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Enrica Lexie's Incident

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ABSTRACT

Enrica Lexie case has quite achieved the super star status in the international legal community. This case is an international dispute between the Republic of India and Italy which has paved way to various political and diplomatic debates in the international legal community. The case has led to complications in the diplomatic camaraderie between India and Italy.

In the following article, the writer seeks to analyze in-depth the case of Enrica Lexie and the important developments and discussions that arose in the legal arena owing to the Enrica Lexie dispute. The writer also seeks to throw light on the controversies arising from the Enrica Lexie incident and some problematic aspects of the interpretation of the United Nations conventions for the law of the sea. The writer shall also be discussing the facts and the progressive development of the case from the Kerala high court to the Supreme court of India and eventually to the ITLOS. In this article, the writer seeks to denote a section to the changes warranted in maritime law in India owing to the Enrica Lexie case.

I. INTRODUCTION

The incident arouses way back on 15th February 2012 off the coast of the Indian state of Kerala when the Italian flagged commercial oil tanker allegedly killed two Indian fishermen onboard the fishing vessel "St. Anthony". The dispute has led to the revelation of several deformities in interpreting international law. The main issue revolving around the dispute was the jurisdiction of both the states in handling the dispute.

The legal proceedings of the dispute began first in the criminal sessions court of a small district in Kerala and made its way to the International Tribunal for the law of the sea and are currently being dealt by the Permanent court of arbitration a tribunal agreed upon by both the parties. Other than the legal world one can see that the political world also deserved a heavy blow owing to the dispute, Enrica Lexie incident seemed to be the culprit for the seemingly deteriorating diplomatic relations between India and Italy.

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II. FACTS OF THE CASE

The M/V Enrica Lexie was an Italian privately owned oil tanker. On 6th February 2012 in accordance with the Government decree, a VPD Consisting of 6 marines from the Italian Navy was deployed onboard the Enrica Lexie at a port in Sri Lanka. This measure was taken in order to ensure the protection of the vessel against piracy during its voyage from Sri Lanka to Djibouti which required the vessel to pass through an IMO designated high risk area

On 15th February 2012, the Enrica Lexie was transiting approximately 20.5 nautical miles off the coast of Kerala, en route to Djibouti.

At the same time, an Indian fishing boat, the St. Antony was engaged in fishing activity in India's Exclusive Economic Zone (EEZ), at a distance of about 20.5 nautical miles off the Indian coast at Kollam, Kerala.

Herein one can find a **factual difference in the claims of Italy and India**

India claims that despite there being no provocation from their end, they faced a volley of bullets from 2 uninformed people (Accused Sergeant Salvatore Girone & Accused Sergeant Massimiliano Latorre) onboard an oil tanker ship Enrica Lexie was about 200 meters from the boat

This resulted in the fatality of 2 fishermen on St. Antony & also endangered the lives of 9 (nine) other fishermen.

Victim-1 Valentine Jelastine who was at the helm of the boat received a bullet to his head.

Victim-2 Ajesh Pink received a bullet hit on his chest. Both died on the spot. It also resulted in severe damage to the vessel.²

Italy claims that as they were transiting off 20.5 nautical miles of the coast of Kerala, they detected an unidentified craft on radar approximately 2.8 nautical miles away from them and was observed to be heading rapidly towards Enrica Lexie

As the craft grew closer, the chief master Sergeant Massimiliano Latorre and

Sergeant Salvatore Girone, the Italian marines from the VPD assessed that it was a pirate attack. Italy claims that despite the sustained visual and auditory warning from Enrica Lexie, the craft continued to head towards it. The 2 members of the VPD also fired warning shots in the water. All the crew members were ordered to take refuge inside the ship's bunker

² Italy's Notification, PERMANENT COURT OF ARBITRATION, (Apr 29, 2021, 08:45 PM) [http://www.pccases.com/pcadocs/Notification/Italys%20Notification%20\(Redacted\).pdf](http://www.pccases.com/pcadocs/Notification/Italys%20Notification%20(Redacted).pdf)

