR 1210.

92 Court of Appeal , in R. v. Bow Street Magistrates, ex parte Mackeson, [1981] 75 Cr App R 24; House of Lords, *Bennett v. Horseferry Magistrates Court and another* [1993] 3All ER 138; *R v. Mullen* [1999] Cr App R 143; Birmingham Crown Court decision not published but quoted in I. STANBROOK, C. STANBROOK, *Extradition – Law and Practice*, Oxford, 2000, p. 349. In the last mentioned case, the Court applied the abuse of process rule to an accused lured into the English territory, by cheating him that his daughter had an incident and was in desperate conditions. There is also an interesting line of reasoning in the cases in which the remedy sought was denied. The application for the stay of the extradition proceeding was dismissed by the House of Lords, *In re Schmidt*, [1995] 1 A.C. 339, because the violation of Irish law were not held sufficiently grove and ultimately because the applicant would have travelled in any case to England. The applicants in House of Lords, *Reg v. Latif; Shazad v. Reg.* decided on 18th January 1996, alleged to have been lured to England to conclude a drug deal and the conduct of the customs officers luring them was not held to be so unworthy or shameful to affront public conscience to allow the prosecution to proceed. In the Privy Council's decision, in *Warren and others v. Her Majesty's Attorney General of the Bailiwick of Jersey,* decided on 28th of March 2011 [2011] UKPC 10, Lord Hope suggested a departure from the (negative) requirement of a "still possible fair trial" in order to apply the principle outlined in the *Bennet* decision. The decision of the Privy Council is also interesting as it deals with the balance of interest underlying the stay of the proceeding. In High Court of Justice, QBD, Administrative Court, *Khurts Bat v. Investigating Judge federal republic of Germany*, decided 29 July 2011 [2011] EWHC 2029, the Court in dismissing the application held that the grant of a visa by itself does not amount to an executive misconduct and that even accepting that polite and encouraging noises were made, and certainly nothing was done to discourage the visit, that falls far short of establishing that the applicant was lured into the UK.

93 *Dr. Subramanian Swamy v. Dr. Manmohan Singh And Anr.*, decided on 31 January, 2012. In the said decision the Court, quotes a relevant part of the House of Lords decision in *Bennett v. Horseferry Magistrates Court and another* [1993] in which Lord Griffith affirms (para 62) that «Your Lordships are now invited to extend the concept of abuse of process a stage further. In the present case there is no suggestion that the appellant cannot have a fair trial, nor could it be suggested that it would have been unfair to try him if he had been returned to this Country through extradition procedures. If the Court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behavior that threatens either basic human rights or the rule of law. My Lords, I have no doubt that the judiciary should accept this responsibility in the field of criminal law. The great growth of administrative law during the latter half of this century has occurred because of the recognition by the judiciary and Parliament alike that it is the function of the High Court to ensure that executive action is exercised responsibly and as Parliament intended. So also should it be in the field of criminal law and if it comes to the attention of the Court that there has been a serious abuse of power it should, in my view, express its disapproval by refusing to act upon it». For an older case of unwarranted arrest of a fugitive abroad, adjudicated in India under the same non-inquiry rule, later overruled in England, see Bombay High Court. *Emperor v. Vinayak Damodar Savarkar* on 6 October, 1910, (1911) 13 BOMLR 296.

94 The Guidelines issued by the Director General of Shipping, Ministry of Shipping dated 29.08.2011 bearing n. F NO.SR-13020/6/2009-MG(pt), under para 7.3, makes clear that, based upon reference n. 3 (*Details of license issued or accepted by the jurisdictional national administration*

Under international law, the individuals belonging to a military force are qualified as organs of the State, whether they act in the framework of an armed conflict or in peacetime (when they carry out other kinds of operations such as, for instance, counter-piracy operations)[96].The arrested service members at the time of the alleged incident were discharging official functions which are expression of the sovereign rights and prerogatives of Government of the Republic of Italy. Official duties encompassed the protection of Italian flagged vessels from pirates and armed robbers, if necessary with the use of weapon. Such official duties are discharged under guidance instructions and rules of engagement issued by the Ministry of Defense of Italy and determine accordingly the need to grant "functional immunity" to the soldiers.

The alleged incident appears to be strictly related with the very purpose of the deployment of the Military Protection detachment. The alleged incident does not refer to an event which is outside and beyond such purpose, and the fact that the incident may have been abstractly determined by a violations of received instructions and rules of engagement, does not by itself make a claim for functional immunity not maintainable but rather determines the need for Italian authorities, while eventually assuming international responsibility, to fully investigate the event and eventually repress and punish any violations of guidance, instruction and rules of engagement. Furthermore, immunity is not lost, as pointed out in a legal analysis of the incident by International Scholars[97], if instructions are violated and authorization to use force exceeded.

