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The Enrica Lexie Case (India vs. Italy)

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ABSTRACT

In this journal article, the authors will explore the development, proceedings, and final verdict of one of the most important cases in Indian maritime law history. The case involved Republic of Italy and Union of India fighting over for protection of two marine officers and later fighting for the rights of two ordinary fisherman who lost their live due to some mishappenings on the day of the incident, Involving various aspects of law and arbitration settlement ideas between the two nations. This incident occurred approximately 20.5 nautical miles off the coast of India's territorial boundary, where Enrica Lexie, an oil tanker vessel flying the Italian flag, committed the crime at sea. Following this incident, the two mariners were charged with various offences under the Indian Penal Code. The Republic of Italy stated that India had no jurisdiction over this matter and that they'd been violating the United Nations Convention on the Law of the Sea, which both countries had ratified, making them parties to the convention. The dispute has sparked heated debate in the Italian Republic and the Republic of India, as well as throughout the international community.

India has always had friendly relations with Italy, but after the incident and the questions rose by both parties, the relationship became strained. The dispute arose in 2012 and was recently settled by an Arbitral Award issued by the Permanent Court of Arbitration (hereinafter PCA). The PCA established the Tribunal to conduct inter-state arbitration proceedings between the states. Between the two nations thus, the Arbitral Award is enforceable, final, and binding.

I. INTRODUCTION

The Enrica Lexie case is one of the most contentious cases involving the killing of two Indian fishermen who had gone to the sea to fish and were opened fired on by two navy marines who were on board the Enrica Lexie, which was

flying the Italian flag. On February 15, 2012³, this incident occurred approximately 20.5 nautical miles from the territorial cost boundary of India's coast from a place near Karla called Ambalapuzha, close to the outer border of the Republic of Indian Contiguous Zone and within the confines of India's Exclusive Economic Zone

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³ The "Enrica Lexie case" and the limits of the extraterritorial jurisdiction of India, Eboli, Valeria & Pierini, Jean Paul. (2012)

(ZEE). This incident was revealed via "Mercury Chat." Following the event, the Vessel had nearly travelled thirty-eight nautical miles when it was invited to enter Port Kochi to cooperate and establish suspected pirates, which allegedly had been appreciated. The ship changed course and headed for Kochi port, where it arrived around midnight every day.

The Master of the Vessel was later made aware that a FIR (First Information Report) on the file of the Circle Inspector, Neendakara, had been registered under section 302⁴, which is for Murder under the Indian Penal Code, as well as section 34 because there was a common intention within the same FIR, filed under section 154 of the Indian Criminal Procedure Code⁵. The Italian oil tanker M.V. Enrica Lexie, which had set sail from Sri Lanka for Djibouti on the Horn of Africa. On the way, they came across the MV St Antony, an Indian fishing boat used for commercial purposes. According to the Italian version of events, they mistook the boat for a pirate ship, and it was nothing more than a cold-blooded murder of innocent people. The accused were apprehended and detained by Indian authorities, resulting in diplomatic tensions between the countries. The Italian government claimed exclusive jurisdiction over the trial of the Italian marine. In response to this statement, the Indian government prosecuted them in their court.

II. THE LEGAL CONFLICT

The Italian republic had delineated the incident

by stating that the republic of India had violated a series of norms according to International Law; there were various allegations made by the Italian republic against India:

- i. Indian administrative authority had acted by machination by asking the Enrica Lexie to change their course and return to the port of Kochi;
- ii. The Indian troops had conducted a thorough examination and investigation of the Enrica Lexie ship, as well as interrogation of the ship's crewmembers.
- iii. The two naval officers who committed the crime were apprehended and taken into custody by authorized authorities. Italy argued that India had no jurisdiction in this matter, and India countered by saying that the victims were of Indian origin and thus required legal redress. This case received extensive media coverage, making it an important matter.

The Legal Provisions at Play before Various Indian Courts

• Contentions of Counsel Representing Italian Marines

The police apprehended the two marines and charged them under sections 302, 307, and other sections of the Indian Penal Code. The first point raised by the counsel for the Italian marines, Mr. Harish N. Salve and Mr. Sohail Dutta, was the issue of jurisdiction. According to the Italian counsel, the shooting occurred in the Contiguous Zone/Exclusive Economic Zone of India, not in Indian territorial waters.

