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FOCUS:

ON THE APPLICATION OF INTERNATIONAL  
LAW IN THE “MARÒ” CASE

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1. *Introduction*

The case of the Italian marines Massimiliano Latorre and Salvatore Girone, arrested and detained by the Indian authorities and awaiting the conclusion of a criminal trial for the killing of two Indian fishermen off the coast of Kerala, does not present aspects worthy of particular attention from the point of view of the application of international law in the domestic Italian legal order and practice, that is the main area of interest to the present *Survey*.

This case is rather significant from the perspective of the application of international law to a situation – more precisely a dispute – which places Italy in bilateral opposition to another State (India) at the level of international relations. A case therefore that provides a testing ground for the use, by Italy, of international legal norms and instruments to affirm its position in such context and, at the same time, an occasion for evaluating, in the light of international law, the position taken and the claims advanced by Italy. It is for the interest of the case from this perspective – as well as for the importance it has assumed as a matter of public opinion and national debate in the last two years – that it has been given prominence in the first issue of the present *Survey*, edited by the Institute for International Legal Studies.

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## 2. *The facts and the court case of the two Italian marines*

The case is well known but it is worth retracing its most important developments and legally relevant steps from the beginning to the present (April, 2014).

On the night of February 15, 2012 the Italian commercial vessel *Enrica Lexie*, en route from Singapore to Djibouti, was approached by a boat off the Indian coast of Kerala. Aboard the *Enrica Lexie* a troop of six naval fusiliers was in service (on the basis of Law No.130 of August 2, 2011 and the Decree of the Minister of Defence of September 1, 2011) to protect the ship from potential attacks by pirates.

Fearing a pirate attack, the Italian soldiers fired warning shots at the approaching boat. The craft was not however a pirate boat but a fishing trawler, the *St Anthony*, and two Indian fishermen, struck by the fusiliers fire, had been killed. The following morning the Indian Coast Guard requested the *Enrica Lexie*, which was proceeding en route to Djibouti, to head to the port of Kochi so that its crew could assist in formally identifying some pirates captured the previous night. When the ship arrived at the port of Kochi the Indian authorities commanded that the *Enrica Lexie* not leave port and, on February 17, members of the Indian Police Force went aboard, confiscated the arms of the fusiliers and proceeded to arrest two marines, Salvatore Girone and Massimiliano Latorre, identified as those responsible for opening fire on the fishing boat. Criminal proceedings with the accusation of murder were thus launched against the two soldiers before justices of the State Court of Kerala.

In defence of the Marines the Italian government, operating within Indian domestic law and judicial system, immediately filed a complaint to the High Court of Kerala, raising the question of lack of jurisdiction over the soldiers. The complaint was based both on the principle of functional immunity (which should have been applied to the marines, who have been acting in the exercise of their official functions), and on the location of the events which took place in international waters (more precisely, in an area where, under Article 97 of the UN Convention on the Law of the Sea – UNCLOS –, jurisdiction should be exercised exclusively by the flag State of the vessel which has provoked an “incident of navigation”).

On May 29, after a series of adjournments by the judges of Kerala had forced the Italian government (in defence of the marines) to submit the claim for lack of jurisdiction to the Supreme Court in New Delhi, the High Court of Kerala finally delivered its judgement, rejecting the claim and affirming the Kerala State court jurisdiction. In addition, the Court bailed the two men and placed them on probation which required that

they surrender their passports and sign in daily at the Kochi police station.

It should be noted that, following the decision of the Kerala Court and given the urgency deriving from the possibility of the conviction of the two marines, Italy managed to conclude an agreement with India on the transfer of sentenced persons (the agreement was ratified by Italy with Law No. 183 of October 26, 2012 and entered into force, after exchange of ratifications, on April 1, 2013).

The agreement provides, among other things, for the transfer to Italy of Italian citizens condemned by the Indian courts, in order to continue to serve their sentence in Italy (provided that the sentenced person does not oppose). It is worth stressing that transfer can only take place following final conviction, and that the execution of each transfer is still subject to the conclusion of a specific agreement between the two States.

