

International journal of Maritime Policy
Vol. 1, Issue 3, Autumn 2021, pp. 75-99
DOI: 10.22034/irlsmp.2021.140649
ISSN: 2717-4255

Study on the Criminal Jurisdiction on the Exclusive Economic Zone with Emphasis on Enrica Lexie case

Mahin Sobhani¹

Received: 18 September 2020 Accepted: 29 June 2021 Published: 26 September 2021

Abstract

On 15 February 2012, two Indian nationals aboard the St. Antony, an Indian fishing ship, were killed allegedly as a result of gunshot wounds following a confrontation with the Enrica Lexie, an Italian merchant ship, in international waters, off the Indian coast. The nature of the confrontation has been in contention. Enrica Lexie was traveling from Singapore to Egypt accompanied by six Italian navy marines. Enrica Lexie began firing at India's Exclusive Economic Zone because they thought pirate boats attacked them. Indian Navy detained the Enrica Lexie and two Italian navy Marines were arrested on charges of murder of two Indian fishermen. This incident caused the dispute between India and Italy over criminal jurisdiction, functional immunity of Italian navy marines, and the practice of arming merchant ships. They refer this dispute to arbitration and finally, Tribunal issued its award. This paper via the descriptive-analytical method, exploring existing documents, conventions, and customary international law shows that criminal jurisdiction over Italian merchant ships at EEZ belongs to the flag state. Most countries permit and even force to arm their flag merchant ships to fight against pirates, so this practice becomes a rule of customary international law. As a result, actions of these Italian marines are attributed to Italy as a governmental act, and state officials are entitled, in principle, to functional immunity from foreign jurisdiction regarding their 'official' acts, i.e., when acting in their official capacity.

Keywords: Criminal Jurisdiction, Exclusive Economic Zone, Immunity, Piracy, Commercial Ship

¹ Assistant Prof. of International Law, Department of Law, Faculty of literature and Humanities, University of Guilan, Rasht, Iran, (corresponding author) Email: mahin_sobhani@yahoo.com

Introduction

The arbitral proceedings were instituted under the United Nations Convention on the Law of the Sea (“UNCLOS”) on 26 June 2015, when Italy served on India a “notification under Article 287 and Annex VII, Article 1 of UNCLOS and statement of claim and grounds on which it is based”. (<https://pca-cpa.org/en/cases/117/>)

According to Italy, the Parties’ dispute arises from an incident that occurred on 15 February 2012 approximately 20.5 nautical miles off the coast of India involving the “Enrica Lexie”, an oil tanker flying the Italian flag, and India’s subsequent exercise of criminal jurisdiction over the incident and over two Italian marines from the Italian Navy. According to India, the incident in question concerns the killing of two Indian fishermen on board an Indian vessel named the “St. Antony”, and India’s subsequent exercise of jurisdiction. It is alleged that the two Italian marines aboard the “Enrica Lexie” killed the fishermen (pca-cpa.org/en/cases/117/).

1.Events Chronology

The Enrica Lexie case is an ongoing international controversy about a shooting that happened off the western coast of India. On 15 February 2012, two Indian fishermen were killed off the coast of Kerala, India, aboard the St. Antony. India alleged that the two Italian marines aboard the Italian-flagged commercial oil tanker MV Enrica Lexie killed the fishermen (Italy v. India, 2015). Shortly after the incident, the Indian Navy intercepted the MV Enrica Lexie and detained the two Italian marines. That has sparked a conflict of opinions over legal jurisdiction and functional immunity between the governments of India and Italy and has continued to cause diplomatic tension between the two states. The handling of that incident by India, and the dispute that followed, led to a rupture in relations between the two states, with two Italian marines being detained in India for a number of years, a frustrated investigation by the



Maritime Policy, Vol. 1, Issue. 3, Autumn 2021

Rome Public Prosecutor, and an impasse between the two states over the exercise of rights of jurisdiction, including immunities from jurisdiction, in relation to the Italian marines (Public opening Statements, 2019, p. 13).

On 15th February 2012, the *Enrica Lexie*, an oil tanker flying the flag of Italy, was en route from Sri Lanka to Egypt. A vessel protection detachment, or "VPD", comprising six Italian marines was stationed on board the ship, with an official anti-piracy mandate entrusted to them under Italian law. Chief Master Sergeant Massimiliano Latorre was the head of the vessel protection detachment. Sergeant Salvatore Girone was one of its members (Public opening Statements, 2019, pp. 13-14).

While the *Enrica Lexie* was navigating about 20.5 nautical miles off the costs of Alappuzha, India, a small, unidentified craft was spotted on radar, proceeding on a collision course with the tanker. As the boat drew nearer, the marines on board the *Enrica Lexie* took a series of visual and auditory measures to urge those on the approaching boat to change it's course. It is to be recalled that these events took place in waters in which pirate attacks were known to have occurred, and a common modus operandi for pirate attacks involved the use of small crafts, including fishing vessels (Public opening Statements, 2019, p. 14).