The principle of functional immunity, also defined as "restricted immunity" by comparison with the principle of personal or absolute immunity which is often regarded as impacting excessively on territorial jurisdiction[98]. Indian domestic law shows, at this purpose, to have recognized in the Code of Civil Procedure the principle that foreign States cannot be sued and enjoy immunity … unless the Central Government grants authorization certified in writing by a secretary to the Government[99].

Under international law, as interpreted by the International Court of Justice, immunity shall be properly claimed by the sending State, which is what has happened through diplomatic notes addressed by the Government of the Republic of Italy to the Government of the Republic of India. Functional immunity cannot be related to conducts inherent to the person, but only to those expression of the function, as explained by the *ICJ* in an *obiter dictum* in the framework of the judgment on the Case on "Certain questions of mutual assistance in criminal matters (Djibouti v. France) of 4th June 2008[100].

Functional immunity (as well as absolute immunity) has been questioned in respect of conduct which is in breach of peremptory norms of international law and related to so called "core crimes" (genocide, war crimes and crimes against humanity), but nonetheless continues to apply to any official conduct which does not violate such norms. Furthermore, the principle of State immunity, which is reflected in the principle of functional immunity of State officials for official conduct, has been recently

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where PSMC is registered) the notification refer solely and exclusively to PMSC which are "Private Military (and/or) Security Companies" and not to regular Armed Forces of a Foreign State where there is no room for any scrutiny on "licensing". Accordingly there was no obligation to register in for the MV EnricaLexie, prior to transiting in the Indian EEZ.

95 The Ministry of Shipping has re-launched a notice for registration after the incident (NAVAREA VIII dated 23 February 2012) which no longer contains any reference to PMSC and in stated in more general terms referring simply to "armed guards" to include governmental guards and to overcome the "shortages" of the previously issued guidelines.

96 For a clear assessment in this sense, see G. MORELLI, *Nozioni di dirittointernazionale*, 1967, p. 209.

97 D. GUILFOYLE, in *EJIL - Talks*, in case of fatal injury cases even where the conduct was careless, reckless or to instructions (in the sense of carrying out an authorized act in an unauthorized manner). On the contrary, Immunity is «unlikely to be upheld where a State agent has abused their authority out of malice or for personal gain. Otherwise, especially in cases of genuine mistake, immunity should generally beupheld».

98 At this purpose, we would like to rely on the "trilogy" of G.P. BARTON, *Foreign Armed Forces: Qualified jurisdictional immunity*, in *BYIL,* 1954, p. 351 ff., *Foreign Armed Forces: immunity from Criminal Jurisdiction*, *BYIL*, 1950, p. 217ff., *Foreign Armed Forces: Immunity from supervisory jurisdiction¸BYIL,* 1949, p. 381 ff..

99 The Supreme Court in *Mirza Ali Akbar Kashani v. United Arab Republic and Anr,,* [1966] 1 SCR 3 19, held that section 86(1) of the Code of Civil Procedure as it stood at the relevant time was the statutory provision coveting a field which would otherwise be covered by the doctrine of immunity under International Law and save and except in accordance with the procedure indicated in section 86 of the Code a suit against a foreign State would not lie. On the relationship between the CPC and the Consumer Protection Act, 1986, see *Ethiopian Airlines v. Ganesh Narain Saboo,* on 9 August, 2011. For an interesting analysis of "State immunity" as opposed to "Foreign State immunity", Kerala High Court, *The State Of Kerala And Anr. v. K. CheruBabu* on 2 November, 1977, AIR 1978 Ker 43.

100 ICJ, Judgment on the case "Certain questions of mutual assistance in criminal matters (Djibouti v. France)", 4 June 2008, 181-200, at http://www.icj-cij.org/docket/files/136/14550.pdf.

reinforced also in respect on violations of peremptory norms by the International Court of Justice in the case of the *Federal Republic of Germany v. the Republic of Italy*[101], when the Court held that "the Italian Republic has violated its obligation to respect the immunity which the Federal Republic of Germany enjoys under international law by allowing civil claims to be brought against it, based on violations of international humanitarian law committed by the German Reich between 1943 and 1945".[102]

The *UN Convention on jurisdictional immunities of States and their property* of 2004 represents the first modern conventional instrument that takes into account the issues of State immunity from suits in foreign Courts[103]. The opinion towards State immunity is relevant, if one considers that the functional immunity can be deemed as an expression of it[104]. The attitude of the Republic of India towards the principle of State immunity is demonstrated by the fact that India has signed the Convention on State Immunity. The link between State Immunity and Immunity of State officials is not impaired by some recent decision – reference is to the U.S. Supreme Court *Samantar v Yousuf* decision[105] - which are without prejudice to international customary law and refer exclusively to the *Foreign Sovereign Immunities Act*, 1976 (*FSIA*28 U.S.C. 1330, 1602 *et seq*.) excluding official immunity based on legislative drafting history.

