

THE DIVERGENCE BETWEEN INTERNATIONAL LAW AND INDIAN LAW APPLICABLE IN COUNTER PIRACY MEASURES: ANALYSED THROUGH THE DECISION OF THE REPUBLIC OF ITALY V. UNION OF INDIA

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The case of Republic of Italy v. Union of India, where two Italian marines were being tried for allegedly shooting two Indian fishermen, came up before the Supreme Court of India in 2013. The case sparked a diplomatic row between the two countries, primarily due to a strong difference of opinion with regard to the question of which of the two countries have the legal jurisdiction to try the case. While the Supreme Court has held that India has the jurisdiction to try the case, it did not explore the nuances of the relationship between domestic and international law and did not take the opportunity to bring some clarity to the extremely ambiguous question of the permissibility of use of force in international law. Against the backdrop of relevant domestic and international law applicable to the case, and in light of international trends, the paper proceeds to argue that the use of force is applicable, subject to restrictions recognised under international law in counter piracy operations. Further, with regard to the jurisdictional issue, the paper also demonstrates that the Indian courts did not possess the jurisdiction to try the case, and it is Italy which is competent to try the case due to the claim of functional immunity which shields the Italian marines.

I. INTRODUCTION

On the turn of the century, the crime of piracy over the seas has become an interest of considerable international attention. Despite its historic and continuing existence, several treaties and conventions have emerged, empowering and obligating states to enforce counter-piracy measures for facilitating trade through the seas. The limits of the means and methods of counter-piracy measures have been consistently stretched to meet the increasing problem of

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piracy.¹ The international community has adopted methods such as universal jurisdiction and search and seizure protocols to enable any naval vessel to react to piracy or the suspicion of piracy.

The case of *Republic of Italy v. Union of India* ('Italian Marines case') and the circumstances surrounding it present a new dilemma.² The fundamental question which the Supreme Court of India faced was with respect to the limitations upon the use of force permissible under international law to combat piracy. This question has so far been left ambiguous under the international regime to allow a free-hand to the states. The issue of jurisdiction also arises in this context before the Supreme Court. Most of the events which occurred surrounding the case are disputed and intertwined with diplomatic chains, making investigation and trial in any court akin to a Rube Goldberg process.

A brief recount of facts which are established is necessary to set the following discussion in context. The 'MV Enrica Lexie', an Italian flagship on board with 6 armed personnel, was heading for Djibouti on February 15, 2012, when it came across an Indian fishing vessel, St. Antony. The armed guards of Enrica Lexie allegedly mistook the fishing boat to be a pirate vessel, at a distance of about 20.5 nautical miles from the Indian sea coast off the State of Kerala outside the territorial waters of India.³ On account of firing from the Italian vessel, two Indian fishermen on the Indian fishing vessel were killed. They were allegedly shot by Massimiliano Latorre and Salvatore Girone of the San Marco regiment of the Italian Navy. While the coast guard was of the opinion that the Indian waters are fishing waters having very few incidents of piracy, the depositions obtained from the crew of the Enrica Lexie suggest that the vessel, despite warnings, came dangerously close to a distance of 50 meters on collision course.⁴ The Italian Ambassador then termed it as an accidental killing.⁵ When the Italian vessel had proceeded about 38 nautical miles on the High Seas towards Djibouti, it received a telephone message, as well as an e-mail, from the Maritime Rescue Co-ordination Centre, Mumbai, asking it to return to the Cochin Port to assist with the enquiry into the incident. Responding to the message, the M.V. Enrica Lexie altered its course and came to the Cochin Port on February 16, 2012.⁶ Upon docking in Cochin, the Master

¹ Richard M. O'Meara, *Maritime Piracy in the 21ST Century: A Short Course for U.S. Policy Makers*, GLOBAL AFFAIRS JOURNAL, Vol. 1 No.1, (Winter 2007), available at <http://www.globalaffairsjournal.com/wp-content/uploads/2011/07/OMEARA.pdf> (Last visited on October 11, 2013).

² (2013) 4 SCC 721.

³ *Id.*, ¶ 2.

⁴ Geneva Academy, *Counter Piracy under International Law*, Academy Briefing 1, August 2012, available at <http://www.geneva-academy.ch/docs/academyLecture/Counterpiracy.pdf> (Last visited on October 11, 2013).

⁵ *Italy Sore over Charge Sheet against Marines*, THE HINDU May 19, 2012 available at <http://www.thehindu.com/news/national/article3433547.ece> (Last visited on March 22, 2014).

⁶ Republic of Italy v. Union of India, (2013) 4 SCC 721.

of the vessel was informed that First Information Report had been lodged with the Circle Inspector, Neendakara, Kollam, Kerala, for offences alleged to have been committed under §§302, 307 and 427 read with § 34 of the Indian Penal Code ('IPC') and §3 of the Suppression of Unlawful Activities Act ('SUA Act') in respect of the death of the two Indian fishermen. On February 19, 2012, the petitioners were arrested by the Circle Inspector of Police and kept in judicial custody.⁷

The petitioners thereupon filed a Writ Petition before the Kerala High Court, under Article 226 of the Constitution, challenging the jurisdiction of the State of Kerala and that of the Circle Inspector of Police, Kollam District, Kerala, to register the F.I.R. and to conduct investigation and arrest. The petitioners prayed for a declaration that their arrest and detention and all proceedings taken against them were without jurisdiction, contrary to law and, therefore, void. The writ petition was dismissed by a single judge bench of the Kerala HC.⁸ Subsequently, the petitioners filed a Writ petition and a Special Leave Petition challenging the order of dismissal of their Writ Petition by the Kerala HC.⁹

The Supreme Court, while admitting that the State of Kerala did not have jurisdiction, confirmed that the Union of India could investigate the matter and try the accused of murder and other offences such as excessive use of force.¹⁰

The paper addresses these two questions. The paper *first* analyses the law on use of force in counter-piracy measures to establish the fact that use of force is in the least tacitly permitted in counter-piracy operations. *Second*, it analyses the jurisdictional aspects of trying the accused for *prima facie* excessive use of force. The paper proceeds with a background of the law applicable to the case to set the discussion in context and proceeds with the discussion on the two questions mentioned above.

A. BACKGROUND OF THE LAW

To a large extent, the international law regarding piracy has historically facilitated the suppression of piracy through the doctrine of universal jurisdiction, under which any state may try and prosecute pirates on the High Seas.¹¹ In this regard, the provisions of the United Nations Convention on the Law of the Seas ('UNCLOS') are in complete harmony with the provisions of

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Eugene Kontorovich, *A Guantánamo on the Sea: The Difficulty of Prosecuting Pirates and Terrorists*, 98 Cal. L. Rev. 243 (2010).

the Maritime Zones Act, 1976. Article 3 of the UNCLOS states that the limit of the territorial sea of a State, extends up to 12 nautical miles from its baseline. The Contiguous Zone of a State extends to 24 nautical miles from the baseline from which the breadth of the territorial sea is measured.¹² Similarly Article 57 states that the breadth of the EEZ extends to 200 nautical miles from the baseline from which the breadth of the territorial sea is measured. The provisions of the high seas apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. Article 89 states that the high seas may not be subjected to the territorial sovereignty of any state.