Eventually, after apparent attempts to approach the *Enrica Lexie*, the craft turned away and headed towards the open sea. During the incident, *Enrica Lexie* sent out a “*Ship security alarm system message*” which describes the “*Nature of distress*” as “*piracy claimed attack*” which was timed at 11:23 UTC.³

The local coastal police station in Kerala received information about the incident. They then alerted the Indian coast guard and the Marine Rescue coordination center (MRCC) which led to the identification of *Enrica Lexie* as the vessel involved in the incident. MRCC then contacted *Enrica Lexie* instructed it to sail back to Kochi.

Italy states that India used trickery to get *Enrica Lexie* to the Kochi port as it was not informed of being held as a suspected vessel.

However, India claims that they were still in the stage of the investigation so they could not have definitively claimed *Enrica Lexie* to be the only suspected vessel.

Italy also claims that Indians used coercion to alter the course of *Enrica Lexie* to Kochi port by sending out a coast guard and 2 vessels.

India claims to be well within its right to dispatch reconnaissance and armed vessels when investigating the matter as *Enrica Lexie* had violated the provision of UNCLOS⁴ by using weapons in the EEZ of India.

On 19th February 2012, the Indian authorities arrested Sergeant Latorre and Sergeant Salvatore Girone and took them into custody after investigation and established Sergeant Latorre and Sergeant Salvatore Girone were responsible for killing the Indian fishermen and for damaging St. Antony.

Italy has challenged India's jurisdiction on the same.

III. INDIAN LEGAL PROCEEDINGS

- **The High court of Kerala;** On 22nd February 2012, Italy filed a petition to the High court of Kerala⁵ for quashing the FIR, in which they challenged jurisdiction and asserted immunity. Italy claimed exclusive jurisdiction over

Enrica Lexie and started the criminal process before Tribunal of Rome⁶

However, Kerala High court dismissed this petition by stating that jurisdiction of the state of

³ *Id.*

⁴ *United Nations Convention on the Law of the Sea*, UNITED NATIONS, (Apr 29, 2021, 08:45 PM) https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf

⁵ Massimiliana Latorre and other v/s Union of Indian writ petition No.4542 of 2012.

⁶ Tribunal of Rome criminal proceeding No.9463 /2012

Kerala and Indian Penal code extended up to 200 nautical miles and applied to Italian marines.

- **Supreme Court of India:** On 19th April 2012, Italy and the 2 marines filed a writ petition in the Supreme court⁷ stating that any action by India about Erica Lexie's incident was not following the principle of sovereign immunity under international law.

As seen above, Kerala High Court dismissed the petition, and therefore, Italy and the 2(two) Italian marines filed a special leave petition in High court challenging the Kerala High court's dismissal of a writ petition.

The writ petition and the special leave petition were heard together and on 18th January 2013, Supreme court gave the Judgment stating that although Kerala High court lacked the jurisdiction to deal with the case, the Union of India possessed the Jurisdiction to investigate the incident acting the Indian law⁸

Supreme court ordered to set up a special court to try this case . On 1st April 2013 the INDIAN NATIONAL INVESTIGATION AGENCY (NIA), was entrusted with the prosecution of the case.

Italy once again challenged the decision of SC to entrust the investigation to NIA but the same was declined by the court. NIA expeditiously proceeded with the investigation through the collection of evidence and witness examination.

On 27 Nov 2013, NIA completed the investigation and invoked the SUA Act and qualified the incident as an act of marine terrorism. They moved for transfer of legal custody of marines to a special court. This was challenged by the marines by filing an application in the Supreme court on 13th January 2014⁹.

However, the act of charging the Italian marines for marine terrorism seemed to create a lot of diplomatic tensions. Indian Government decided to downgrade the charge to murder, attempt to 24th February 2014. Italy again challenged the validity of the investigation.