India’s jurisdiction over the case, affirmed by the judges of Kerala, was confirmed in a judgement by the Supreme Court in New Delhi, (again following numerous adjournments) on January 18, 2013, almost nine months after Italy submitted its complaint to the Court in New Delhi. In brief, the Supreme Court excluded the possibility of applying the principle of functional immunity to the two marines in the current case, inasmuch as they were State agents not covered by the principle, and inasmuch as Indian practice would not grant immunity from criminal jurisdiction to armed personnel aboard a foreign commercial vessel.

The Court also excluded the possibility of applying Article 97 of UNCLOS, because it should be applied only to high seas *stricto sensu*, and not to bodies of water forming part of the contiguous zone or the exclusive economic zone of a State, such as that where the incident occurred.

However, the Supreme Court added that, as the events occurred in such zone, jurisdiction would not belong to the State of Kerala, but rather to the Union of India. As a consequence, the criminal proceedings underway before the Tribunal in Kerala should be terminated, and new proceedings should start before a special tribunal, to be established by the Union of India to try the case. The special tribunal was actually formed by and is still working at the Chief Metropolitan Magistrate of New Delhi. The two marines were therefore transferred from Kerala to New Delhi and granted freedom of movement, but with the obligation to sign in on a weekly basis with the local police.

Since then, the court case has continued focussing essentially on whether or not the Indian General Prosecutor can incriminate the two Italian soldiers on the basis of the so-called SUA Act, that is the Indian law for

the suppression of unlawful acts against the safety of maritime navigation (the main object and purpose of which is the suppression of acts of terrorism and piracy carried out beyond the outer limits of territorial waters). Application of the SUA Act implies, *inter alia*, the investigative competence of the National Investigative Agency (NIA, the Indian federal anti-terrorism police), and – what is most important – may require the infliction of the death penalty for those guilty of murder.

On the first issue, that is to contest the investigative competence of the NIA, the defence team of the two Italian marines immediately lodged a complaint before the Supreme Court in New Delhi, which decided, on April 26, 2013, not to exclude the possibility for the General Prosecutor of using the NIA in the investigation, given a possible incrimination of the marines under the SUA Act.

It has to be recalled that, in the meantime – that is in the period between the two abovementioned Supreme Court decisions on January 18 and April 26, 2013 respectively –, a serious diplomatic incident occurred between Italy and India which, among other things, resulted in the resignation of the Italian Minister of Foreign Affairs, Giulio Terzi di Sant'Agata, on March 26, 2013.

The incident occurred when the two soldiers were granted special leave to return to Italy to vote in the general election for the Italian Parliament. The leave was granted by submission of an affidavit issued by the Italian Ambassador guaranteeing the return of the two marines after they had exercised their right to vote.

In a communiqué of March 11, 2013 the Italian Minister of Foreign Affairs informed India that, given India's lack of response to the request advanced by Italy to open a bilateral dialogue to seek a diplomatic solution to the case in the context of a collaborative effort to combat piracy, Italy acknowledged the existence of an international dispute with India; and that, given such acknowledgement, the two marines would have not been returning to India upon expiration of the leave granted them.

Beyond the reason of seeking to move the issue of jurisdiction over the marines from the Indian domestic judicial level to the international level, and of taking the marines away from the ongoing Indian criminal proceedings, the Minister's communiqué was also motivated by the conviction that it was unacceptable that the two Italian soldiers returning to India risked being condemned to death as a consequence of the application of the SUA Act, a criminal law designed to combat terrorism and to punish terrorists.

The communiqué of the Italian Minister of Foreign Affairs provoked a robust response from India and particularly from the Supreme Court which, on March 14, 2013, issued an injunction ordering the Italian

Ambassador not to leave India without the Court’s permission, a measure defined by the Italian Government in another communiqué, on March 18, as “a clear violation of the Vienna Convention on Diplomatic Relations which codifies universally recognised principles”.

However, tensions between the two States moderated in the following days, insofar as the Italian Government decided to reverse itself and, in conformity with its prior undertaking, proceeded to return the two marines to India on March 22, 2013 (on the eve of the expiry of the leave granted by the Indian authorities).

As noted, this Government’s decision resulted in the resignation of the Italian Foreign Minister Giulio Terzi who, before resigning declared that the “rift” caused by his previous communiqué had anyway served the positive result of obtaining informal assurances from the Indian authorities that, in the case of conviction under the SUA Act, the marines would have not been subjected to the maximum penalty, the death sentence.