Traditionally, piracy has been declared as a *hosti humani generis*.¹³ This ‘peril of the sea’ has been recognized since ancient times, and is considered to be a crime against humanity under customary international law. However, under this rule, only a state which had a nexus with the commission of the crimes by pirates could prosecute them for the same.¹⁴

The application of the principle of universal jurisdiction marks a significant departure in this regard. The conferment of universal jurisdiction in piracy has been developed through unwritten customary international law,¹⁵ and has been codified in various legal frameworks such as the Geneva Convention on the High Seas 1958, UNCLOS 1982 and the Convention for the Suppression of Unlawful Acts against Maritime Navigation, (‘SUA Convention’). As a result of being incorporated as customary international law, universal jurisdiction allows even states that are not parties to these conventions to prosecute pirates.¹⁶ Universal jurisdiction in prosecuting crimes of piracy is a permissive exception to the traditional rule that requires some nexus between the prosecuting state and the crime.¹⁷

It is thus certain that the need for a universal jurisdiction emerged from two insufficient mechanisms. *First*, piracy was merely rendered as a *hosti humani generis* i.e. it was declared as a crime against all mankind and *second*,

¹² United Nations Convention on the Law of the Sea, December 10, 1982, 1833 U.N.T.S. 397, Art.33.

¹³ Burgess, Douglas Richard II, *Hostis Humanis Generis : Piracy, Terrorism and a New International Law* (Thesis for LLM, 2003), available at https://circle.ubc.ca/bitstream/handle/2429/14412/ubc_2003-0366.pdf (Last visited on April 26, 2014).

¹⁴ *Id.*

¹⁵ Eugene Kontrovich, Jerusalem Centre for Public Affairs, *Piracy and International Law*, February 8, 2009, available at <http://jcpa.org/article/piracy-and-international-law/> (Last visited on October 14, 2013).

¹⁶ Douglas Guilfoyle, *Piracy off the Coast of Somalia*, July 21, 2011, available at <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmfaff/writev/1318/m06.htm> (Last visited on February 11, 2014).

¹⁷ Robert Beckman, *The Piracy Regime under UNCLOS: Problems and Prospects for Cooperation*, January 17-18, 2011, available at <http://cil.nus.edu.sg/wp/wp-content/uploads/2010/10/Robert-Beckman-Session-1.pdf> (Last visited on October 14, 2013).

power to prosecute was conferred only on those states where a nexus was established. The principle of *hosti humani generis* forms an indelible link between the criminalization of piracy, its codification in the various conventions and the deemed legality of use of force in counter-piracy measures. It has been a stepping stone for the intensification and international recognition of counter-piracy measures. The evolution of universal jurisdiction broadened the scope for prosecuting acts of piracy. Its subsequent inability to reduce occurrences of acts of piracy created a need for a stronger mechanism to deal with piracy. Consequently, it was a precursor to allow the use of force in counter-piracy measures.¹⁸ Thus as a result of the insufficiency of the grant of universal jurisdiction against counter-piracy measures, international law moved on to the option of using armed force against pirates.

However, not all states are permitted to use force in counter-piracy measures. In India, although § 3 of the Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002 ('Act of 2002'),¹⁹ does not differentiate between excessive force in the retaliation of piracy and acts of piracy as such,²⁰ it would mean that under the Act of 2002, the principle of universal jurisdiction would extend to include even the prosecution and trial of the forces resisting potentially piratic acts. This would be a misguided interpretation as it would be contrary to the very objectives of the provision for universal jurisdiction. The criticism of such a misinterpretation can be justified through the dissent by Moore J. in the *SS Lotus case* which states that it is not the municipal law of the states which governs piracy but piracy as per the law of nations which should be considered.²¹

Thus, the same scheme cannot be used for counter-piracy measures. In counter-piracy measures there is always the availability of protection of state authorizing the act of counter-piracy and also the flag state jurisdiction, thereby curbing the right of universal jurisdiction.²² It means that in contrast to

¹⁸ Treves, *infra* note 59; The United Nations Legal Council, *The Question of the Scope and Applicability of Universal Jurisdiction in Carrying Out Anti-Piracy Operations*, available at <http://www.ualberta.ca/~hsmun/LEGAL%20paper%201%20edited.pdf> (Last visited on March 21, 2014).

¹⁹ § 3(c) states: "seizes or exercises control over a fixed platform or a ship by force or threatens or in any other form intimidates shall be punished with imprisonment for life". Further § 3(g)(i) states: "in the course of commission of or in attempt to commit, any of the offences specified in clauses (a) to (d) in connection with a fixed platform or clauses (a) to (f) in connection with a ship- (i) causes death to any person shall be punished with death". There is no exception provided within the statute for authorized acts or defences provided which could exclude the application of the provisions of the Act of 2002.

²⁰ See, GEISS & PETRIG, *infra* note 30.

²¹ *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), Publications of the Permanent Court of International Justice, Series A - No. 10; Collection of Judgments, A.W. Sijthoff's Publishing Company, Leyden, 1927.

²² *Id.* The *SS Lotus case* provides jurisdiction to the state, the flag of which is displayed by the ship. Thus the flag-state has jurisdictions over the matters governing the ship. This premise when juxtaposed to the fact that universal jurisdiction was not meant to try counter-piracy

pirate vessels, every ship purporting to use force in counter-piracy measures is flying the colours of a particular state. Universal jurisdiction in this context has to have a restricted operation. This is because the application of universal jurisdiction in matters of use of excessive force during counter-piracy operations by one state can go against the exercise of the jurisdiction by the flag-state. Such a situation may arise as both states may want to exercise jurisdiction over the same incident. This potentially creates conflicts and uncertainty as to the determination of which state has a valid claim of jurisdiction. To avoid such conflicts, states amended the SUA Convention, seeking to remove universal jurisdiction in matters of acts of counter-piracy by curbing the universality of jurisdiction.²³ However such intent could not be effectively applied, as states which had ratified the SUA Convention prior to the amendment, did not reflect the amendment in their domestic law.²⁴

Thus, alternatively, it is suggested that the best way for states to combat piracy is to ensure that they have a national legislation in place which enables them to exercise the extraordinary jurisdictional powers given to all states under UNCLOS over acts of piracy outside their territorial sovereignty.²⁵ Such national legislations must provide that a particular state would have the jurisdiction to try an accused even beyond its national territory or in the geographical territory of another state in cases of use of force in counter piracy measures, so long as the vessel has the flag of the state exercising such jurisdiction. This would avoid issues of violation of sovereignty of other states.

In terms of the illustration of the Italian Marines' case, an argument on the grounds of universality of jurisdiction could potentially be made as a consequence of the archaic provisions of the Act of 2002. As per the Act of 2002, India has the jurisdiction to try the particular dispute, as among the offences listed therein, it includes use of excessive force by vessels purporting to engage in counter-piracy operations.²⁶ However if the position was to be analysed in light of the position of international law, universality of jurisdiction would not extend to prosecute acts of counter-piracy by a state. The problem however with the tenability of the argument for jurisdiction, based on the Act of 2002 is that, with respect to disputes between states, India would be bound by the provision of the SUA Convention. Thus in case of the dispute between the Republic of Italy and the Union of India, reliance would have to be placed on the provisions of the SUA Convention.

measures as opposed to piratic acts, gives an interpretation that flag-state jurisdiction curbs the utility of universal jurisdiction in counter-piracy operations.

²³ The Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation, 1678 U.N.T.S. 222, Art. 8*bis*(5).

²⁴ The Act of 2002 is an example of such an occurrence.

²⁵ Beckman, *supra* note 17.

²⁶ See Guilfoyle, *infra* note 33, 29.