The marines fired three volleys of warning shots into the water as the skiff continued to approach. When the skiff finally turned away, it was very close to the tanker, seconds from a collision. The master of the *Enrica Lexie* and the marines immediately reported the incident to all concerned authorities, Italian and international. Hours after the incident, when the *Enrica Lexie* had resumed it's navigation and was some 36 nautical miles off the Indian coast, India dispatched armed Coast Guard vessels and aerial unit's to interdict the *Enrica Lexie* and escort her to Kochi (Public opening Statements, 2019, p. 15).

On 19th February 2012, Chief Master Sergeant Latorre and Sergeant Girone were compelled to disembark the vessel by the Kerala police. They

were arrested on the spot, with an accusation of murder for having allegedly killed two Indian fishermen, Ajeesh Pink and Valentine Jelastine, on board the fishing boat the St Antony, in the context of the incident. At its core, this dispute is about which state, Italy or India, is mandated to exercise jurisdiction over Massimiliano Latorre and Salvatore Girone, members of the Italian armed forces on official duties, and with regard to what has become known as "the Enrica Lexie Incident". As members of the Italian armed forces, then, as today, the marines were state officials. They were performing official duties at the time of the incident, exercising official functions under Italian law. They were stationed on an Italian-flagged vessel.²

The incident occurred in international waters, beyond India's territorial sea. As soon as the nature of the incident became known, Italy took immediate steps to investigate the incident. A criminal investigation was opened by the Rome Public Prosecutor. In parallel, an admiral of the Italian Navy was immediately dispatched to India to enquire into the incident. Both sought the cooperation and assistance of the Indian authorities. No cooperation was forthcoming. Instead, the Indian authorities pressed ahead with their own proceedings. Charges were brought against the marines before the Kerala courts, later thrown out by the Indian Supreme Court, which went on to invent a novel procedure to try the marines, although on charges that were never defined. The Italian courts failed to determine the marines' claim to immunity as required under international law (Public opening Statements, 2019, pp. 16-17).

The prompt assertions by the marines and Italy that India lacked jurisdiction over the Enrica Lexie and the marines under the UN

² That was following a European Parliament resolution of January 2015, stating that "no charge has been brought by the Indian authorities" and that "Italian marines' detention without charge is a serious breach of their human rights". ("MEPs call for Italian marò accused of killing Indian fishermen to be repatriated - News - European Parliament". Retrieved 1 August 2017.)



Maritime Policy, Vol. 1, Issue. 3, Autumn 2021

Convention on the Law of the Sea were swept aside by reference to India's domestic law, which purported to give the Indian authorities penal jurisdiction beyond its territorial sea.

This dispute is rooted in the provisions of UNCLOS: in Articles 87 and 58, which address Italy's freedom of navigation, and the rights attendant thereon; in Article 89, which provides that no state may subject any part of the high seas to its sovereignty; in Article 92, which provides that ships on the high seas shall be subject to the exclusive jurisdiction of their flag state; in Article 97, which provides that, in the event of an incident of navigation, it is the flag state that has exclusive jurisdiction to investigate the incident; Articles 2(3), 56(2) and 58(2), which require respect for rules of international law and the rights of other states, including concerning the immunity of state officials; Article 100 on the duty to cooperate in the repression of piracy; and Article 300 on the obligation not to abuse rights granted by the convention. (Public opening Statements, 2019, pp. 17-18)

The *Enrica Lexie* was an Italian-flagged vessel. It was in international waters at the time of the incident. The actions of which the marines have been accused took place on the *Enrica Lexie*, even if they are alleged to have had consequences elsewhere. The territorial link with India, such as it is, was a consequence of the Indian authorities unlawfully interfering with the freedom of navigation of the *Enrica Lexie* following the incident, and of trickery by the Indian authorities that brought the *Enrica Lexie* into Indian waters. (Public opening Statements, 2019, p. 19) The immunity of members of the armed forces of a state from foreign criminal jurisdiction is recognized worldwide. While the marines are now in Italy, their deprivation of liberty continues³ (Public opening Statements, 2019, pp. 20-21).

³ In April 2016 this Tribunal ordered Italy and India to cooperate to allow the return of Sergeant Gironi to Italy, under the authority of the Supreme Court of India. The Supreme Court of India

On the other hand, India claimed that, there wasn't any coercion to in persuading the Enrica Lexie to collaborate; the shipmaster decided to accede to that request and to come to Kochi port (Public opening Statements, 2019, p. 24). After it was *prima facie* established that two of the six marines on board the Enrica Lexie had fired the shots killing the two innocent fishermen, they were arrested when they were on Indian territory. Legal proceedings were then commenced in the Indian court of Kollam in the state of Kerala. In light of the facts of this case, and in circumstances where the alleged accused were available on the territory of the country of nationality of the deceased victims, is, legally speaking, entirely natural. No legal or administrative authority would deny on both legal and humanitarian grounds to recognize the immediate requirement for carrying out a prompt inquiry and investigation of the two killings. Italy initially joined the proceedings before the Indian courts, but surprisingly, in a negative way, hampered them by filing multiple interlocutory applications challenging the actions of the Indian authorities (Public opening Statements, 2019, pp. 25-26).