The dispute on the application of the SUA Act continued to characterise the development of the affair in the succeeding months, both at the diplomatic level (often in a multi-lateral context) and in the defensive strategy adopted in the domestic judicial proceedings in India.

As far as regards the court case, after many postponements, caused also by the uncertainty of the General prosecutor (and therefore of the Indian government) over the criminal rules – the provisions of the SUA Act, or the Indian criminal code – on which to base the indictment of the two marines, the Supreme Court finally declared admissible, on March 28, 2014, the claim by the Italian defence team against the application of the SUA Act and the employment of the NIA (the anti-terrorist police): the Court fixed a deadline of four weeks for the Prosecutor to take a definitive stand on the issue of applicable rules, in view of allowing the Court to decide on the merits of the Italian claim.

As a consequence of the Court’s decision on the admissibility of the Italian claim, the Special Tribunal competent for the marines’ case suspended all proceedings and adjourned the hearing to July 31, 2014.

As far as regards the diplomatic steps taken by Italy, from the parliamentary briefing given by Italian Foreign Minister Emma Bonino on February 13, 2014, it emerges clearly that, up to that point, they were aimed, essentially, at making the European Union, the Secretary General of the United Nations, Italy’s allies and, more generally, the so-called international community aware of the dangerousness of India’s conduct at the international level, by emphasising in particular that it was unacceptable that Italian soldiers employed in the official function of

combating piracy could be judged, on the basis of the SUA Act, in the same way as terrorists: according to Italy, this would have caused a serious risk to endanger all international action against piracy.

3. *Substantive international law issues: a) The question of the application of the United Nations Convention on the Law of the Sea (UNCLOS) to the case of the Enrica Lexie*

As it becomes clear from the above description of facts, the crucial legal issue in the “marò” case concerns the exercise by India of criminal jurisdiction over the Italian marines accused of killing the two Indian fishermen off the coast of Kerala.

Both the marines’ defence during proceedings before the Indian court and the official communiqués of the Italian Government contest the Indian jurisdiction on the basis of two main arguments.

One argument refers to the location of events which led to the death of the fishermen aboard the *St Anthony*. The events took place approximately 22 nautical miles off the coast of Kerala, outside India’s territorial waters but within Indian exclusive economic zone and contiguous zone.

According to the Italian position, as explained in detail by Latorre and Gironè’s defence team before the Indian courts, Article 97 of UNCLOS, to which both Italy and India are party, should apply to the events in question.

Article 97 states that in cases of collision or other incident of navigation occurred on the high seas, criminal or disciplinary proceedings against the master or any other person in the service of the ship can be only instituted either to the flag State or to the State of which the person is a national. Since the episode which resulted in the death of the Indian fishermen should be considered, according to the Italian position, an “incident of navigation” covered by Article 97, it would follow that any criminal proceedings against those presumed responsible for the incident could only be started and conducted by Italian judges, as they are organs of the State that is at the same time the flag State of the vessel responsible for the incident and the national State of individuals presumed to be responsible for the death of the Indian fishermen. Indian judges, on the other hand, would not be entitled to exercise jurisdiction.

Putting to one side the specific reasons advanced by the Court of Kerala and then the Supreme Court in New Delhi in rejecting the claim raised by the marines’ defence team, it must be said that the assertion of an Italian exclusive jurisdiction on the basis of UNCLOS, and in particular of Article 97, rests on highly dubious grounds. Article 97, in fact, applies only in cases of collision between vessels or other incidents of navigation

as, for example, damage to cables or underwater conduits, and collisions with islands or artificial constructions. The killing of persons caused by voluntary warning or defensive fire does not fall within situations considered under the provision, nor is there any trend in the practice indicating the possibility of extending in such a direction the scope of Article 97.

Nor would a reference to Article 92, Paragraph 1, of UNCLOS be more convincing. As it is well known, according to such provision, ships on the high seas shall be subject to the exclusive jurisdiction of the flag State. But it is well established that this provision covers only the “*jurisdiction to enforce*”, which is to say the power to carry out coercive acts, while it does not exclude the possibility that another State exercises its own criminal jurisdiction (and therefore carries out investigations or starts judicial proceedings) over the crew of a foreign vessel for events occurring on the high seas.