II. JUSTIFICATION FOR USE OF FORCE IN COUNTER-PIRACY

The dispute around the use of force in counter-piracy operations revolves around the permissibility of counter-piracy forces to cause death of pirates. In the present case, the marines took the defence that they believed the approaching fishermen to be pirates. Two situations arise under which the permissibility may come into question. The first condition is if pirates were conducted as combatants under the third Geneva Convention.²⁷ The second condition is if self-defence or authorized use of force was exercised in a law-enforcement scenario outside military engagement. In the subsequent section we discuss the ways in which use of force has been incrementally authorized under international law. We contrast this trend to the Indian laws which do not provide for a distinction between counter piracy and piratic activities.

Article 2(4) restricts the states from exercising the use of force to settle international disputes. The prohibition of use of force stems from the monopolization of force by the state.²⁸ Thus it is the state or in the international context, the Security Council, which yields a 'monopoly' over force and can use military force as a measure. Under Chapter 7 of the UN Charter, the Security Council can provide for any means necessary, even an armed attack, in case of breach of peace or threat to breach of peace or act of aggression.²⁹

The merits of the case concern the justification for the use of force in counter-piracy operations. It is admitted at the outset that the facts with regard to the incidents are disputed especially in this regard. Additionally, factors such as imminent threat and self-defence further complicate this domain and necessitate a discussion. There are a considerable number of international documents restricting the use of force, but with caveats, limiting it to exceptional circumstances.³⁰ State practice demonstrates that exceptions have turned into a rule on account of the emerging need to combat piracy.³¹ Statistical data of counter-piracy measures suggests that around three hundred pirates are missing from their expeditions and around seventy are confirmed dead.³² A liberal

²⁷ Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) 75 UNTS 135, Art. 4.

²⁸ Hans Kelsen, *Collective Security and Collective Self-Defense Under the Charter of the United Nations*, *The American Journal of International Law*, Vol. 42, No. 4 (Oct., 1948), 783-796.

²⁹ Charter of the United Nations 1950, Art. 39.

³⁰ ROBIN GEISS & ANNA PETRIG, *PIRACY AND ARMED ROBBERY AT SEA: THE LEGAL FRAMEWORK FOR COUNTER-PIRACY* 69 (2011).

³¹ The following report is an example of the liberal use of use of force. This report changes the stance of the UK in this regard. House of Commons Foreign Affairs Committee, *Piracy off the Coast of Somalia*, Tenth Report of Session 2010-12, January 5 2012, 19-59, available at <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmfa/1318/1318.pdf> (Last visited on October 11, 2013).

³² Kaija Hurlburt, *The Human Cost of Somali Piracy*, June 6 2011, available at http://oceansbeyondpiracy.org/sites/default/files/human_cost_of_somali_piracy.pdf (Last visited on October

view is emerging in allowing the use of force in counter-piracy measures.³³ Although no resolution or legislation explicitly allows the use of force, broad terminology of the resolutions indicate that use of force is permissible.³⁴ The justification for it due to lack of clarity in law, depends on the fact situations of each individual case.³⁵ In the Italian Marines' case the events agreed upon as facts are few and therefore present an evidentiary quandary as to the occurrence of the incident.

Within the international legal regime, the SUA Convention under Article 3(g), made a person liable for killing of a person unlawfully and intentionally for suspicion in connection of the commission of piratic acts or of violence listed under the convention.³⁶ The reflection of the provision of Article 3(g), SUA Convention, can be found in §3(a) of the Act of 2002.³⁷ The operation of the Act of 2002 and the SUA Convention, *prima facie*, seek to prohibit the use of force. However the Convention unlike the Act of 2002 is self-limiting. To remove any application of Article 3(g) of the SUA Convention in counter-piracy measures and towards legitimizing the use of force in counter piracy, Article 3(g), *vide* the additional protocol of 2005, was deleted from the SUA Convention, a position not reflected in the Act of 2002. Even though the marines had been charged under §3 of the Act of 2002, it is as such in conflict with the present regime under international law. It could be one of the possible reasons why the pursuance of the charge under §3 of the SUA Convention is being debated.³⁸

11, 2013).

³³ Douglas Guilfoyle, *Piracy off Somalia: A Sketch of the Legal Framework*, April 20, 2009, available at <http://www.ejiltalk.org/piracy-off-somalia-a-sketch-of-the-legal-framework/> (Last visited on February 14, 2014).

³⁴ Milan Vego, *Counter-Piracy: An Operational Perspective*, 169-180 TIDSKRIFTI SJÖVÄSENDET, Issue 3(2009); "All Necessary Means": *United Nations v. Libyan Arab Jamahiriya: Humanitarian Intervention or Colonial War?*, March 28, 2011, available at <http://www.i-p-o.org/IPO-nr-UN-Libya-28Mar.htm> (Last visited on March 22, 2014).

³⁵ Michael W. Reisman, *Criteria for the Lawful Use of Force in International Law*, available at <http://heinonline.org/HOL/Page?handle=hein.journals/yjil10&div=22&gsent=1&collection=journals> (Last visited on October 11, 2013).

³⁶ The Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation, 1678 U.N.T.S. 222, available at <http://cns.miis.edu/inventory/pdfs/apt-maritime.pdf> (Last visited on September 29, 2013)(Art. 2(7) reads "Any person commits an offence if that person unlawfully and intentionally: injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f)").

³⁷ The preamble of the legislation states that the Act of 2002 is an implementation act of the SUA Convention. The distinction between excessive force used in counter piracy and piracy was made in the SUA Convention by an amendment which removed from the ambit of the Convention, acts of excessive force used in counter-piracy measures. However such a change is not reflected in the Act of 2002. Further recently the prosecution dropped charges against the marines under the Act of 2002.

³⁸ The Government released a statement that it had decided to drop all charges under the Act of 2002. Further it reverted on its statement and has decided to pursue charges under the SUA Act. *MHA Nod to Slap SUA Charges against Italian Marines*, DECCAN HERALD January 21, 2014, available at <http://www.newindianexpress.com/nation/>

In the context of use of force, the UN Basic Principles of the Use of Force and Firearms by Law Enforcement Officials ('Basic Principles'), adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, regard the use of force as an extreme measure to be used sparingly in times only where it is 'strictly unavoidable to protect life'.³⁹ However, the interpretation has shifted from the UN Basic principles. Any measure mentioned within the SUA Convention permits the use of force as the provisions are subject to operation of the 'all necessary means clause'.⁴⁰ The 'all necessary means' clause is commonly understood to include the use of military force and is used in the Security Council resolution combating piracy, which allows for military vessels and other naval vessels to enter Somalia's territorial waters and use force to combat piracy.⁴¹ In *Republic v. Mohamed Aweys Sayid*, the Seychelles Supreme Court⁴² stated that pirates were termed as violators of *jus cogens* principles and were therefore disallowed from having any self-defence measures. It also limited the applicability of International Human Rights Law ('IHRL') in the context of pirates.⁴³ The Court fell a step short of allowing use of force through the operation of the law, but ascertained the fact that the necessity of use of force would be construed liberally.⁴⁴

State practice within the United States and the United Kingdom also suggests that, although the applicable test for use of force is self-defence, the threshold level of necessity has been brought down from the international standard of absolute necessity to the requirement of necessity 'in the totality

MHA-Nod-to-Slap-SUA-Charges-against-Italian-Marines/2014/01/21/article2011112.ece (Last visited on February 14, 2014).

³⁹ UN Basic Principles of the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27 to September 7, 1990, Arts. 9-11.

⁴⁰ Memorandum for the Public International Law and Policy Group's High Level Piracy Working Group, *Legal Responsibility of the Seychelles to Investigate and Prosecute Cases of Excessive Use of Force in Apprehending Pirates*, available at http://law.case.edu/war-crimes-research-portal/memoranda/PILPG_Issue_32_Excessive_Use_of_Force_in_Apprehension.pdf (Last visited on October 11, 2013). See also, Treves, *infra* note 59.