This Tribunal, after hearing the parties on 30th and 31st March 2016, vide its order dated 29th April 2016, prescribed provisional measures regarding cooperation between Italy and India for relaxation in the bail conditions of Sergeant Girone on considerations of humanity; that Sergeant Girone, while remaining under the authority of the Supreme Court of India, may return to Italy during the present Annex VII arbitration. Accordingly, Sergeant Girone left India on 27th May 2016 and reached Italy on 28th May 2016. Indian citizens were killed on an Indian boat, and India has apprehended the accused persons when they were in its territory. Is there any provision granting Italy exclusive jurisdiction in circumstances where two human beings located on an Indian boat were

has, on the same basis, allowed the extension of Chief Master Sergeant Latorre's stay in Italy for the duration of this arbitration. (Public opening Statements, 2019, pp. 20-21).



Maritime Policy, Vol. 1, Issue. 3, Autumn 2021

killed as a result of actions coming from individuals on board a commercial vessel? It is rather India whose legal rights under UNCLOS have been violated by Italy. It is for this reason that India has introduced counterclaims, which arise as a result of Italy's breach of India's sovereign and other rights in its exclusive economic zone by its marines firing automatic weapons at an Indian fishing boat, the St Antony (Public opening Statements, 2019, pp. 28-30). According to India, Italy has tried to create a state of confusion by raising issues concerning the investigation, India's domestic legislation, and certain other factual and practical aspects that this Tribunal lacks jurisdiction to deal with. Such issues form the subject matter of proceedings before the domestic trial court, and not before the Arbitral Tribunal, whose jurisdiction is limited to matters concerning the interpretation and application of UNCLOS. Italy has already submitted to the jurisdiction of the Indian courts by using the Indian courts in responding to the issues relating to prosecution, and in filing the various petitions for different prosecution purposes.⁴

While tangential, the incident drew attention to the practice of commercial shipping using armed guards, Italian authorities maintained that India lacked jurisdiction in judging the case, since, based on the Enrica Lexie positional records, the ship was outside the Indian territorial waters, and well in the international navigation area. Furthermore, they maintained that India lacked jurisdiction for arresting the two marines, since they were on an Italian ship in international waters, charged of security duties. As such, they were military personnel on duty in defense of a part of the national territory, and could not be considered terrorists or being accused of murder.

So, there are several legal questions. First, it must be explained that whether India has jurisdiction over crimes that are committed in its

⁴ The remaining portion of the hearing will be confidential (Public opening Statements, 2019, pp. 32-33).

Exclusive Economic Zone. Second, it must be explored that if Italy has right to recruit it's military marines on the board of commercial ship and then these military marines deserve to have functional immunity for shooting to fishing ship.

To answer these questions, this paper divided two sections: First section is dedicated to explain rules governing on the criminal jurisdiction on the Exclusive Economic Zone; Second section is devoted to scrutinize on the rules governing security of commercial ships.

2. Rules Governing on the Criminal Jurisdiction on the Exclusive Economic Zone:

Crimes committed at sea present a 'dynamic legal scenario' where international law recognizes a multitude of domestic jurisdictions existing concurrently. At all times, a ship is subject to the domestic laws of the country in which it is registered, but it can also be within the territorial jurisdiction of another country whilst transiting it's waters and in its ports, and thereby subject to that second country's laws (UNCLOS, Articles 25-27).

According to Article 92: "1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry..."

Further, where a citizen is involved in a criminal offence, either as an alleged perpetrator or as a victim, their country of citizenship is recognized under international law as also having jurisdiction to investigate and prosecute the crime. A criminal act committed on board will therefore often lead to potentially competing jurisdictional claims (Jurisdiction at sea, 2013, p. 22). As India has claimed, it has right to exercise jurisdiction



Maritime Policy, Vol. 1, Issue. 3, Autumn 2021

to this incident, because two Indian people were killed and then the Italian accused were present voluntarily in India. So this country is able to bring justice for them, because of passive nationality jurisdiction criterion that is recognized by international law.

United Nations Convention on the Law of the Sea accords countries with specific jurisdictional zones and corresponding rights in ocean space adjacent to their territory. Territorial jurisdiction operates like concentric circles, ranging from full territorial sovereignty within internal waters, to almost no sovereign rights on the high seas.

There are two categories of territorial jurisdiction that would allow coastal state to enforce its criminal laws against an alleged criminal act committed whilst at sea: Port State jurisdiction and Coastal State. Jurisdiction beyond these two categories – in the ‘contiguous zone’ and the ‘exclusive economic zone’ – is severely limited, and will be discussed briefly below.