Recent State practice on functional immunity shows that there is a trend towards the extension of the grant of functional immunity also to official conduct related to international prohibited conduct like torture. Such practices mainly refer to "civilian" claims and tort actions.

Nevertheless, the distinction between civilian and criminal cases is not a matter of degree of State interest and a supposed higher degree of interest in the repression of conduct in criminal cases, but rather the consequence that for certain conduct (e.g.: Torture) international conventions establish a duty to punish. The House of Lords has recently distinguished penal and civil cases in accordance with the said rationale. In the case *Jones*, the Law Lords held that Saudi Arabia and its organ Colonel Abu Aziz were immune from the civil jurisdiction of English Courts by virtue of the *State Immunity Act*[106]. At this purpose, and in order to prevent misunderstandings, it must be pointed out that the transformed principles of International law reflected in the said *State Immunity Act* –conferring the right to sue a foreign State for acts *jure gestionis*, without certificate of the Government – were deemed not to apply to

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101 The judgment of 3 February 2012 is available at http://www.icj-cij.org/docket/files/143/16883.pdf. The Federal Republic of Germany sued the Italian Republic before the International Court of Justice for "violations of obligations under international law" allegedly committed by Italy through its judicial practice. According to the Federal Republic of Germany, the violations occurred as Italy allowed civil claims based on violations of international humanitarian law by the German Reich during World War II from September 1943 to May 1945, to be brought against the Federal Republic of Germany and so failed to respect the jurisdictional immunity which the Federal Republic of Germany enjoys under international law. Germany also claimed that violation occurred as Italy took measures of constraint against 'Villa Vigoni', German State property used for government non-commercial purposes, violating Germany's jurisdictional immunity; and because Italy declared Greek judgments based on occurrences similar to those defined above in request No. 1 enforceable in Italy.

102 ICJ, Judgment on the Case " *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)"*, cit., para 139.

103 Adopted by the General Assembly of the United Nations on 2 December 2004. See UN General Assembly resolution 59/38, available at: http://untreaty.un.org/ilc/texts/instruments/english/conventions/4_1_2004_resolution.pdf. The Convention is available at http://untreaty.un.org/English/notpubl/English_3_13.pdf . The Convention is not yet in force as 30 ratifications are required for the Convention to enter into force. Up to now (April 24, 2012), there are 28 signatories States and 13 parties. Information available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&lang=en.

104 Law Commission of India, Report n. 54 of 1973 on the *ccp*, 1908, pp. 61.

105 Case n. 08-1555 decided June 1, 2010. The Supreme Court held that even if the FSIA applies to an "agency or instrumentality" as well as "separate legal person, corporate of otherwise" (28 U.S.C. 1603 *b*) of a State, such definition referred to an "entity" rather than to an individual and that State official were not covered under 28 U.S.C. 1604. The Supreme Court finally decided that «whether petitioner may be entitled to immunity under the common law, and whether he may have other valid defenses to the grave charges against him, are matters to be addressed in the first instance by the District Court on remand». In the remand proceeding Samantar decided to defend on the merits renouncing to the claim of immunity. The Opinion of the Court and quoted passages are effectively criticized in the concurring opinion of Justice Scalia who considers legislative history non probative.

106 Anyway, the House of Lords pointed out the contradiction of this complete separation of civil and criminal law. See House of Lords, *Judgments - Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others*, Session 2005-06, [2006] UKHL 26 (on appeal from[2004] *EWCA Civ1394),* available *at http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060614/jones-1.htm.* On the lack of coherence in common law where civil and criminal proceeding are completely separate, see M. FRULLI, *Some reflections on the functional immunity of state officials*, in *IYIL*, 2009, pp. 91-99.

India[107]. However, while continuing to apply the provisions contained in the Code of civil procedure conferring immunity to a wider and rather absolute extent than the English *State immunity Act, 1978*, the way by which developments in international law jointly with principles of natural justice have to be taken in consideration has been found in the criteria underlying the grant or denial of the certificate by the Government[108].

As to the mentioned distinction between civilian and criminal cases, Indian case law shows that immunity claims for offences have been dealt by referring to the jurisprudence of the Supreme Court in respect of section 86 of the Code of civil procedure and also foreign case law[109].

Functional immunity is not restricted to "top officials" expressing the will of a State and applies to all those acting authoritatively within their responsibility for an activity which qualifies as *iure imperii* under international law[110].

