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PIRACY AND MARITIME ISSUES: THE ENRICA LEXIE

CASE

(By Rayman Kaur & Donna Xavier)

INTRODUCTION

The act of piracy is considered as the “enemy of all mankind” under the admiralty law. In the international customary law, it is considered to the “peril of the sea”. The prohibition and suppression of piracy is a major concern to be dealt in the International Law. The pirates, before adopting Public International Law were being prosecuted by any State by using the Doctrine of Universal Jurisdiction¹.

The provisions with regard to the United Nations Convention on Law of Sea (UNCLOS) are in consonance with the provisions of Maritimes Zones Act, 1976. It is pertinent to note that the UNCLOS has limited the territorial extent to 12 nautical miles from the baseline of a State², the extent of 24 nautical miles from baselines is considered as the Contiguous Zone³ and 200 nautical miles from the baseline is the breadth of Exclusive Economic Zone (EEZ) from where the breadth with regard to the territorial sea has to be measured.⁴

The Kerala Coast of India has been declared to be highly prone to pirate attacks and have come into the ambit of ‘High Risk Area’ in 2012. In order to curtail this pirate attacks, use of force has become a necessity and this mechanism of using force to suppress this evil under the International law has caused for this legal dispute between India and Italy.

RELEVANT FACTS

This event took place on 15th February, 2012 when an Italian flagged vessel, MV Enrica Lexie’ was heading towards Djibouti along with six armed personnel on board and was encountered with an Indian fishing boat named St. Antony. The armed guards sailing in the Enrica Lexie were responsible for protecting the vessel from any piracy attacks. The ship was close to the Contiguous Zone of Indian border when they had reported the piracy attack.

The Italian marines mistook the Indian fishing boat to be a pirate vessel and shot dead two fishermen within a distance of 20.5 nautical miles of India’s Contiguous zone off the Kerala

¹ Eugene Kontorovich, A Guantanamo on the Sea: The Difficulty of Prosecuting Pirates and Terrorists, 98 Cal. L. Rev. 243 (2010).

² Section 2, Article 3, Part II, UNCLOS.

³ Section 4, Article 33, Part II, UNCLOS.

⁴ Article 57, Part V, UNCLOS.

Coast. The two Indian fishermen, Ajeesh Pink and Valentine Jelastine were allegedly killed by Salvatore Girone and Massimiliano Latorre of the Italian Military Department. The Maritime Rescue Co-ordination Centre, Mumbai received a telephonic message as well as email asking the Italian vessel to return to the Kochi Port in order to assist them with the enquiry relating to the incident. When Enrica Lexie received the message, it had proceeded about 38 nautical miles towards Djibouti but it altered its course and came to the Kochi Port in response to the message on 16th February, 2012. Later, on 19th February 2012 the two marines were arrested under the charge of murder under the Indian Penal Code.

During the opening trial phases which took place in the Indian courts, Italy made a settlement deal of paying a compensation of Rs. 1 crore to the bereaved family of each deceased fishermen and it was assented & endorsed by the seal of Kerala High Court.⁵ But later, this order was quashed by the Indian Supreme Court as it stated that the case must be tried in the national court and the Kerala HC had no jurisdiction to hear this case.⁶

It was decided in January 2014 that the Italian Marines will be prosecuted based upon the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA), passed in 1988 with the object of reducing international terrorism. India received huge criticism from Italy as equating this incident with international terrorism was unjustifiable. This also gained critique from European Union as the only punishment if convicted under SUA is death penalty and warned India of further sanctions. These charges were then downgraded to violence from murder, thus weakening the stance of India in the International Tribunal for Law of Sea (ITLOS), thereafter.

ITALY'S CONTENTIONS

Italy claimed that the marines shall be given sovereign immunity as they were guarding an Italian vessel and were working under the direct instructions of Italy. This contention was rejected by the Indian Supreme court due to the absence of any agreement with regard to such immunities between India and Italy.

⁵ Timeline: The Italian Marines Case, HINDU (Mar. 22, 2013), <http://www.thehindu.com/news/resources/timeline-the-italian-marines-case/article4538162.ece> [hereinafter Timeline].

⁶ Republic of Italy v. Union of India, Writ Petition (Civil) No. 135 of 2012, and Special Leave Petition (Civil) No. 20370 of 2012, at § 84 (2013) (Supreme Court of India), available at <http://ilcurry.files.wordpress.com/2013/03/imgs-1.pdf>.