According to article 27(5): “...the coastal State may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal water.” So, if a criminal act occurred when the ship is in internal waters (all waters landward of the TSB) having visited a port or about to visit a port, or when the ship has departed the port and is now in the territorial sea of state (12nm from the TSB), then port state can claim jurisdiction over the alleged criminal offence (UNCLOS, Articles 25- 27).

However, minor matters, such a petty theft, are often left to the Master of the Ship. More significant crimes, such as assault, manslaughter or murder, are said to engage the ‘interests’ of the port State. Consequently, the laws of the port State can and will apply as their enforcement is an exercise of sovereignty and relate to the ‘peace, good order and government’ of the State (Jurisdiction at sea, 2013, p. 26).

Under limited circumstances, a coastal State may exercise its territorial jurisdiction if the ship is not visiting a port of that State but is travelling through its territorial sea.

According to Article 27(1) on UNCLOS: “The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases: (a) if the consequences of the crime extend to the coastal State; (b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; (c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or (d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances....”

The coastal state may only exercise jurisdiction over its exclusive economic zone and continental shelf for purposes relating to economic exploitation and environmental protection. This does not extend to criminal matters. Should state wish to exercise jurisdiction over an alleged crime occurring within its contiguous zone, exclusive economic zone, continental shelf or on the high seas, it can only do so under certain circumstances. Such an exercise of jurisdiction is called extra-territorial jurisdiction. Extra-territorial jurisdiction is provided in general international law and is beyond the scope of UNCLOS (Jurisdiction at sea, 2013, p. 27).

Countries can claim extra-territorial jurisdiction, concurrent with flag state jurisdiction, over crimes committed on foreign-flagged ships that occur beyond its territory based on a number of principles: Next port jurisdiction; Jurisdiction based on the nationality of the accused or victim (Jurisdiction at sea, 2013, p. 27).



Maritime Policy, Vol. 1, Issue. 3, Autumn 2021

However, under Article 97 of UNCLOS the flag state (the country in which the ship is registered) has primary responsibility over its ship, including criminal jurisdiction, even when the ship is outside the flag state's territorial waters.

However, given that vessels are generally flagged in distant states, flag states' ability to play an active role in investigations and/or prosecutions can be extremely limited⁵ (Jurisdiction at sea, 2013, p. 30).

As noted above, in this case, the incident was occurred in EEZ of India where is limited jurisdiction for India as coastal state. Shooting and murder of two Indian fishermen in EEZ haven't been exactly included in Indian territorial jurisdiction, because they are not economic problems that are related to coastal state. So, India has claimed that Enrica Lexie entered Indian internal waters voluntarily and Italy accepted India jurisdiction over this incident, and after some years objected to India jurisdiction. In fact,

⁵ Evidence received during the inquiry indicated that in many cases, the flag state is simply a flag of convenience and does not have the interest, will or resources to deal with a crime. In such cases, other states with concurrent jurisdiction may be able to come to an agreement with the flag state to investigate and prosecute the alleged crime.

The application of Australian criminal law to matters beyond 200nm can only be applied to an act committed on an Australian ship, an act committed by or against an Australian citizen, or to instances on board a non-Australian ship not involving an Australian citizen but where the next port of call is an Australian port or an external territory of Australia. This reflects the international jurisdictional rules as explained above, particularly those under UNCLOS. Whenever a Federal, state or territory prosecutor seeks to commence criminal proceedings for an alleged criminal act on board a foreign registered ship, the Federal Attorney-General must give consent before the matter proceeds to a hearing or determination. The purpose of the Attorney-General's consent is to ensure consultation with foreign governments who hold concurrent jurisdiction, particularly the flag State. The Intergovernmental Agreement states that, while the Australian Government, the States and the Northern Territory are empowered under the cooperative scheme to investigate and prosecute crimes that fall within their relevant jurisdictions, the applicable international legal obligations must be observed. The Intergovernmental Agreement is given legal force at the federal level by the Australian Crimes at Sea Act 2000 (Cth) (the Crimes at Sea Act). (Jurisdiction at sea, 2013, p. 30)

India has admitted that it doesn't have jurisdiction over the event has occurred in India EEZ. So if it has shown that India compel Enrica Lexie to change route and enter to a port of India, we can assert that India violated above articles, and deny jurisdiction of Italy as a flag state over Italian ship when the crime committed in EE of India.

3. Rules Governing Security of Commercial Ships

It is controversial that if commercial ships can be armed to defend themselves against pirates or it is necessary warships escort them against pirates. With increasing attacks by pirates especially in some dangerous areas, answering to this question becomes more important than before. It is necessary to note that "Somali pirates operate in an area covering approximately 2.9 million square nautical miles. If you took all of the navies of all the countries in all of the world, and put them against this area, they still wouldn't be able to cover this amount of nautical space"(Independent, 2011).