On 8th September 2014, Sergeant Latorre filed an application before the Supreme court seeking permission to leave for Italy for rehabilitation and further medication citing brain Ischemia Supreme court granted it on humanitarian grounds.

⁷ Writ petition NO.135 of 2012

⁸ Republic of Italy and others v/s Union of Indian and Others

⁹ *The Enrica Lexie Incident*, JUS MUNDI, (Apr 29, 2021, 08:45 PM), https://jusmundi.com/en/document/decision/en-the-enrica-lexie-incident-italy-v-india-order-friday-29th-april-2016#decision_2262

IV. INTERNATIONAL LEGAL PROCEEDINGS

The international legal proceeding was instituted on 26th June 2015

The Italian republic served on the republic of India a notification under Article 287 and Annex VII, Article I of UNCLOS and statement of claim and grounds on which it is based. Italy and India are both parties to UNCLOS having ratified the convention on 13th January 1995 and 29 June 1995 respectively, thereby both these parties are bound to UNCLOS. Part XV of UNCLOS establishes a regime for settlement of disputes under Article 279¹⁰ which requires state parties to seek a solution by peaceful means following UN charter Article 283(1) ¹¹further requires that when a dispute arises between state parties, they should proceed to an exchange of views regarding a settlement by negotiation and other peaceful means

Italy claims to have actively sought and proposed a diplomatic solution to the case and claims that despite its best effort the dispute remains unsolved Italy claims to believe that there is no scope for further substantive discussions proceeded to seek the relief under Article 286

Article 286 of UNCLOS¹² provides that “any dispute concerning the interpretation or application of this convention shall where no settlement has been reached by recourse to Section 1 be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section”

Thereby, Italy in conformity with Article 286 submitted this dispute with India to an arbitral tribunal constituted following Annex VII which has jurisdiction over the dispute following Article 288(1) the convention of the law of the sea.

- **INTERNATIONAL TRIBUNAL TO THE LAW OF THE SEA-ITLOS**

On 21 July 2015, pending the constitution of the Arbitral Tribunal, Italy filed with the International Tribunal for the Law of the sea a request for the prescription of provisional measures under Article 290¹³, paragraph 5, of the convention “*Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea or, concerning activities in the Area, the Seabed Disputes Chamber, may prescribe, modify or revoke provisional measures*

¹⁰ *United Nations Convention on the Law of the Sea of 10 December 1982*, UNITED NATIONS, (Apr 29, 2021, 08:45 PM), https://www.un.org/Depts/los/convention_agreements/texts/unclos/UNCLOS-TOC.htm

¹¹ *id*

¹² *id*

¹³ *id*

following this article if it considers that prima facie the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4”

In its final submission, Italy requested the prescription of the following provisional measures (the same was requested in the notification)

a) India shall refrain from making or enforcing any judicial or administrative measure against Sergeant Massimiliano Latorre and Sergeant Salvatore Girone in connection with the Enrica Lexie Incident, and from exercising any other form of jurisdiction over that Incident; and

b) 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 he the duration of the proceedings before the Annex VII Tribunal.

On 6th August 2015, India filed written observation on Italy’s ITLOS request in its final submissions before ITLOS, India stated that the following conditions have to be fulfilled to request for provisional measures pending the constitution of an Annex VII Tribunal.

The following conditions have been listed with great clarity by ITLOS in the MOX plant case¹⁴

- There must be a risk of irreparable prejudice to the rights of either party
- Such a risk must be imminent
- The urgency must be such that the provisional measures are required pending the constitution of the Tribunals

India stated that the above conditions have not been satiated the following submission were presented by India to prove so:

- 1) Firstly, it can be observed that neither of Italy’s submission fulfills the **aggravated urgency** basic condition for the prescription of provisional measures

Second, given that Italy’s request is made under Article 290(5), it will fall to the Annex VII Arbitral Tribunal, once constituted, to consider whether provisional measures are justified or whether any provisional measures previously ordered by this Tribunal should be modified, revoked or affirmed. The notion of urgency must also be seen in this context. In other words, the Tribunal is not called upon to prescribe provisional measures that will remain in place until the

¹⁴MOX plant case Ireland V/s United kingdom

substance of the dispute is finally decided by the Annex VII arbitral tribunal; only until the Annex VII Tribunal is in a position to address the matter if requested to do so.