On the contrary, in the case of the *Enrica Lexie* there is an element that would clearly justify the exercise of criminal jurisdiction by Indian judges against the foreign crew of a foreign ship for events taking place out of the Indian territorial waters. We refer precisely to the nationality of the victims, which, as is well known, constitutes one of the most basic criteria in allocating the jurisdiction to a State, even when facts to be judged have taken place outside the territory of that State and the acts have been carried out by nationals of a foreign State.

#### *4. b) The question of functional immunity of the marines*

The other argument invoked by Italy in contesting Indian jurisdiction concerns the principle of functional immunity, that is the rule of general international law on the basis of which acts carried out by State officials in the exercise of their duties should be attributable to the State and not to the individuals who concretely carried out the acts in question.

According to this principle, aimed at protecting State sovereignty (in the sense of the freedom of each sovereign State to organise itself), as well as at allowing persons acting on behalf of a State to perform their functions, State officials or organs who have acted in the exercise of public functions shall also enjoy immunity from the criminal jurisdiction of another State for acts or omissions carried out in the exercise of such functions. As a consequence, according to general international law, a State should not exercise its criminal jurisdiction over the organs or officials of a foreign State even if they have committed acts which constitute serious crimes under the criminal law of the first State (though

there are some exceptions to this principle, for example in the case of the commission of *crimina iuris gentium*, such as genocide, war crimes, or crimes against humanity, or – in a different sense – in the case of secret or “covert” activities carried out on behalf of the State).

As recalled, the claim for functional immunity was rejected by the Indian courts. Leaving aside again the arguments actually employed by Indian judges to reject it, Italy’s claim appears, in this case, well founded and rather solid.

There is no doubt that the two Italian soldiers are to be considered as Italy’s public officials: they are members of the Italian armed forces performing the public task of protecting marine trade against pirates, on the basis of an Italian law which, in the exercise of their duties, qualifies them as law enforcement officers; they answer to the Italian Minister of Defence and are paid by the Ministry of Defence (and not by the ship owner, who does pay a contribution to the Ministry of Defence). It is also beyond doubt that the specific acts attributed to them, and which caused the deaths of the Indian fishermen, were carried out during the exercise of their public functions and not outside of such functions, nor for “private” motives.

Furthermore, these acts were not even carried out within Indian territorial waters, but in a body of water where no previous “authorisation” is required from the territorial State for foreign military to perform their functions and be covered by functional immunity (as it is argued by some with reference to acts carried out within the territory and territorial waters of the State).

Of course, as is often the case with unwritten rules of general international law, so with the principle of functional immunity, there may be doubt and uncertainty about the scope and limits of its application, about possible exceptions to it, and even regarding its legal value as *lex lata*.

However, evidence and indications coming from State practice, domestic and international jurisprudence, “codification” underway at the United Nations or carried out by the *Institut de Droit International*, lead to the conclusion of both the legal value and the essential content of this rule, as well as to the inclusion, within its scope of application, of situations like that of the two marines, Latorre and Girone.

It is therefore out of respect for this binding rule of general international law that India should not exercise any criminal jurisdiction over the two soldiers, should end the proceedings which have been initiated, and should leave the exercise of jurisdiction to Italian judges.

And it is precisely – and we would say exclusively – on the violation of the principle of functional immunity that, in our opinion, Italian claims



should be centred and concentrated, both before Indian courts and, even more, in its diplomatic action and strategy.

*5. The applicability of the SUA Convention and its implementing legislation in the court case of the marines*

Another legal issue of the “Marò” case concerns the application of the SUA Act, that is to say the Indian law for the suppression of unlawful acts against maritime navigation, by which India, in 2002, implemented at the domestic level the homonymous 1988 IMO Convention. As it is well known, this Convention was concluded following the hijacking of the transatlantic liner *Achille Lauro* by a Palestinian commando, and was originally conceived as a legal instrument aimed at struggling against acts of terrorism perpetrated beyond the territorial waters of a coastal state.

It is precisely against the application of this law that the major efforts of the marines’ defence team were concentrated before Indian courts, and on which the diplomatic actions of the Italian government was mainly focused, in an attempt to gain solidarity and international support for Italian claims against India, and to put some pressure on India to give due consideration to Italy’s claims.