⁴¹ Douglas Guilfoyle, *Counter-Piracy Law Enforcement and Human Rights*, 59 I.C.Q.L., 2010 141, 147; Security Council Resolution 1846 of 2008S/RES/1846 (2008), available at <http://www.un.org/News/Press/docs/2008/sc9514.doc.htm> (Last visited on October 11, 2013); See also Donald R. Rothwell, *Maritime Piracy under International Law*, available at <http://www.crimesofwar.org/commentary/maritime-piracy-and-international-law/> (Last visited on October 11, 2013).

⁴² The Seychelles Supreme Court empowered by the municipal act granting universal jurisdiction to try crimes of piracy, was funded by the United Nations to build prison facilities for keeping the pirates. It has become one of the most active jurisdictions in trying piracy. See *Seychelles Piracy Trials*, February 2012, available at <http://law.case.edu/saddamtrial/index.asp?t=5> (Last visited on October 11, 2013).

⁴³ *Rep v. Mohamed Aweys Sayid & Eight Others*, Crm. Side No. 19, ¶ 37 and 47 (Sey. Sup. Ct. 2010).

⁴⁴ The assertion can be logically derived from the fact that the burden of proof in cases of piracy is on the accused to prove that no act of piracy was committed. The Indian Piracy Bill, 2012 also takes this stand. Municipal legislations or courts of law are however reluctant to declare the use of force as legal.

of circumstances’ or ‘as observed by a rational man’.⁴⁵ In other cases under international law, recognizing the increasing threat of piracy, use of force with limitations has been considered a necessary step in counter-piracy measures.⁴⁶ Even use of force of a lethal nature is now an accepted common practice in counter piracy measures.⁴⁷

The International Maritime Organization (‘IMO’) provides for a recommendatory ‘Best Practice Manual’. Although the manual does not actively prescribe the use of force, it recommends the existence of naval or military forces, in addition to evasive measures.⁴⁸ The existence of naval personnel can reasonably be construed to be primarily for the protection of the vessel from hostile forces or pirates. Thus a situation where use of force would be necessary has been contemplated even in the ‘Best Practice Manual’, which is evidence of the increasing acceptance of the necessity to use force to combat piracy.

The issue of justification for the use of force in the Italian Marines case should have arisen in the processes of the Courts but was not sufficiently addressed by the judiciary. With respect to India, the Piracy Bill 2012 (‘The Bill’) which reflects the more nuanced and updated representation of India’s obligations under the UNCLOS, stays silent on the use of force for capturing pirates.⁴⁹ Article 105 of UNCLOS empowers every state to seize a pirate ship under the control of pirates; arrest the persons on board; and seize the property on board which includes the use of force wherever necessary.⁵⁰ The Bill only makes a statement that on the high seas, or outside the jurisdiction of any state, every state may seize a pirate ship and arrest the persons on board.⁵¹ However, the Bill refrains from specifically authorizing Indian enforcement authorities to exercise such powers. Further mechanisms of search and seizure flow from

⁴⁵ R v. Owino, (1996) 2 Cri. App. R. 128 at 134; R v. Rose, (1884) 15 Cox 540; Beard v. United States, 158 US 550 (1895).

⁴⁶ States and organizations involved include Australia, Canada, Denmark, France, India, the Netherlands, the Russian Federation, Spain, the United Kingdom, the United States, NATO Operation Ocean Shield, the Coalition of the Willing’s Combined Taskforce 151 and EU Naval Force Operation Atalanta; Security Council Resolution 1846, UN Doc S/RES/1846; See also Douglas Guilfoyle, *The Laws Of War And The Fight Against Somali Piracy: Combatants or Criminals?*, Melbourne Journal of International Law, Vol. 11, 2012, 3-5, available at <http://www.law.unimelb.edu.au/files/dmfile/download9cf01.pdf> (Last visited on October 11, 2013).

⁴⁷ M/V “Saiga” (Saint Vincent and the Grenadines v Guinea) ITLOS Case No 2 (July 1, 1999) ¶ 155; (Canada v. United States of America) (1923) 3 Rep Intl Arbitral Awards 1609.

⁴⁸ International Maritime Organization, *Piracy And Armed Robbery Against Ships in Waters off The Coast of Somalia*, available at <http://www.imo.org/MediaCentre/HotTopics/piracy/Documents/1339.pdf> (Last visited on October 11, 2013).

⁴⁹ Piracy Bill, 2012, Preamble, available at http://www.prsindia.org/uploads/media/Piracy/piracy%20bill%20text%20_%202012.pdf (Last visited on October 11, 2013).

⁵⁰ ROB McLAUGHLIN, UNITED NATIONS NAVAL PEACE OPERATIONS IN THE TERRITORIAL SEA 80 (2009).

⁵¹ Piracy Bill, 2012, §13, available at http://www.prsindia.org/uploads/media/Piracy/piracy%20bill%20text%20_%202012.pdf (Last visited on October 11, 2013).

Article 105 of the UNCLOS.⁵² If this view is accepted then the interpretation of the use of force if necessary must also be adopted as a means of counter-piracy by virtue of the Security Council Resolution.⁵³ On the contrary, the Act of 2002 deters and restricts the use of force in counter-piracy measures, in contradiction to the international law as reflected by the SUA Convention as amended by additional protocol of 2005. The gravity of the situation is enhanced by the fact that India is one of the prominent states active in counter-piracy measures off the coast of Somalia.⁵⁴

Although the use of force, as we have argued is allowed under international law to combat piracy, it is fraught with restrictions. The *first* is that of proportionality which we have previously dealt with. The *second* is the characterization of the force as either military or law-enforcement mechanisms.⁵⁵ The biggest challenge to the justification of use of force is in fact posed by the contention, that counter-piracy measures do not have a military nature but are law-enforcement situations, with an international mandate.⁵⁶ Being understood as a law-enforcement situation, the threshold of self-defence is considerably heightened.⁵⁷ Outside military situations, military necessity cannot justify the actions taken in counter-piracy.⁵⁸ Thus in a law enforcement mechanism, the threshold of self-defence would be higher. The argument is that they are disorganized forces and do not constitute a situation of armed conflict under Article 3. Judge Tullio Treves states “This (use of force in combating piracy) is not, use of force against the enemy according to the law of armed conflict”, and rejects the position that piratic acts constitute armed conflict.⁵⁹ He agrees with

⁵² India has signed and ratified the UNCLOS. Ratification statement can be found: Division for the Ocean Affairs and the Law of the Sea, *Declarations and Statements*, available at http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#India Declaration made upon ratification (Last visited on February 14, 2014).

⁵³ The Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation, 1678 U.N.T.S. 222, Art. 8.

⁵⁴ Anjana Guha Roy, *Indian Navy's Anti-Piracy Operations*, available at <http://voiceofindia.com/in-focus/indian-navys-anti-piracy-operations/538> (Last visited on February 14, 2014).

⁵⁵ By ‘characterization of the use of force’ what is meant in fact is the objective, purpose and the nature of the use of force. Milena Sterio, *Fighting Piracy in Somalia (and Elsewhere): Why More Is Needed*, 33 *Fordham Int'l L. J.* 372 (2010).

⁵⁶ Douglas Guilfoyle, *Counter Piracy, Law Enforcement and Human Rights*, available at http://www.academia.edu/219914/Counter-Piracy_Law_Enforcement_and_Human_Rights (Last visited on October 11, 2013); With regard to the nature of the pirates and the reasons as to why they do not qualify as combatants warranting a military intervention, see Section III.