Further the Italian counsel relied upon Article 97 under the United Nations Convention on Law of Seas that provides for “Penal jurisdiction in matters of collision or any other incident of navigation”⁷. The counsel also relied upon the Maritime Zones Act, 1976 which recognises the significance of Flag State Jurisdiction and Article 92 of UNCLOS which provides for exclusive jurisdiction of the flag state while on high seas⁸.

The Marine Zone Act, 1976 further provides for the right to innocent passage to all foreign ships (exclusive of warships and inclusive of submarines as well as other underwater vehicles) in the territorial waters⁹. While highlighting this provision, Italy contended that as the incident took place at 20.5NM off the Indian coast, therefore it falls outside the territorial jurisdiction of India.

INDIA’S CONTENTIONS

India claimed its jurisdiction over the incident basing its argument on the domestic legislation which confers jurisdiction upon the Indian courts to try any person (including a foreigner) with respect to an offence committed on board a ship which is registered in India¹⁰.

It was also stated by the Indian coast guard that although immediate reporting of any pirate activity or even suspicion of such event to the Maritime Rescue Coordination Centre (MRCC) is an accepted procedure (i.e. followed by all), the MV Enrica Lexie without reporting the incident kept sailing for 70Km continuously towards its route to Egypt. The Indian Coast guard itself contacted the ship after two and a half hour of the incident and upon which they reported the shooting incident and were thereby asked to reach the Kochi port for inquiry with regard to the incident.

DECISION OF THE SUPREME COURT

The Indian Supreme Court ruled out that India had jurisdiction by relying heavily upon the principle laid down in the S.S.Lotus case (France v. Turkey)¹¹. In this aforementioned case, the question with regard to a State’s extent of criminal jurisdiction was brought in 1927 to the Permanent Court of Justice. In this case, the French Steamship, Lotus collided with the Turkish Steamship, Boz-Kourt which resulted in the sinking of Turkish ship and caused death

⁷ Article 97 of the United Nations Convention on Law of Seas (UNCLOS).

⁸ Article 92 of the United Nations Convention on Law of Seas (UNCLOS).

⁹ Section 4 (1) of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976.

¹⁰ Section 3 and 4 of Indian Penal Code, 1860 and Section 188 of Code of Criminal Procedure, 1973.

¹¹ S.S. Lotus (France v. Turkey), PCIJ (1927)

of eight Turkish men. The Turkish government initiated the criminal proceedings when *Lotus* arrived at Constantinople and arrested Turkish vessel captain Hassan Bey and the officer Watch, the *Lotus*. The arrest was protested by the French government who contended that the Turkish government had no jurisdiction to try a foreigner, on board a foreign vessel which furthermore gave exclusive jurisdiction to the French government as the vessel was bearing the state's (France) flag. The Permanent Court of International Justice (PCIJ) held in this matter that the Turkish court has not acted contrarily to the International Law as the offence committed on the *lotus* had irrevocable effects on Bon-Kourt bearing the Turkish flag.¹²

The Supreme Court further asserted that it had complete jurisdiction to try the matter as the incident took place in the Contiguous zone of India and therefore under the provisions of UNCLOS and Maritime Zones Act, 1970, it can be treated as an offence committed within the Indian Territory. The Supreme Court reiterated that the Kerala High Court lacked jurisdiction but only the Union has the authority to this case via a special court. The special court was required to setup in order to try the case in accordance with the Code of Criminal Procedure, 1973, UNCLOS, 1982, Indian Penal Code, 1870 and the Maritime Zones, 1976 unless their arise a dispute between the UNCLOS and domestic law provisions. However, the SC ruled that the petitioner by adducing further evidence in-front of the special court can raise the question of jurisdiction.

DIPLOMATIC FALLOUT BETWEEN INDIA & ITALY:

The incident sparked a diplomatic fallout between India & Italy. The Indian foreign ministry had summoned the Italian ambassador following which India expressed its disappointment & lodged an official protest¹³. In May 2012, post filing of murder charges against the marines by NIA, Italy recalled its ambassador from India. In December 2012, the Indian ambassador was summoned to the Italian foreign ministry, whereby Italy expressed its “strong disappointment & profound bitterness” over the decision of Indian SC with regard to the question of jurisdiction.¹⁴ Additionally, Italian foreign minister Giulio Terzi & Deputy foreign minister Staffan De Mistura stated that legal and political measures would be taken at global level.