There are indeed some doubts regarding the applicability of the SUA Act to the case of the marines, doubts which might even lead one to the opinion that such an application would be contrary to the 1988 Convention to which both India and Italy are parties.

The first doubt arises from the fact that the Convention is a treaty instrument conceived, essentially, to combat international terrorism. The application of its provisions to the acts committed by the Italian marines could therefore be understood as being contrary to the very purpose of the Convention.

It is however also true that the Convention compels States parties to prosecute, more generally, any acts of violence against persons on board a ship if the act is likely to endanger the safe navigation of the ship, and that the Indian Act implementing the Convention does not contain any specific reference to the goal of combating international terrorism, nor limitations on the scope of its application solely to cases where there is a connection to terrorism. Taking this into account it cannot be excluded that the Convention – and the Indian SUA Act – could be applied to the case of the killing of the fishermen off Kerala.

A second doubt concerns the possibility of applying the 1988 Convention to actions carried out by soldiers of a State exercising their official

functions. It is in fact unclear whether the provisions of the Convention cover or not such acts (which the text of the Convention does not expressly exclude from its scope). In this regard some clarification comes from Article 3 of the 2005 Additional Protocol to the Convention, according to which the SUA provisions would not apply to the acts in question “*inasmuch as they are governed by other rules of international law*”.

It could be argued, therefore, that applying the Indian law implementing the Convention to the acts committed by the Italian marines – which were carried out in the exercise of their official functions – is incompatible with the Convention. However, it would also be necessary to demonstrate, to this end, that the acts in question “*are governed by other rules of international law*”, a demonstration, in our view, neither simple nor to be taken for granted.

Whatever the rights or wrongs of the applicability of the SUA Act to the case, the crucial point is another: it is rather that the whole question of the application of the SUA Act is subject to the negative resolution of the preliminary question of functional immunity. In other words, the problem arises only if one believes that India can exercise criminal jurisdiction over Latorre and Girone because they are not covered by functional immunity.

But if one believes – as we do – that the rule of general international law on functional immunity prohibits India from exercising criminal jurisdiction over the marines, the question of the applicability of the SUA Act evidently becomes irrelevant. In other words, the problem would not be that the Indian judges cannot judge the Italian soldiers on the basis of the SUA Act but rather, and more radically, that the Indian judges cannot subject them to any criminal proceedings.

With this in mind, and considering that the invocation of functional immunity, as we have noted, actually is one of the main arguments put forward by Italy against India (and before Indian judges), we cannot but express our puzzlement about the emphasis which Italy has placed on the question of the application of the SUA Act both in its multilateral diplomatic actions, and in the defensive strategy adopted before the Indian judges.

Our puzzlement does not derive from the ineffectiveness up to now of the Italian strategy emphasising that treating Italian soldiers in the same way as international terrorists would be unacceptable and detrimental to international action against piracy. It rather derives from the fact that this strategy hides a contradiction making less clear and coherent the well founded position of Italy on the issue of functional immunity.

The contradiction is that the Italian strategy, in concentrating mainly on the claim against the application of the SUA Act to the “*marò*”, seems to

suggest that if the two men were to be tried not as terrorists or pirates (that is, on the basis of the SUA Act) but rather on the basis of, for example, the Indian penal code (or under other provisions of the Indian criminal law), the proceedings and eventual conviction by Indian judges would be somehow *more* or perhaps even *wholly* acceptable.

But, as we said before, what is not acceptable – in the sense of not in conformity with international law – is not so much the possible application by Indian judges of an anti-terrorism Act, or that the outcome of the judgement might comport the application of the death penalty, but rather that, in violation of the rule of functional immunity, India would subject to criminal jurisdiction two foreign State officials for acts they committed in the exercise of their public functions.

Furthermore, the contradiction (or at least the ambiguity) in the strategy followed by Italy emerges not only from the emphasis placed on the question of the application of the SUA Act, but, to a greater degree, in the decision by Italy of actively working in defence of the marines before the Indian courts, rather than to reject outright any legitimacy in the exercise of criminal jurisdiction on the part of India and to strongly protest at the international level against any such exercise.