India also claims that Italy has now and then acted in a manner to cause several deferments to the proceedings being carried out by Supreme court in India and India also states that other than this the ongoing dispute has been in force for over 3yrs and nothing that has recently taken place concerning the legal situation in India and the proceedings there even remotely adds any urgency to the matter.

2) Secondly, India states that the very purpose of provisional measures is to preserve the respective rights of the parties. India states that both the provisional measures requested by Italy would prejudice the decision of Annex VII or preclude its implementation. India finally requested ITLOS to reject the submissions made by the Republic of Italy in its request for the prescription of provisional measures and to refuse prescription of any provisional manners in this case. On 10th and 11th August 2015, a hearing on provisional measures was held at ITLOS in Germany.

On 24th August 2015, ITLOS issued an order to both the parties to suspend all court proceedings and refrain from starting any new proceedings that shall in any way aggravate the dispute submitted to the arbitral tribunal or might jeopardize the carrying out of any decision which the arbitral tribunal may render.

ITLOS' prescribed provisional measure reads as follows: "Italy and India shall both suspend all court proceedings and shall refrain from initiating new ones which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal or might jeopardize or prejudice the carrying out of any decision which the arbitral tribunal may render.

- **PERMANENT COURT OF ARBITRATION**

According to Italy's request dated 8 September 2015, having consulted the Parties during a meeting in Hamburg, on 30 September 2015, the President of ITLOS appointed H.E. Judge Jin-Hyun Paik and H.E. Judge Patrick Robinson as arbitrators, and H.E. Judge Vladimir Golitsyn as an arbitrator and President of the Arbitral Tribunal according to Annex VII, Article 3, subparagraphs (d) and (e), to the Convention. By letter dated 9 October 2015, the President of the Arbitral Tribunal informed the Secretary-General of the Permanent Court of Arbitration that the Parties had agreed to request the PCA to act as registry in the present arbitration. By letter of 12 October 2015, the Secretary-General of the PCA confirmed that

the PCA was prepared to act in this capacity¹⁵.

V. ISSUE IN QUESTION

The main issue surrounding the *Enrica Lexie* has been the issue of jurisdiction as to **whether India had jurisdiction to try the case or whether Italy had jurisdiction to try the case**. Next pertinent issue has been **whether the marines were protected under sovereign functional immunity?**

- **Claim for Jurisdiction**

The foundational question, in this case, has been the claim for jurisdiction by both the parties. As already observed above, the incident occurred in the EEZ of India and thereby was beyond the territorial waters of India. However, India instituted the proceedings in *Enrica Lexie* dispute under Sec 3 and 4 of the Indian Penal Code which authorizes the court to try a person in respect of an offense committed on board a ship that is registered in India.

Italy contended that both Italy and India are signatories to the UNCLOS and thereby must abide by UNCLOS. Article 97¹⁶ of UNCLOS provides for penal jurisdiction in matters of the collision of UNCLOS therefore Italy content that as per above India had to recognize the primacy of flag jurisdiction. Italy also states that as the incident occurred beyond territorial waters so India has no jurisdiction.