Finally, the concept of *iure imperii* act has to be determined, in accordance with international law and in the instant case, protection from pirates and armed robbers with weapons and subsequent powers to investigate and eventually arrest and detain pirates and armed robbers belongs to the "core" of public State functions. Functional immunity has been granted under International law and Common law to military personnel even in the presence of status of forces agreements (otherwise restricting immunity) for acts falling outside the purpose of such agreements[111]. Recently, the Italian Supreme Court acknowledged the lack of jurisdiction by any Court in Italy to try a U.S. Soldier which for the killing at a check point of an Italian high official[112].

The subject matter has been analyzed in the «Preliminary report on immunity of State officials from foreign criminal jurisdiction» by United Nations Special Rapporteur (United Nations General Assembly documents A/cn.4/601) whose conclusions were officially joined by India in an official position[113].

7. Conclusions

The "Enrica Lexie" case will influence the practice related to the protection through military detachments of merchant vessels, as it highlights all the risk deriving from the interference of the jurisdiction of Coastal States while sailing in the maritime zones of the said state.

The framework of international maritime law seems to be sufficiently conclusive in respect of the exclusion of "multiple jurisdiction" and the right to assert exclusive jurisdiction by the flag State and the limitations of the Coastal State jurisdiction in its Economic Exclusive Zone reinforces the argument. However, even admitting that the Coastal State may to a certain extent claim jurisdiction, this does not by itself mean that the Coastal State, in this case India, has effectively established its jurisdiction based on its relevant domestic law. In the instant case, the Indian relevant provisions are evidence of a cautious attitude by the Indian lawmakers to refrain from extending excessively its

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107 Delhi High Court, *Deepak Wadhwa v. Aeroflot* on 26 April, 1983, 24 (1983) DLT 1. In *Uttam Singh Duggal & Co. Pvt. Ltd. v. United States Of America, Agency ...* on 1 April, 1982, 22 (1982) DLT 25, the same Court affirmed to «find no plausible reason why the prevalent English law on sovereign immunity be not adopted in India. This also is in consonance with justice, equity and good conscience».

108 Supreme Court, *Harbhajan Singh Dhalla v. Union Of India* on 5 November, 1986, 1987 AIR, 9 1987 SCR (1) 114.

109 The Bombay High Court in *The State Of Maharashtra v. Czechoslovak Airlines* on 23 September, 1977, (1978) 80 BOMLR 495 dealt with a case concerning the offence related with the omission to maintain a wages register having reference to the jurisprudence of the Supreme Court and the issue of functional immunity for commercial activities of a foreign State. The possibility to grant functional immunity was not excluded *per se*. The Bombay High Court in *The State Of Maharashtra v. Czechoslovak Airlines* on 23 September, 1977, cit. excludes restricted immunity based on the commercial character of the activity.

110 For a curious quotation of a case of doctrine of sovereign immunity extended to an action for breach of promise of marriage, *Mighell v. Sultan of Johore*, 1894-1 Q. B. 149, quoted by the Calcutta High Court, *Royal Nepal Airline Corporation ... v. MonoramaMeher Singh Legha And ...* on 11 September, 1964, AIR 1966 Cal 319.

111 House of Lords, *Holland v. Lampen Wolfe*, 20 July 2000.Supreme Court of Japan, Decision, April 12, 2002; 56 Minshu 729 [20021, H.J. (1786) 43, [2002], H.T. (1092) 107 [2002], in *JAIL,* 2003, p. 161ff.

112 Corte di Cassazione, Sez. I, 24 luglio 2008, n. 31171 (ud. 19 giugno 2008), at http://latribuna.corriere.it/dynuni/dyn/allegati/sentenze/2008/cass%2024-7-2008%20n%2031171.pdf.

113 Official position expressed on November 03, 2008 and November 01, 2011.

extraterritorial jurisdiction. Perhaps, the incident may become a turning point in the Indian legislation and the *Piracy Bill 2012* may be a first step towards a strengthening of the Indian extraterritorial jurisdiction.

Nevertheless, currently the questions if Indian statutes afford Indian Court with jurisdiction and if those involved in the incident are amenable to Indian laws seems to impose a negative answer. Immunity, which is supported by strong arguments in the instant case, represents in a logical sequence of legal arguments, the third and last trier after the exclusive flag State jurisdiction based on the geographic contexts of the incident took place and the second trier represented by all those arguments excluding that jurisdiction may be asserted based on domestic law. Based on the circumstances, the grant of immunity may have its advantages as arguments based on immunity are intrinsically easy and suggestive and allow to shortcut often more intricate legal issues.