Of course, on the one hand it is easy to understand that the Italian government wishes to guarantee the best possible defence to the marines before the Indian judges, hence avoiding that they are subjected to preventive detention or risk accusations carrying very severe penalties. But on the other hand, it is also clear that this strategy, unaccompanied by a strong and unequivocal diplomatic protest against India would end up weakening both the specific effectiveness of the claim against Indian jurisdiction before the Indian judges, and the possibility for Italy to assert at the international level the argument of the violation of functional immunity, since the defence in the Indian proceedings would appear as an implicit waiver of such immunity. And, indeed, no such firm and constant diplomatic protest against India occurred.

In this respect it is slightly surprising that the first Italian formal act from which there emerges a clear protest against India was merely the communiqué of the Minister of Foreign Affairs on March 11, 2013, more than a year after the start of the exercise of criminal jurisdiction by Indian authorities. And it is also negatively surprising that to this act – the purpose of which was essentially to communicate to India the decision, then not acted upon, to not return the two soldiers following their “electoral” leave – there has, as yet, been no coherent follow-up even though a year has passed since that initial communiqué.

Therefore, it might seem like Italy has taken a step backwards not only from the decision not to return the marines to India but also from the position that an international dispute had been established with India concerning, among other things, the violation of the principle of functional immunity.

*6. The possible options for international dispute settlement means*

The last observation brings us to the final part of our reflections, concerning the possible use by Italy of international means of settlement to resolve the dispute with India.

In this regard the first point to be emphasised is precisely that the “marò” case has actually assumed the character of an international dispute between Italy and India.

As for the question of when it assumed such character – a question of some relevance in determining the possible application to the dispute of specific means of settlement –, the dispute should be considered to have arisen, in our view, not at the moment in which the Indian authorities started enforcing their jurisdiction over the two Italian soldiers, but only when Italy clearly expressed and brought to the attention of Indian Government its protest against the behaviour of Indian authorities: that is to say, in light of publicly available information, at the date of the communiqué of March 11, 2013 (or, at best, the day after the judgement of the Supreme Court of India of January 18, 2013, as it may be implicitly inferred from the Italian government’s communiqué of March 18, 2013).

It is, in fact, only at that moment that the contrast of different interests between Italy and India assumed the aspect of a disagreement, a conflict of views between the two States about the exercise of jurisdiction over the Italian soldiers. Otherwise, that is to say if there had been no official protest by Italy, it is clear that no dispute between the two States would have arisen at the international level, and the “marò” case would have remained only an Indian internal court case. (It is worth stressing, however, that although it had arisen only at that time, the international dispute does concern not only the conduct of the Indian authorities in the immediately preceding period – most particularly beginning with the judgement of the Supreme Court on January 18, 2013 – but obviously all their conduct from February 17, 2012, the day on which Indian authorities started exercising criminal jurisdiction over Latorre and Girone).

But, putting aside the question of the critical date of the dispute between Italy and India, what counts is that once the case has assumed the character of an international dispute, the consequence should be that Italy

seeks a solution to it through the means at its disposal under the law and practice of international relations. From this perspective, various options would be available to Italy, though not all equally accessible or convenient.

One option would be that of seeking to obtain the constitution of an arbitral tribunal on the basis of Annex VII of the UNCLOS, to which both Italy and India are parties. This would be possible under Part XV, Section 2, of the Convention, on “Compulsory Procedures Entailing Binding Decisions”. According to the provisions of this Section, in order to settle the dispute with Italy, India should be actually bound to accept, at least, the establishment of an arbitral tribunal in accordance with Annex VII of the Convention, since it – unlike Italy – has made no choice on the forum for dispute settlement, that is to say that it has opted neither for the International Tribunal for the Law of the Sea (ITLOS), nor for the International Court of Justice.

The option to activate the procedure aimed at the constitution of an arbitral tribunal under Annex VII of the UNCLOS would have the advantage for Italy of allowing it to request – at the same time as requesting that an arbitral tribunal is established – that such tribunal decides, as a provisional measure, that Indian Courts suspend the criminal proceedings underway, delivering the two marines to the authorities of a third State. While awaiting the establishment of the arbitral tribunal, the adoption of such provisional measure could be submitted as a matter of urgency for a decision by the ITLOS, and once it would eventually have been adopted, it would then be subject to confirmation by the arbitral tribunal, which indeed could also revoke or modify it.