However, the Supreme court heavily relied on the *S.S. Lotus* case¹⁷ to claim that India has jurisdiction. The said case related to a collision between the French Steamship „*Lotus*’ and the Turkish Steamship „*Boz-Kourt*’, which resulted in the sinking of the latter and the death of eight Turkish subjects. Once the *Lotus* arrived at Constantinople, the Turkish Government commenced criminal proceedings against the Captain of the Turkish vessel and the French Officer of the Watch, onboard the *Lotus*. The French Government questioned the judgment on the ground that Turkey had no jurisdiction over an act committed in the open seas by a foreigner, onboard a foreign vessel, whose flag gave it exclusive jurisdiction in the matter. On being referred to the Permanent Court of International Justice, it was decided that Turkey had not acted in a manner that was contrary to International Law since the act committed on board the *Lotus* had an effect on the *Boz-Kourt* flying the Turkish flag.

The Court also ruled that since the incident took place within the Contiguous Zone, over

¹⁵ *The Enrica Lexie Incident*, JUS MUNDI, (Apr 29, 2021, 08:45 PM), https://jusmundi.com/en/document/decision/en-the-enrica-lexie-incident-italy-v-india-order-friday-29th-april-2016#decision_2262

¹⁶ *United Nations Convention on the Law of the Sea*, UNITED NATIONS, (Apr 29, 2021, 08:45 PM) https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf

¹⁷ *S.S.Lotus (France v/s Turkey)* (PCIJ) 1927 NO.10

which, under the provisions of the Maritime Zones Act, 1976, and UNCLOS 1982, India is entitled to exercise rights of sovereignty. The Supreme Court admitted that the State of Kerala had no jurisdiction to try this case, but the Union of India could try this case through a special court

- **Claim of Immunity**

Italy contended that the Italian Marines were protected under sovereign functional immunity as they were the naval guards and therefore functioning under the instruction of the Republic of Italy. This contention was rejected by the Indian Supreme Court in the absence of a status of force agreement between the Republic of Italy and India. But the same immunity will be available to the military personnel involves in a criminal proceeding in a foreign land remains an unsettled question.

VI. SUMMARY OF THE JUDGEMENT

The judgement stated that in the present Arbitration there is a dispute between the Parties as to which State is entitled to exercise jurisdiction over the incident of 15 February 2012 involving the “Enrica Lexie” and the “St. Antony”, and that the dispute concerns the interpretation or application of the Convention; thereby PCA had jurisdiction to try the case.

It stated that the Marines are entitled to immunity in relation to the acts that they committed during the incident of 15 February 2012, and that India is precluded from exercising its jurisdiction over the Marines. The tribunal also declared that India must cease all its proceedings and does not have the jurisdiction over the matters of this case. The Italian marines must be given immunity for the acts that they have committed.

The tribunal found that Italy had acted in breach of the provision of UNCLOS by infringing India’s right to freedom of navigation in the seas by firing and restricting the movement of St. Antony. It stated that, India is entitled to payment of compensation in connection with loss of life, physical harm, material damage to property (including to the “St. Antony”) and moral harm suffered by the captain and other crew members of the “St. Antony”, which by its nature cannot be made good through restitution.

This case has displayed the inefficacy of Indian criminal jurisdiction and also reflected upon the conflict in this matter between the domestic and the international law.

VII. CONCLUSION

In this paper, we have observed the slow progress of the Enrica Lexie case. The dispute has unfolded a lot of arrears in international law. United Nations Convention on the Law of the

Sea (UNCLOS) is clear in respect to exclusive jurisdiction by the flag state but the convention is still unclear about the extension of sovereign rights granted to States within the contiguous zone and the Exclusive Economic Zone (EEZ). Also, there is no clarity in regards to which state will exercise the prescriptive and enforcement jurisdiction over the different zones of the sea¹⁸.

This case has led us all to awaken and realize the weakness in maritime law. It is indeed impressive that we have come a long way since the principle of freedom of seas but there is still a long way to go to ensure that soon we do not again face a conundrum of cases like *Enrica Lexie*.

¹⁸ A. L. Morgan (1996) The new law of the sea: Rethinking the implications for sovereign jurisdiction and freedom of action, *Ocean Development & International Law*, 27:1-2, 5-29, DOI: 10.1080/00908329609546072