⁵⁷ Rob McLaughlin, *Legal-Policy Considerations and Conflict Characterisation at the Threshold Between Law Enforcement And Non-International Armed Conflict*, MELBOURNE JOURNAL OF INTERNATIONAL LAW, Vol. 13, 2012.

⁵⁸ Additional Protocol I, Art. 52 (2): Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

⁵⁹ Tullio Treves, *Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia*, 20 *EUR. J. INT'L L.* 399 (2009).

the view that piracy is a law-enforcement scenario and states that a conflict between a military vessel and a pirate ship cannot be construed as an armed conflict as the pirates, being non-state actors, cannot be at war with forces of another country.⁶⁰ However, he disagrees with the contention of the heightened threshold and says that the use of force is legal as per international law and can be conducted under the application of international law.⁶¹

III. THE RESTRICTIONS ON THE USE OF FORCE: THE APPLICABILITY OF IHL IN PIRACY

Although counter piracy operations have gained a high degree of international recognition and some international instruments seem to permit even the exceptional measure of use of force, such measures are not free of obstacles. A contentious issue which arises in operating counter-piracy measures is with respect to the protection offered by the Geneva Conventions of 1949⁶² to pirates, in particular Somali pirates of the Indian Coast. If organized pirates are granted protection under International Humanitarian Law ('IHL'), counter-piracy operations would be severely restricted.⁶³ The treatment and the use of force against pirates would strictly be governed by the rules of IHL, in turn potentially reducing the state's discretion and autonomy of conducting counter-piracy measures. If pirates are to be construed as civilians under the Fourth Geneva Convention, military ships would not legitimately be allowed to use force against them. Another illustration is that if pirates are treated as combatants, they would have to be granted a prisoner of war status under the Third Geneva Convention, thereby imposing severe liabilities on the state exercising universal jurisdiction.⁶⁴ This analysis is imperative as determination of the status of pirates and the applicability of IHL, determines the gamut of rights available to forces combating piracy. As was the apprehension in the Italian Marines' case, and due to the varying nature of piratic acts throughout the world, the analysis of protections of IHL is limited only to pirates of the Somali coast in this paper.

The non-granting as well as granting of protection under the Geneva Conventions are both double-edged swords. It is in fact a determination

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² The contention arises with regard to the application of the 3rd and the 4th Geneva Conventions. See Common Articles 1 and 3, Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) 75 UNTS 135 and Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) 75 UNTS 287.

⁶³ Michael Scharf, *Tainted Provenance: When, If Ever, Should Torture Evidence Be Admissible?*, 65 WASH. & LEE L. REV. 129 (2008).

⁶⁴ Protocols additional to the Geneva Conventions of August 12, 1949, International Committee of the Red Cross, Geneva, 1977, 3-87, Art. 43.

of the applicable law; of whether the regime of IHL would apply or whether the regime of human rights law would apply which in turn would determine the question of use of force and its justification. The source of the debate stems from a Security Council Resolution, specific to the situation of Somali Pirates in the Indian Ocean in 2008, conferring the protection of all applicable “humanitarian and human rights law” to pirates, posing a question of which kind of law, if not both, applies.⁶⁵ The Security Council left the question open for determination and probably for state interpretation, but in the process gave an ambiguous character to the processes of counter-piracy measures.

Settled law in this regard confers the status of a *lex generalis* to international human rights law and of a *lex specialis* to IHL.⁶⁶ Thus in times of armed conflict IHL will apply and amend the applicable human rights law to that extent. Post conflict, when IHL ceases to apply the *lex generalis* will take over. After the Hague and Geneva Conventions, it is a settled position that the human rights framework will operate outside an armed conflict whereas the humanitarian framework will operate within the existence of an armed conflict.⁶⁷ The application of IHL does not merely have implications on the pirates or suspected pirates availing their protections, but more importantly, also on the enforcement officials, such as the members of the military, conducting counter-piracy measures. Leaving such a question undecided would in most situations lead to varying, if not a complete lack of, procedures in counter-piracy operations, each of which would be justified by the concerned state. It would eventually lead to conflicts between international law and municipal law.⁶⁸

The *first* approach is that of granting pirates of the Somali coast, protection under IHL. In order to examine this approach, we consider in the following part, the various arguments with regard to the threshold of the conflict between pirates and forces combating piracy, to consider whether it amounts to a situation of either an international or a non-international armed conflict. The first situation for consideration is where pirates are protected as ‘combatants’ of a non-international armed conflict under the Third Geneva Convention or the First Additional Protocol, with the application of the Laws and Customs of War.⁶⁹ According to this stream of thought, the use of proportionate force to achieve a legitimate military objective is necessary and any force used in excess

⁶⁵ S.C Res. 1851, U.N Doc. S/RES/1851 (2008).

⁶⁶ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004, ¶106.

⁶⁷ Françoise J. Hampson, *The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body*, September 30, 2008, available at <http://www.icrc.org/eng/resources/documents/article/review/review-871-p549.htm> (Last visited on October 11, 2013).

⁶⁸ A conflict of such a nature can be seen in the SUA Convention addressed above.

⁶⁹ DANIEL HELLER-ROAZEN, AGENTS OF CHAOS AND UNLAWFUL COMBATANTS: PIRATES IN PHILOSOPHY AND LAW, THE ENEMY OF ALL: PIRACY AND THE LAW OF NATIONS 32 (2009).

is illegal.⁷⁰ This approach would ideally legalize use of force to a great extent as it would successfully rebut the argument of piracy being a law-enforcement operation. In effect it would undisputedly allow use of force in counter-piracy operations, subject to the proportionality requirement.⁷¹ As beneficial as this appears to be to the cause of counter-piracy, the approach is restricted by theoretical as well as practical concerns. The argument is that piracy conventionally forms a crime against humanity, thus requiring the existence of an organizational policy.⁷² The *de facto* organization of the Somali pirates, it is contended, suffices to constitute a non-international armed conflict, thereby invoking the application of the Third Geneva Convention.⁷³ In case of a non-international armed conflict, even the dissident forces of an organized group are combatants. However, there are certain requirements or threshold levels to qualify as a non-international armed conflict, which in the case of Somali pirates, are not met with. In case of a non-international armed conflict, the forces have to meet requirements of having an organized hierarchical structure which is absent in pirates of the coast of Somalia.⁷⁴ Further there has to be a sustained protracted armed violence which is also absent in case of pirates thus rendering them inadequate to meet the thresholds of Common Article 3. It has been consistently argued that the Somali pirates do not constitute such an organized force as to go beyond the threshold of an internal disturbance as required by Common Article 3.⁷⁵ The practical concern is that granting a prisoner of war status would make the judicial processes difficult as specific processes of trial, arrest and punishment will have to be followed to protect their status.⁷⁶

The *second* stream of thought is that of regarding pirates of the Somali coast as civilians under the protection of the Fourth Geneva Convention, therefore debarring any use of force upon them except that which is used proportionally in self-defence.⁷⁷ This approach considers pirates as common criminals and therefore classifies them as civilians.⁷⁸ The existence of a conflict in

⁷⁰ See *Legality of Nuclear Weapons Case*, Advisory Opinion, I.C.J. Reports 1996, 226.

⁷¹ *Id.*

⁷² See also M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 516-518 (1999). Historically, Piracy was considered *hostes humani generis crime* i.e. the enemy of all human-kind.

⁷³ See Burgess, *supra* note 13.

⁷⁴ *Prosecutor v Tadic*, Case No.IT- 94-1 Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction ¶ 70.