¹² 8 Republic of Italy v. Union of India (2013) 4 SCC 721.

¹³ Italy warns India of European response to marines trial, BBC News (10 February 2014), <https://www.bbc.com/news/world-europe-26118155>.

¹⁴ Marines: Indian Ambassador Saha summoned by MFA S-G Ambassador Valensise, Ministero degli Affari Esteri e della Cooperazione Internazionale (13 Dec 2012), https://www.esteri.it/mae/en/sala_stampa/archivionotizie/comunicati/2012/12/20121213_ambasciatoreindia.htm

In March 2013, dispute arose when Italy went back on its promise to send the marines to India for trial. However, the Italian PM revised his decision & the marines were sent back to India.

INTERNATIONAL ARBITRATION:

In June 2015, Italy initiated proceedings against India before an arbitral tribunal under UNCLOS¹⁵ of which a written notice was forwarded to India. On July 2015, Italy presented a report before the ITLOS seeking provisional measures; it also asked the tribunal to instruct India not to take any action against the marines & to permit the marines to stay in Italy till the tribunal's proceedings were in progress¹⁶. The statement made by Italy before ITLOS states, "India shall refrain from taking or enforcing any judicial or administrative measures against Sergeant Massimiliano Latorre and Sergeant Salvatore Girone in connection with the Enrica Lexie Incident, and from exercising any other form of jurisdiction over the Enrica Lexie Incident [and that] India shall take all measures necessary to ensure that restrictions on the liberty, security and movement of the Marines be immediately lifted to enable Sergeant Girone to travel to and remain in Italy and Sergeant Latorre to remain in Italy throughout the duration of the proceedings before the Annex VII Tribunal."¹⁷

In August 2015, the tribunal by a majority opinion of 15:6 set forth provisional measures & held that "Italy and India shall both suspend all court proceedings and refrain from initiating new ones which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal or might jeopardise or prejudice the carrying out of any decision which the arbitral tribunal may render."

The ruling by the tribunal also necessitated India & Italy to submit their respective initial report of the incident by September 24, 2015. Further, the tribunal also declined Italy's request for provisional release of the marines as it believed that it would impact the issues pertaining to the merits of the case. The decision taken by the ITLOS implied that neither party got what they wanted in its entirety.

Recently, on July 2, 2020 the Permanent Court of Arbitration gave the following decision:

¹⁵ Annexure VII of the UNCLOS

¹⁶ Vijaita Singh, *Italy moves ITLOS in marines case*, The Hindu Newspaper (26 July 2015 and 03:12).

¹⁷ ITLOS Press, *ITLOS Press Release about Italian requests*, International Tribunal for the Law of Sea, (22 July 2015), https://www.itlos.org/fileadmin/itlos/documents/press_releases_english/PR_232_EN.pdf.

- That the marines were eligible for immunity with regard to the acts that they had committed leading to the incident, thereby restraining India from applying its jurisdiction over the marines.
- That India must take measures to end its application of criminal jurisdiction on the marines.
- That India has to pay compensation for the loss of life, physical harm, material damage to property, including St. Antony & moral harm endured by the captain & the crew members.¹⁸

CONCLUSION:

VPD (Vessel Protection Detachment) are essentially units assigned on civilian ships for the purpose of safeguarding the vessel from any kind of possible attacks and in the present case, the marines had also been employed on the vessel, MV Enrica Lexie for the very same purpose. Further, with regard to the responsibilities of the VDP, it has been stated that they could force for self-defense. In the present case, the Indian vessel, St. Antony was in international waters without displaying any flag and that too in an area described as having 'high risk' of pirate attacks. Under such situation, the action taken by the marines can be held as justified.

*Additionally, it may be noted that International law accords recognition to exclusive right of the flag state, and citing the decision meted out by Permanent Court of International Justice (PCIJ) in *S.S. Lotus*, ships are also treated as floating territories¹⁹. This implies that flag state's law can be exercised on that vessel, hence in the current case, the laws of the State of Italy are applicable on MV Enrica Lexie which means if they have to be prosecuted, it can be done only under the Italian jurisdiction.*

¹⁸ *The Enrica Lexie Incident (Italy v. India)*, Permanent Court of Arbitration, <https://pca-cpa.org/en/cases/117/>.

¹⁹ *S.S. Lotus (France v. Turkey)*, PCIJ (1927)