Furthermore, there are some Security Council resolutions to recognize that piracy exacerbates instability in some states such as Somalia and stressed the need for a comprehensive, international response that also works to tackle the underlying causes of the phenomenon. So, Security Council adopted some resolutions under Chapter VII of the United Nations Charter such as Resolution 2442 (2018) to Authorizing 12-Month Extension for International Naval Forces Fighting Piracy off Somali Coast (Resolution 2442, 2018, para. 2). Thanks to an increase the rate of piracy especially in some areas such as Gulf of Aden, Security Council adopted some resolutions to fight against the piracy and extend jurisdiction of states in to territorial sea and even territory of Somalia. In fact, Security Council adopted 14 Resolutions and extend jurisdiction gradually. However, these resolutions are exceptional in international law, and despite of them, states do not have jurisdiction in the territorial sea of coastal states other than



Maritime Policy, Vol. 1, Issue. 3, Autumn 2021

Somalia. Security Council resolutions about piracy in Somalia are framed very cautiously and, in particular, note that they ‘shall not be considered as establishing customary law’. They are adopted on the basis of the Somali Transitional Government’s (TFG) authorization. Although such authorization seems unnecessary for resolutions adopted under Chapter VII (Treves, 2009, p. 399). So, it is concerned that ships in high sea and territorial sea are under the danger of pirates and it is necessary to escort them by warships or arm them.

First, there is no prohibition in the law of the sea against military vessels escorting merchant ships. If there is “armed attack” on the fleet as a whole or continuous attacks on essential parts of it, there would be the right to self-defense against armed attack. The ICJ’s decision in the *Oil Platforms* case suggests that attacks on commercial vessels only qualify as armed attacks if they are of such gravity that they threaten the state’s security interests. This is supported by the *Definition of Aggression* art. 3 (d) on attacks on the marine fleet of another state (Ejiltalk.org, n.d). So, there is a right to collective self-defense against pirates, because they attack every merchant ship in the dangerous areas. Seizing a pirate ship under the power granted to all states by UNCLOS implies the possibility of the use of force. This is not use of force against the enemy according to the law of armed conflict, because there is no armed conflict, international or internal. Pirates are not at war with the states whose flotillas protect merchant vessels in the waters off the coast of Somalia. It has been argued that pirates not being combatants are civilians who, under international humanitarian law, may not be specifically targeted except in immediate self-defense. Whatever opinion one holds about the applicability of the law of armed conflict, it is a fact that practice in the waters off Somalia seems to indicate that warships patrolling these waters resort to the use of weapons only in response to the use of weapons against them as a right to self-defense (Treves, 2009, p. 412).

It is supposed to alongside the right of self-defense for flag state, under international law, merchant vessels and their crews have the right to carry arms as an individual self-defense if that is required for the vessel to exercise its freedom of navigation. Self-defense measures include providing weapons and training to the crew and/or hiring armed guards to allow the vessel to navigate. The self-defense measures and their employment should be proportionate to the threat (Brian D. Starer and Douglas R. Burnett, 2008).

There is a pressing need to arm merchant ships to fight against pirates, because all navies of all of the world wouldn't able to fight against pirates and there are not enough warships in the world to defeat piracy at sea. Consequently, some countries such as USA and Italy as a flag state allow their ships to arm when they want to transit dangerous areas.

This customary international law has been codified in the United States for US vessels and crews in 33 USCS § 383 "Resistance of pirates by merchant vessels"⁶: The flag State of a vessel may promulgate requirements or restrictions on the use of weapons by merchant ships at sea. In the case of the United States, the US Coast Guard requires that US flag vessels sailing in waters infested with pirates operating out of Somalia carry guards in addition to US Coast Guard-approved vessel security plans to avoid, defend and deter pirate attacks. These measures can include the training and arming of the ship's crew and guards with lethal and/or nonlethal

⁶ "The commander and crew of any merchant vessel of the United States, owned wholly, or in part, by a citizen thereof, may oppose and defend against any aggression, search, restraint, depredation, or seizure, which shall be attempted upon such vessel, or upon any other vessel so owned, by the commander or crew of any armed vessel whatsoever, not being a public armed vessel of some nation in amity with the United States, and may subdue and capture the same; and may also retake any vessel so owned which may have been captured by the commander or crew of any such armed vessel, and send the same into any port of the United States." 33 U.S. Code § 383. Resistance of pirates by merchant vessels, <https://www.law.cornell.edu/uscode/text/33/383>



weapons and the use of guards during the time the vessel is at risk of pirate attacks. US flag vessels that do not comply with these requirements are in violation of US Coast Guard requirements. In practical terms, the vessel owner will be exposed to serious legal consequences in the event of a pirate attack if the vessel owner has not complied with flag State requirements and taken prudent steps to meaningfully implement and actively monitor and exercise the US Coast Guard's anti-pirate measures (*Ibid*).