⁷⁵ Michael H. Passman, *Protections Afforded to Captured Pirates Under the Law of War and International Law*, Tulane Maritime Law Journal, Vol. 33, No. 1. 4-5 (2008); WATKIN AND NORRES, *NON-INTERNATIONAL ARMED CONFLICT IN THE 21ST CENTURY* 12-54 (2012), available at <http://www.peacepalacelibrary.nl/ebooks/files/356612716.pdf> (Last visited on October 11, 2013).

⁷⁶ Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) 75 UNTS 135.

⁷⁷ Michael H. Passman, *Protections Afforded to Captured Pirates Under the Law of War and International Law*, Tulane Maritime Law Journal, Vol. 33, No. 1. 4-5 (2008).

⁷⁸ Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) 75 UNTS 135, Art. 4.

this stream of thought is considered to be against the State of Somalia which hosts pirates in its territorial waters, posing a threat to the peaceful passage of vessels through the High Seas, EEZs etc. as provided by the UNCLOS.⁷⁹ Such a view is paradoxical in nature as the perpetrators who are cause of the conflict and therefore potentially attribute State responsibility to Somalia, are themselves considered protected civilians under this approach. This would indeed be a misinterpretation of the Fourth Geneva Convention.⁸⁰ This position becomes untenable by the very fact that the State of Somalia itself has consented to combating piracy of its coast and thus could not have supported the actions of the pirates.⁸¹

The contrary approach to that of protection is of the non-applications of the Geneva Conventions, which forms the strongest case, within the debate.⁸² There are several reasons justifying this approach. *First*, in the case of the Somali pirates no state is backing, aiding or sponsoring such piratical attacks. The UNCLOS lists piracy as a crime and makes it obligatory on state parties to fight it, rejecting any claim of state protection.⁸³ Moreover in order to constitute a non-international armed conflict there has to be protracted and sustained violence.⁸⁴ The attacks of pirates off the Somali coast do not constitute a sustained or even a protracted nature of violence.⁸⁵ *Second*, the objective of the Geneva Convention is to reduce the suffering of the victims in war.⁸⁶ As established above, pirates are perpetrators of a customary crime and are not victims of war. *Third*, no protection under the customs of war has traditionally been offered to pirates.⁸⁷ The nature of piracy too deviates from the regime under the Geneva Conventions for international armed conflicts; where ‘combatants’ or ‘civilians’ are associated between state conflicts, distinct from piracy which is characterized by non-state actors.⁸⁸ Finally, the UNCLOS definition presumes

⁷⁹ Douglas Guilfoyle, *The Laws of War and the Fight Against Somali Piracy: Combatants or Criminals?*, MELBOURNE JOURNAL OF INTERNATIONAL LAW, VOL 11 3-5(2012).

⁸⁰ Passman, *supra* note 75, 32.

⁸¹ The Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation, 1678 U.N.T.S. 222, Art.8bis(5), available at <http://cns.miis.edu/inventory/pdfs/aptmaritime.pdf> (Last visited on September 29,2013).

⁸² Douglas Guilfoyle, *Counter-piracy Law Enforcement and Human Rights*, 59 I.C.Q.L. 141 (2010).

⁸³ United Nations Convention on the Law of the Sea 1982, 1833 U.N.T.S. 397 (‘UNCLOS’), Art. 100-105.

⁸⁴ International Committee of the Red Cross, *Opinion Paper, How is the Term “Armed Conflict” Defined in International Humanitarian Law*, March 2008, available at <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf> (Last visited on October 11,2013).

⁸⁵ GEISS & PETRIG, *supra* note 30; Passman, *supra* note 75.

⁸⁶ Eric A. Heinze, A “Global War on Piracy”? *International Law and the Use of Force Against Sea Pirates*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1900413 (Last visited October 11 2013.)

⁸⁷ Leiber Code, Art. 82, available at http://avalon.law.yale.edu/19th_century/lieber.asp#sec3 (Last visited on October 11, 2013).

⁸⁸ Daphné Richemond, *Transnational Terrorist Organizations and the Use of Force*, 56 CATH. U. L. REV. 1001, 1012 (2007).

that an act of piracy should be done for 'private ends'.⁸⁹ Although for prosecution of pirates such a nature of the crime is not considered as extremely relevant but, it is a different situation with regard to the application of IHL.⁹⁰ Even in case of a non-international armed conflict the nature of the conflict should be public so as to either overthrow a regime, bring about a change in government or self-determination etc., thereby completely excluding the possibility of acts done for private ends.⁹¹ It is therefore a situation not warranting any protection of IHL.

Piracy as a crime, therefore, possesses a unique nature. It is an international crime having universal jurisdiction attributable to an individual, which does not constitute any form of international or non-international armed conflict or which does not have a specific organizational policy behind it.⁹² It is therefore unique in nature and mandates a specific consensus for its application.

No general consensus with regard to state practice can be found which takes into account IHL restrictions in its application of the use of force in counter-piracy measures.⁹³ In fact it is quite pertinent to note that certain countries have legalized the use of armed guards on board merchant and civilian vessel, assessing the eventuality that the use of force may be required.⁹⁴ Although the stringency of the restrictions on the method of capture or seizure or fending off piratic attacks in terms of IHL is no longer applicable, such restrictions are not unchecked. The regime of the international human rights law fundamentally governs the methods of use of force, and to that extent limits such operations. Pirates are conferred with due process protections and rights of humane treatment. Best recommended practices have been designed in this regard to determine the extents of a counter-piracy operation.⁹⁵

A situation where human rights law is applicable would then qualify as a law-enforcement situation. Although this creates a higher threshold for application of use of force, it does not go unjustified.⁹⁶ With regard to

⁸⁹ Passman, *supra* note 75 (Passman supports this particular view).

⁹⁰ International Committee of the Red Cross, *Codification of Customary International Law Applicable in Situations of Armed Conflict*, available at http://www.icrc.org/customary-ihl/eng/docs/v2_cou_il_rule157 (Last visited on October 11, 2013).

⁹¹ United Nations Convention on the Law of the Sea, December 10, 1982, 1833 U.N.T.S. 397, Art. 100.

⁹² See CHERIF BASSIOUNI *supra* note 72.

⁹³ Amitai Etzioni, *Somali Pirates: An Expansive Interpretation of Human Rights*, Canadian Naval Review, Vol. 6 No. 4, 10 (2011), available at <http://www.navalreview.ca/wp-content/uploads/public/vol6num4/vol6num4.pdf> (Last visited on October 11, 2013).

⁹⁴ *Comparison Of Flag State Laws on Armed Guards and Arms on Board*, available at http://www.skuld.com/Documents/Topics/Voyage_and_Port_Risks/Piracy/ICS-ECSA%20Private%20Armed%20Guards%20Flag%20State%20Laws%20June%202012.pdf (Last visited on February 14, 2014).

⁹⁵ As discussed in section above, See Kelsen, *supra* note 28.

⁹⁶ Guilfoyle, *supra* note 33.

the application of human rights conventions, Italy is signatory to the ICCPR and ECHR.⁹⁷ The first argument concerns the extraterritorial application of the human rights treaties. To state that ICCPR is not applicable extraterritorially would be an untenable position as its extraterritorial application is widely recognized.⁹⁸ Although the extra territorial application of the ECHR is contentious, the favoured argument is the extension of the ECHR beyond the territory of the State. However, its application to the ship bearing the flag of a signatory country is uncontested.⁹⁹ The applicability of both the human rights treaties raises a significant question of whether use of force by naval forces of a state violates the obligations of international human rights law. For the present purposes however, such a broader question need not be answered. It suffices to say in the context of piracy off the Somali coast, that Security Council Resolutions allowing for all necessary means make use of force actions attributable to the UN.¹⁰⁰ The Security Council Resolutions being binding on the states make the UN attributable for the use of force.¹⁰¹

In the context of the Italian marines' case, the conferment of protection of the combatant status would yield an unfavourable result for the marines, as they would then have to prove the proportionality and not the justification of the force. In contrast, under the aegis of the UN, the actions of the marines are backed by an over-arching legal framework which authorizes them to use force if necessary while combating piracy.