But, making recourse to an arbitral tribunal under the UNCLOS would also have, on the other hand, the serious drawback for Italy of submitting for settlement essentially the issues relating to alleged violations by India of the relevant UNCLOS provisions (Article 97 and possibly Article 92), though it cannot be completely excluded that the arbitral tribunal might also consider the issue of functional immunity, by availing itself of Article 293 of the UNCLOS, which allows the tribunal to apply, apart from UNCLOS, any other rules of international law not incompatible with the Convention.

As we have noted, however, Italian claims to exclude the criminal jurisdiction of India on the basis of UNCLOS are not well grounded. There is, therefore, a significant risk that the arbitral tribunal would, on the merits, rule against Italy, by not finding in India’s conduct any violation of the UNCLOS provisions invoked by Italy.

Another option would be that for Italy to bring the case before the International Court of Justice (ICJ). But the possibility to activate the ICJ seems more difficult to put into practice than the establishment of an arbitral tribunal under the UNCLOS. The mechanism of so-called compulsory jurisdiction of the Court, provided for by Article 36, paragraph 2, of the ICJ Statute cannot be utilised. In fact, as it is well known, Italy has not yet submitted the declaration for the compulsory acceptance of the competence of the Court.

Nor would it be possible for Italy to unilaterally apply to the ICJ to raise the question of the application of the SUA Act and thereby of a violation of the 1988 SUA Convention. This Convention does indeed provide, under Article 16, for the possibility of making unilateral recourse to arbitration or to the ICJ; but it was India, in this case, which expressly made a reservation concerning Article 16 of the Convention, and which is therefore not obliged to submit to the jurisdiction of the Court. Furthermore, even if it had been possible for Italy to submit the dispute to the International Court of Justice (or to an arbitral tribunal) on the basis of the SUA Convention, and even supposing that the application of the SUA Act to the marines would be judged as being contrary to the Convention, this most likely would not achieve the outcome to preclude the exercise of criminal jurisdiction by India, but only to prevent and exclude the application of the Indian SUA Act to the marines.

Apart from the limited options for making unilateral recourse to international jurisdiction or arbitration, the possibility would indeed remain for Italy of activating an international arbitral tribunal or the International Court of Justice by virtue of an ad hoc bilateral *compromis*. But given the current state of affairs, the conclusion of such an agreement with India seems an unrealistic, or at least very distant, possibility.

A similar problem exists for the possible resolution of the dispute through “diplomatic” or “hybrid” means of settlement.

In theory, the search for a diplomatic solution might be convenient for both States parties to the dispute, especially if one considers the high degree of uncertainty of outcome of a strictly legal assessment carried out by jurisdictional or arbitral organs applying to the case general international law rules and principles, or the relevant treaties provisions.

Rather than to political-diplomatic means (such as the mediation of a third State or of an international organisation), the specific type of dispute between Italy and India would in particular lend itself to means such as a conciliation commission or a “ruling” – a sort of diplomatic arbitration – by the Secretary General of the United Nations (like that tried out, some years ago, in the *Rainbow Warrior* dispute between New Zealand and France). It has to be noted, however, that such means or

procedures of dispute settlement are rarely put into practice by States, and – above all – that they cannot but presuppose an agreement between the State parties to the dispute.

With all this in mind, direct bilateral negotiation with India would still be for Italy the most convenient route to follow in order to seek a solution for the “marò” case which would take into account, at least in part, Italy’s interests and claims.

But such a route – like those others aimed at activating diplomatic means of settlement which imply the intervention of a third party (mediation, conciliation commission, or ruling by the UN Secretary General) – anyway would preliminarily require insisting efforts by Italy to persuade India to enter into a bilateral dialogue about the “marò” case.

The problem is that until now such efforts seem to have been sorely insufficient.

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Quotation: G. Palmisano, *On the Application of International Law in the “Marò” Case*. In: “Italy and International Law. Survey of Italian cases and materials on International law by the Institute for International Legal Studies of the National Research Council of Italy”, edited by G. Palmisano and O. Ferrajolo, No. 1: 2012-2013, May 2014, <http://www.larassegna.isgi.cnr.it/en/focus-on-the-application-of-international-law-in-the-marò-case/>