Britain is poised to allow merchant ships formally to carry arms for the first time since the Second World War in a dramatic effort to tackle the escalating threat of international piracy. For vessels registered in other nations, the law of the flag should be consulted. But generally few (if any) flag States restrict merchant vessels and crews from exercising their right to self-defense while navigating outside of territorial waters. Ship owners that do not have an updated vessel security plan, approved by the flag State, and have not recently exercised this plan in view of today's pirate threats including reasonable measures to prevent, evade and defend against pirate attacks, may be civilly liable to crew members, passengers and cargo interests for injuries and losses caused by pirates by providing an unseaworthy ship for the known peril of piracy reported in certain waters. The standard of care in these situations is what a prudent ship owner would do in similar circumstances. Given the known danger of pirates off the coast of Somalia, it is unwise for a vessel owner to allow a ship to enter these waters without means to deter, defend itself or get timely and effective help from pirate threats. This is especially true for vessels that elect not to participate in naval convoys or use a private armed escort vessel where an escort response is available within 10 to 15 minutes between the time the crew sounds an alert that pirates are approaching and when pirates have boarded the vessel (*Ibid*).

3.1. The Right of Self Defense under International Law

The right of freely navigating the ocean, and of self-defense, of repelling force by force was common to both vessels [warship and armed merchant vessel]; but every hostile attack in a time of peace is not necessarily piratical. It may be by mistake or in necessary self-defense or to repel a supposed meditated attack by pirates. It may be justifiable, and then no blame attaches to the attack...

If pirates attempt to deprive vessels of their right to exercise the freedom of navigation, the ship owner and the crew may take reasonable steps to defend the vessel and the crew while in the exercise of freedom of navigation. These measures, as part of the vessel's legally required vessel security plan, may involve security guards and outfitting lethal and nonlethal weapons. Under international law warning shots do not constitute a use of force.

While these measures are not restricted outside of territorial seas, within territorial seas, to enjoy the right of innocent passage, the merchant vessel should not exercise or practice with weapons of any kind or undertake any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal state (*Ibid*).

2.3. Port State Requirements

Port States may restrict the use of weapons by crews of foreign flag ships while in port. The presence of weapons should be specifically provided for in the vessel security plan approved by the flag State. In these cases, it is recommended that any weapons aboard ship for self-defense be unloaded and securely stowed and locked below decks under the supervision of the master while the ship is in port or entering or leaving territorial seas during a port call. In this fashion, there is little basis for a port State to consider the vessel as constituting a threat to the peace, security, and good order of the port State. If the security situation poses a risk to the ship and its crew



Maritime Policy, Vol. 1, Issue. 3, Autumn 2021

in a given port, local security guards should be hired after liaison with the port State authorities (*Ibid*).

Article 301 of the United Nations Convention on the Law of the Sea is the core element of this analysis. This Article states: In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.

In using the common meaning of words, Article 301 could be read as: countries that ratified the United Nations Convention on the Law of the Sea should abstain to engage in possible or actual aggressive or violent actions in violation of specific states of a countries' structure of none of the countries or abstain to engage in none of all the possible ways contrary the elements of a certain category of law included in the Charter of the United Nations (Goyette, 2014, p. 8).

Concerning its heading, Article 301 titles 'Peaceful uses of the seas', its primary meaning is quite obvious. As a whole, 'Peaceful uses of the seas' means: activities taking place in the seas conducted in a non-violent and respectful manner (*Ibid*).

Moreover, paragraph (2) (a) and (b) Article 19 of UNCLOS expresses that any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations and any exercise or practice with weapons of any kind shall be considered to be prejudicial to the peace, good order or security of the coastal State. If commercial ships during territorial sea use their weapons even to fight against pirates shall be considered to be prejudicial to the innocent passage. Territorial sea has been regarded as territorial integrity of coastal sea. According to the definition of piracy in Article

101, this crime commit in high sea. So if attack by pirates occurred in territorial sea of costal state, this state has criminal jurisdiction to pirates unless some special permission such as Security Council Resolutions accord jurisdiction to other states. However, in my opinion, these provisions don't exclude inherent right of self-defense for commercial ships when pirates attack against them even in territorial sea of coastal state.

So, if a state threatens security of another state, it gives rise to international responsibility for former state towards latter state. Although Article 301 doesn't provide any precise provisions about this incident, if we interpret this article in this way, Italy has international responsibility towards India due to its marine's actions. These guards were recruited to defend *enrica lexi* against pirates. This mission is a governmental mission. So, according to 'Kelsenian theory' state officials have the right, in principle, to functional immunity from foreign jurisdiction regarding their 'official' acts, i.e., when acting in their official capacity (Mazzeschi, 2015, p. 4). However, there is a controversy about legality arming merchant ship. First of all, it is important to solve this problem, because it influences on the responsibility of Italy as a state and the liability of marines as a private person. If this act has been regarded as a legal and sovereign action, breach of the obligation to appropriate measures before shooting is a state violation and then makes state responsibility. if arming merchant ship can be regarded as an arbitrary and personal act and is not been able to attribute to state, then shooting and killing fishermen are illegal and cause individual responsibility for marines, unless these actions criminalized as an international crime that there are concurrence between state responsibility and individual criminal responsibility (Nollkaemper, 2003, p. 615) then there is no functional for Italian marines. Many other courts have continued to maintain that functional immunity does not apply to foreign officials accused of international crimes: here we may mention the



2004 Ferrini judgment of the Italian Court of Cassation (Mazzeschi, 2015, p. 29).

State immunity cannot be applied to acts that are not related to the typical exercise of governmental authority but are expressly qualified as unlawful acts because they breach fundamental rights (Mazzeschi, 2015, p. 30). As a result, if arming commercial ships is allowed in flag state and marines are recruited to do this duty, this act attributes to their state and there is functional immunity for them.