Being legally backed by the applicability of use of force, there is a compelling case for the marines even for the killing committed in suspicion of piracy, as collateral damage. As no such protection is offered to the pirates under the Geneva Conventions the threshold for self-defence has to be met with and along with proportionality, the use of force has to be justified.

⁹⁷ Human Rights Library, University of Minnesota, *Ratification of International Human Rights Treaties – Italy*, available at <http://www1.umn.edu/humanrts/research/ratification-italy.html> (Last visited on February 14, 2014).

⁹⁸ Sergio Euben Lopez Burgos v. Uruguay, Communication No. R.12/52, U.N. Doc. Supp. No. 40 (A/36/40) at 176; Human Rights Committee, General Comment No. 31 [80], *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 10, CCPR/C/21/Rev.1/Add.13 (May 26, 2004). See also International Court of Justice, Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ¶¶107-13 (July 9, 2004).

⁹⁹ Tarik Abdel-Monem, *The Long Arm of the European Convention on Human Rights and the Recent Development of Issa v. Turkey*, available at <http://www.wcl.american.edu/hrbrief/12/2abdel.pdf> (Last visited on March 22, 2014).

¹⁰⁰ International Law Commission, *Report on the Work of its Sixty-First Session* (May 4 to June 5 and July 6 to August 7, 2009), 62-70, U.N. GAOR, 64th Sess., Supp. No. 10, U.N. Doc.A/64/10, Draft Art. 6.

¹⁰¹ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971, I.C.J. Reports 1971 at ¶¶ 87-116.

IV. THE LEGALITY OF THE USE OF FORCE AND THE APPLICATION OF THE MARITIME ZONES ACT

The applicable laws of the state which has jurisdiction form a vital part of justifying use of force in these circumstances. The Italian Marines' case poses a complex issue, as the maritime incident occurred not in the territorial waters of India, but within its Contiguous Zone.¹⁰² The UNCLOS provides for a separate regime with respect to the Contiguous Zone and the EEZ, where states are conferred certain specific rights, but not sovereignty over those waters.¹⁰³ Article 33 of the UNCLOS provides for the Contiguous Zone of the coastal state. An analysis of the Italian Marines case renders an impression that the Court does not delve into the matter of its jurisdiction. It leaves an option to the accused of invoking Article 100 of the UNCLOS in order to challenge the jurisdiction of the Union of India, and therefore the courts.¹⁰⁴ We submit that there is no case where either simultaneous or exclusive jurisdiction vests with the Indian courts. There are two reasons argued here: the non-applicability of the Indian laws, namely the IPC and the Code of Criminal Procedure ('CrPC'), rendering the incident outside the territorial jurisdiction of India and the valid jurisdiction of the matter vesting with the Italian Court.

The justification which the Supreme Court of India took to apply the CrPC and the Act of 2002 was that the incident took place at 20.5 miles of the Indian coast, a place outside the territorial waters of India but within its Contiguous Zone, as specified under the Maritime Zones Act.¹⁰⁵ The Court based its analysis on the difference between rights of sovereignty and complete sovereignty. Sovereignty is the principle which is supreme, in contrast to rights of sovereign, where some rights akin to those exercised in the sovereign territory are granted.¹⁰⁶ However, the Court interpreted rights of sovereignty to include the ability of a state to apply its criminal legislation, as distinct from 'sovereign rights' under the EEZ regime, thereby applying the provisions of the IPC, and other legislations. It is submitted that the construction given to the 'rights of sovereignty' is artificial and contrary to the provisions of the UNCLOS. Article 33 of the UNCLOS provides for the rights which the state may exercise, and limits it to the contiguous zone notified by the coastal state. It confers rights on the state to the extent of "customs, fiscal, immigration or sanitary laws" and therefore cannot be considered to include, as applicable, the

¹⁰² Republic of Italy v. Union of India, (2013) 4 SCC 721.

¹⁰³ United Nations Convention on the Law of the Sea, December 10, 1982, 1833 U.N.T.S. 397, Arts. 33 and 55.

¹⁰⁴ United Nations Convention on the Law of the Sea, December 10, 1982, 1833 U.N.T.S. 397, Art. 100.

¹⁰⁵ The UNCLOS places a restriction under Article 33 that the Contiguous Zone cannot extend beyond 24 nautical miles.

¹⁰⁶ Republic of Italy v. Union of India, (2013) 4 SCC 721, ¶ 60-62.

CrPC in matters of offences beyond the scheme provided by the UNCLOS.¹⁰⁷ The incident occurred where there was homicide with the suspicion of piracy and was not in the least connected to customs, fiscal, immigration or sanitary laws; an observation neglected by the Court. Therefore no procedural law applied by the Court was applicable at the present time.

India signed the UNCLOS with only one substantial reservation which interpreted the provisions of the UNCLOS to disallow military activities or manoeuvres within the EEZ of a coastal state without its permission.¹⁰⁸ Thus as against India, the provision would imply a necessity of a notification to the coast guard as to military activities conducted in the EEZ of India. As to the law governing the MV *Enrica Lexie*, by virtue of the flag-state jurisdiction, reliance has to also be placed upon the Italian ratification statement of the provisions of the UNCLOS. While acceding to the provisions of the UNCLOS, Italy declares that “the coastal state does not enjoy residual rights in the exclusive economic zone. In particular, the rights and jurisdiction of the coastal state in such zone does not include the right to obtain notification of military exercises or manoeuvres or to authorize them”.¹⁰⁹ Thus the Republic of Italy and consequently its naval officers were not bound to report to the Indian Coastal Guard of the armed response they gave to the perceived threat. Thus, they were not bound by this requirement under UNCLOS and therefore did not violate international norms regarding reporting incidents of piracy. Italy exempts itself as against states exercising the option to require notification of military manoeuvres.

Thus even if the acts of the Italian marines were to be considered as a military manoeuvre without the permission of India, they were not bound by the notification provision due to the Italian reservation. Further with regard to the recall of the MV *Enrica Lexie*, as per Article 52 read with Article 19 of the UNCLOS,¹¹⁰ the ship was out of the territorial waters of India and therefore the Indian authorities could not hamper the right of innocent passage of MV *Enrica Lexie* according to their international obligations. The calling back of the ship from its intended course was in itself a violation of the obligations under UNCLOS.¹¹¹ Although the Indian authorities claimed that the ship had an obligation to return and that the incident should have been reported, MV *Enrica Lexie* had no obligation to return as the incident was not a breach of

¹⁰⁷ Sergii Masol, *Jurisdictional Problems Relative to the Crime of Piracy*, available at http://www.academia.edu/1834079/JURISDICTIONAL_PROBLEMS_RELATIVE_TO_THE_CRIME_OF_PIRACY_OFF_THE_COAST_OF_SOMALIA (Last visited October 11, 2013).

¹⁰⁸ Oceans and Law of the Seas United Nations, *Declarations and Statements*, available at http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#India Declaration made upon ratification (Last visited on March 22, 2013).

¹⁰⁹ *Id.*

¹¹⁰ Article 52 talks about the right of innocent passage and Article 19 talks about the meaning of innocent passage.