3.3 Deadly Force and Other Considerations

Ship owners must carefully evaluate the decision to arm crew members and hire armed guards. Crew members require instruction in avoiding and deterring pirate attacks and must receive training in the safe use of small arms, including the use of deadly force.

On the same note, the use of armed guards requires careful evaluation of the company providing these services. Armed guards with no experience in working with merchant vessels and crew members in security situations may not be the best choice. Rather, a company with a track record that combines not only military but merchant marine experience is likely a better choice.

Use of small arms by crew members or armed guards necessarily raises the issue of deadly force. Deadly force is force that the person employing it knows or should know creates a substantial risk of causing death or serious bodily harm. Deadly force may only be employed when lesser means have failed or are not reasonably available, and a person reasonably believes that a person poses an imminent threat of death and serious bodily harm to crewmembers on the vessel. Deadly force should be employed only after lesser means of stopping or dissuading the hostile person (such as warning shots) have been exhausted. Personnel must be aware that the use of deadly

force will be subject to scrutiny and can subject them to prosecution or potential civil liability particularly in the territorial seas of another country.

Part of any security plan should include an evaluation of the vessel security plan in light of flag and relevant port State requirements and international law (Brian D. Starer and Douglas R. Burnett, *op. cit.*).

Consequently, there are concerns about arming merchant ships among international organizations especially IMO. This organization during several guidelines warned to this solution, because it is believed that these arms cannot deter attacks behalf pirates.

The ship security plan or emergency response procedures should be prepared based on the risk assessment, detailing predetermined responses to address increases and decreases in threat levels. The measures should, inter alia, cover:

1. The need for enhanced surveillance and the use of lighting, surveillance and detection equipment;
2. Controlling of access to the ship and the restricted areas on the ships by ships' personnel, passengers, visitors, etc.
3. prevention of unauthorized intrusion by active and passive devices and measures, such as netting, wire, electric fencing, long-range acoustic devices, as well as the use, when appropriate, of security personnel on vessels transiting high-risk areas, and taking other measures to make it more difficult for pirates to board vessels. The safety of onboard personnel should always be taken into account when installing passive devices on board and awareness information should be provided;

Companies owning or operating ships that frequently visit areas where attacks occur should consider the purchase and use of more sophisticated visual and electronic devices in order to augment both radar and visual watch capability against attackers' craft at night, thereby improving the



Maritime Policy, Vol. 1, Issue. 3, Autumn 2021

prospects of obtaining an early warning of a possible attack. In particular, the provision of night vision devices, small radars to cover the blind stern arcs, closed circuit television and physical devices, such as barbed wire, may be considered. In certain circumstances non-lethal weapons such as acoustic devices, may also be appropriate. Infrared detection and alerting equipment may also be utilized.

According to this guideline, the carrying and use of firearms by seafarers for personal protection or for the protection of a ship is strongly discouraged. Seafarers are civilians and the use of firearms requires special training and aptitudes and the risk of accidents with firearms carried on board ship is great. Carriage of arms on board ship may encourage attackers to carry firearms or even more dangerous weapons, thereby escalating an already dangerous situation. Any firearm on board may 'self-become an attractive target for an attacker (PIRACY AND ARMED ROBBERY AGAINST SHIPS, 2009).

According to this guideline carrying and use of any firearms on commercial ships are forbidden, on the other hand some countries allow to carry lethal weapons and recruit security guards and maritime personnel on commercial ships.

Over a number of years, the position of the IMO's Maritime Safety Committee (MSC) on this issue has evolved from:

1. "The carrying and use of firearms for personal protection or protection of a ship is strongly discouraged" (MSC/Circ.623, annex paragraph 40 (June 18, 1993)); to
2. "Flag States should strongly discourage the carrying and use of firearms by seafarers for personal protection or for the protection of a ship" (MSC.1/Circ.1333, annex, paragraph 5 (June 26, 2009) – Updated and revoked by MSC.1-Circ.1333-Rev.1 in June 2015), to

3. The current position of tacitly acknowledging that the deployment of armed security personnel on board ships has become an accepted industry and flag state practice in certain circumstances.