¹¹¹ It is a violation of Article 52.

peace against the sovereignty of the state.¹¹² The present incident was merely an act of retaliation for a perceived threat of piracy and would not constitute an act of aggression. Thus, there was no justification for mandating the return of the ship in the territorial waters of India.

A second limb of the argument with respect to the lack of jurisdiction of the Indian courts is the analysis of the claim of the functional immunity taken by the petitioners. There are two forms of immunity applicable under international law: immunity *rationae materiae* which is subject matter immunity and *rationae personae* which is personal immunity to people such as diplomats etc. In the present case, it was the *rationae materiae* immunity which was claimed.¹¹³ In theory, such immunity governs all official acts, rendering immunity to ‘agents of states’ acting on its behalf.¹¹⁴ Immunity from investigation or from criminal liability, in effect, is ousting of the jurisdiction of the courts of that country and therefore becomes relevant for discussion at this juncture.¹¹⁵

The concern arises because of the ill-defined limits of collective responsibility to maintain international peace and the manifestation of state sovereignty through its criminal jurisdiction.¹¹⁶ The actions of the persons (to whom a functional immunity is awarded) have to be in the course of an official

¹¹² United Nations Convention on the Law of the Sea, December 10, 1982, 1833 U.N.T.S. 397, Art. 25; David A. Ridenour, *Ratification of the Law of the Sea Treaty: A Not-So-Innocent Passage*, available at <http://www.freerepublic.com/focus/f-news/1766001/posts> (Last visited on March 22, 2014).

¹¹³ Alberto Di Martino, *Crimes Committed by Peacekeepers: Immunity v. Principles of Criminal Jurisdiction. A Brief Outline*, available at http://www.academia.edu/4459316/Peacekeepers_between_Criminal_Liability_and_Immunity (Last visited March 22, 2014).

¹¹⁴ *Prosecutor v. Blaškić (Objection to the Issue of Subpoena)*, IT-95-14-AR108 (1997), 110 ILR (1997) 607, ¶ 38. The Court held that:

“Officials are mere instruments of a State and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of the State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called ‘functional immunity’. This is a well-established rule of customary international law going back to the eighteenth and nineteenth centuries”.

See other examples where immunity has been granted e.g. Fidel Castro in Belgium and Spain because he benefited from personal immunity as a sitting head of state; complaints against Colonel Kadhafi and Ariel Sharon were also rejected for the same reason in French and Belgian courts, respectively.

¹¹⁵ *Diplomatic Protection before the ICJ and National Courts*, Part 2, available at <https://openaccess.leidenuniv.nl/bitstream/handle/1887/12538/04.pdf?sequence=9> (Last visited on March 22, 2014).

¹¹⁶ Martino, *supra* note 113.

duty.¹¹⁷ They have to be interpreted in light of the applicable foreign law.¹¹⁸ In the instant case Italy had passed a specific legislation mandating naval presence on merchant vessels for their protection.¹¹⁹ Therefore conferment of such protection from a potential threat would be acting in official duty. Although it is in dispute whether the marines were privately contracted or whether they belonged to the Italian Naval Regiment, it is clear that their acts were in pursuance of the legislation. Further, the marines were subject to the provisions of the Italian Military Penal Code of Peace. The head of the military team obeys the rules laid down by the Italian Ministry of Defence and not that of the ship master.¹²⁰ The argument for functional immunity is therefore valid and Indian courts do not possess jurisdiction.

The functional immunity however has to be distinguished from absolute immunity. The functional immunity conferred upon the marines by the Republic of Italy in the performance of its mandated functions cannot be used to avoid prosecution from Italy itself. The immunity therefore has no operation and subject to valid jurisdiction, the marines may be prosecuted under Italian law by Italian Courts. The functional immunity aspect deals even with the extra-territorial jurisdiction claimed under the IPC. §3 of the IPC states that, if a person commits a crime abroad and enters the territory of India he can be prosecuted under the provisions of the IPC.¹²¹ Such a claim is precluded by the existence of functional immunity. The principle of functional immunity is governed by the equality of sovereign rule, especially as a defence to the extra-territorial application of criminal legislation, thereby legitimising its application in the Italian marines' case.¹²²

Having contended above that the Indian courts do not possess jurisdiction, the second prong of the argument seeks to demonstrate that the courts of Italy have proper jurisdiction. As a consequence of the PCIJ decision in *France v. Turkey*, ships are now considered floating territories.¹²³ Therefore the laws of the nation which the flag of the ship bears are the laws applicable to that ship. The municipal laws of the state and therefore of the possibility of the use of force would be governed by the flag country of that ship.¹²⁴ Specific to the Italian Marines' case, their ship MV *Enrica Lexie* sailing in the Indian EEZ

¹¹⁷ Natalino Ronzitti, *The Enrica Lexie Incident: Law of The Sea And Immunity Of State Officials Issues*, available at http://www.sidi-isil.org/wp-content/uploads/2012/05/01_Ronzitti.pdf (Last visited on February 14, 2014).

¹¹⁸ International Law Commission Draft Articles on State Responsibility for Internationally Wrongful Acts November 2001 Supplement No. 10 (A/56/10), Art. 6 (Law No. 130 of 2 August 2011).

¹²⁰ Ronzitti, *supra* note 117.

¹²¹ Indian Penal Code 1860, §3.

¹²² Martino, *supra* note 113.

¹²³ S.S. *Lotus* (Fr. v. Turk.), 1927 PCIJ (ser. A) No. 10 (Sept. 7), Publications of the Permanent Court of International Justice, Series A - No. 10; Collection of Judgments, A.W. Sijthoff's Publishing Company, Leyden, 1927.

¹²⁴ *Id.*

bearing an Italian flag commenced an armed attack on the later-discovered fishing boat.¹²⁵ Subject to the applicability of the law of India in the contiguous zone (the fiscal sanitary etc. laws); the municipal law of Italy therefore should apply in the present context.¹²⁶ The marines are bound by the laws of Italy and therefore can be tried for the violation thereof. The determination of use of force by the Courts is also without meaning if the Courts do not possess jurisdiction to try the matter or the Union of India does not possess the competence to investigate it.

V. CONCLUSION

The use of force under international law has taken the form of a necessary evil. On one hand the explicit prohibition on the use of force and its only exception being the collective security measures taken by the Security Council presents a strong case for dissuasion to use force in counter-piracy measures. However, the insufficiency of the mechanisms to deal with piracy and the customary nature of the use of force in counter-piracy mechanisms necessitate the justification of use of force. The ambiguous nature in which this has been dealt with creates jurisdictional problems for states in prosecuting excessive use of force to counter piracy. Applicability of universality of jurisdiction and its opposing rule of flag state jurisdiction, in addition to the space afforded to municipal jurisdictions to interpret it, may create a legally untenable situation such as that which occurred in the Italian Marines' case. The interpretation given by the Indian Supreme Court was consistent with the Indian legislation. Yet the Indian legislation was not applicable in the present case as the incident occurred outside the territorial application of the statutes i.e. outside the territorial waters of India. Further, the legislation itself governing the present situation was not in tune with the current international law creating a problem. The Act of 2002 reflecting an old situation and the overarching reach of the CrPC and other criminal legislation are not in tune with the UNCLOS. The Court had the opportunity to make the observation and change the law, a task which it did not undertake.

¹²⁵ Republic of Italy v. Union of India, (2013) 4 SCC 721.

¹²⁶ See also Advisory opinion of the ICJ in Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, 1959 ICJ 267 (The Court held that after registration, the nationality of the vessel is the one of the flag under which it flies).