In May 2011, the MSC reaffirmed its position that it neither endorses nor condemns the use of armed personnel on board merchant ships and accepted that the carriage of armed personnel was an individual decision subject to the law of flag States. It was accepted that some ship owners use armed personnel on board ships, hence the need for the IMO to develop appropriate guidance, bearing in mind the need for extreme caution in matters relating to liability, jurisdiction, sovereignty, ships in transit and rights of innocent passage, among other issues.

While the Organization acknowledges that armed security personnel on board ships has become an accepted industry, their use should not be considered as an alternative to other protective measures, such as the Best Management Practices for Protection against Somalia based Piracy (BMP4), which was disseminated by IMO through MSC.1/Circ.1339, in September 2011(IMO,2011).

Conclusion

This paper via descriptive-analytical method, with explore existing documents, conventions and practice of states concludes that although, there is a gap in conventions about legality of arming of merchant ships, it seems that there is a customary rule that merchant vessels in dangerous areas can have weapons and security guards, especially in high sea and EEZ. According to this rule, some countries allow and sometimes force their flag states to have weapons and security guards. It is supposed to be better that merchant ships employ educated marines especially state navy marines. So it seems that shooting and killing other people during transiting by marines can attribute to flag state according to article 5 of



draft on state responsibility.⁷ Shooting and killing other people during transiting by marines is a violation of international obligations, if these marines don't obey necessary instruction to use of firearms accordance with above guidelines. So, these Italian officials have functional immunity and India would not able to arrest them for actions that had done behalf of their state.

Despite of this, this incident occurred in EEZ that is the same as high sea in the rules of distribution of jurisdictions between states. In fact, flag state has primary jurisdiction over every crime and violation that committed by flag ships in the EEZ as well as the high sea, other than those are related to economic affairs and environmental problems. So Italy as a flag state has a primary jurisdiction over this incident unless Italy admitted India jurisdiction and withdrew its marines Immunity.

References:

- Brian D. Starer and Douglas R. Burnett, 2008, Protecting crews and ships from piracy by arming merchant vessels for self defenses, <https://www.lexology.com/library/detail.aspx?g=c834dd3d-bb76-4064-8cc4-1e12046001d5>
- Goyette, Sarah, (2014), Faculty of Law Threat or Use of Force at Sea Assessing the Adequacy of the Convention on the Law of the Sea —Master thesis in Law of the Sea, August, UIT, <https://munin.uit.no/bitstream/handle/10037/7156/thesis.pdf?sequence=1&isAllowed=y>

⁷ “The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.”

- Jurisdiction at sea: international law and domestic law, INQUIRY INTO THE ARRANGEMENTS SURROUNDING CRIMES COMMITTED AT SEA, Troubled Waters Inquiry into the arrangements surrounding crimes committed at sea House of Representatives Standing Committee on Social Policy and Legal Affairs, 2013.
- IMO approves further interim guidance on privately contracted armed security personnel,<http://www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Pages/Private-Armed-Security.aspx>
- Mazzeschi, Riccardo Pisillo, (2015), “The functional immunity of State officials from foreign jurisdiction: A critique of the traditional theories”, QIL 17, pp. 3-31.
- Nollkaemper, André, (2003) Concurrence between Individual Responsibility and State Responsibility in International Law, The International and Comparative Law Quarterly, Vol. 52, No. 3 , pp. 615-640.
- Permanent Court of Arbitration, The Enrica Lexie Incident (Italy v. India)". 26 June 2015. Retrieved 18 November 2018.
- PIRACY AND ARMED ROBBERY AGAINST SHIPS, Guidance to ship owners and ship operators, shipmasters and crews on preventing and suppressing acts of piracy and armed robbery against ships, MSC.1/Circ.1334 23 June 2009, INTERNATIONAL MARITIME ORGANIZATION.



Maritime Policy, Vol. 1, Issue. 3, Autumn 2021

- PUBLIC OPENING STATEMENTS, (2019), In the matter of an arbitration before an Arbitral Tribunal constituted under Annex VII of the 1982 United Nations Convention on the Law of the Sea, PCA Case No. 2015-28, Permanent Court of Arbitration Peace Palace The Hague The Netherlands.
- Resolution 2442, 2018, S/RES/2442 (2018)
- Special report: MPs to consider allowing commercial vessels to carry weapons, as attacks off the Horn of Africa increase. Kunal Dutta, Jonathan Owen and Brian Brady report, Sunday 19 June 2011 00:00, Merchant ships could be armed to tackle pirate threat, <https://www.independent.co.uk/news/uk/home-news/merchant-ships-could-be-armed-to-tackle-pirate-threat-2299753.html>
- Treves, Tullio, (2009) “Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia”, The European Journal of International Law Vol. 20, No. 2, pp. 399 – 414.
- United Nations Convention on the Law of the Sea, 1982
- 33U.S. Code §383. Resistance of pirates by merchant vessels, <https://www.law.cornell.edu/uscode/text/33/383>
- <https://www.ejiltalk.org/how-international-law-restricts-the-use-of-military-force-in-hormuz/>
- <https://pca-cpa.org/en/cases/117/>