⁴ Section 302 of the Indian Penal Code.

⁵ Circle Inspector of Police, Neendakara, Kollam

District, Kerala, F. I. R. No. 2 of 2012.

According to section 4 of the IPC, the jurisdiction of Indian courts does not extend beyond India's territorial waters (12 nautical miles), and thus the police station lacked jurisdiction to file a FIR. Only Indian nationals, not foreigners, can be prosecuted in matters that extend beyond India's territorial waters (CZ & EEZ).

The legal counsel also argued that because the incident occurred on the high seas, India, as a signatory to the UN Convention on the Law of the Sea, could not initiate criminal proceedings, and that an Italian court had already opened the case in Rome.

According to UNCLOS section 87 1(a), every country has the right to free navigation without interference from sovereign bodies. The Counsel also held that the marines were on official business for their home country, attempting to protect and secure their country's interests, particularly in a volatile and troubled part of the sea (Piracy activities), and as such, are entitled to immunity under international law conventions.

• **Contentions of Counsel Representing Indian Fishermen**

The incident occurred 20.5 nautical miles off the Indian coast, according to the Indian counsel. Article 27 of the UN Convention on the Law of the Sea grants criminal jurisdiction to a coastal state over a foreign ship if a crime is committed on the ship and the consequences extend to the coastal state. As a result, there is no doubt about India's jurisdiction in the matter.

The Indian fisher boat (St. Antony) was also said to be 100 metres away from the ship and posed

no threat to the oil tanker. The respondents contended that UNCLOS Articles 32 and 56 were applicable because these laws require the coastal state (India) to maintain law and order in the EEZ, giving India jurisdiction to try the accused Italian marines. In this case, the marines were security on-board a private oil tanker and thus can only be considered a "Private security team," with no legal immunity in India.

• **Decision of Various Courts of Appeal**

The High Court of Kerala found the petitioner (The Marines) guilty and upheld the territorial and criminal jurisdiction of Indian courts to try the case in "Massimiliano Latorre & Ors. v. Union of India."⁶

Following the petitioners' appeal to the Supreme Court of India, the Kerala High Court's decision was overturned on the grounds that, while the IPC and CrPC give the Republic of India the authority to try the case, Kerala cannot, and the Union of India must, and thus the Supreme Court established a special court to look into the matter.

The case is now known as The Republic of Italy as a result of the appeal. The Union of India vs. the Ambassador⁷

The Jurisdiction of the State Regarding Seas

The opinion of the Legislative Authority, the body that authorizes rule and regulation within the state and then comes to the judicial body that function when this rule and regulations of the law are not complied with by punishment, either by court order or an order to have the state in the seas can be differentiated between them in

⁶ WP(C). No. 4542 of 2012 (P)

⁷ WP (CIVIL) NO.135 OF 2012

different categories. The State has the authority to exercise jurisdiction over anything that occurs on its territory.

It would be considered false if it crosses this line of exercise of power if, in this area, a crime had been committed in a physical manner within the territorial boundary or within the boundary of the state or within the territory of the state and, if the crime had been committed outside the State but could have been committed in a territorial capacity It has been observed that a country invokes territorial jurisdiction quite frequently when it is within India's territory, but in some cases, it can be used for extraterritorial jurisdiction, which has received recognition under international law as well as in customary international law⁸.

To invoke this principle, certain criteria must be met, such as:

- i. A crime committed by a citizen in a foreign territory.
- ii. A foreigner committing a crime against the interests of the state's nationals this is also referred to as the passive personality principle⁹.

The last principle is extraterritoriality, which is a universal principle that states can exercise jurisdiction even when there is no connection with the crime at all, but this can only be done if the matter is international crime and related to jus cogens norms, but when it comes to the sea, it is a debatable topic as seen in the past and now

because the sea has various uses such as for commerce.

The Law of the Sea in the Geneva Convention

The UN Convention on the Law of the Sea (UNCLOS), also known as the Law of the Sea Convention, has developed before that the main case for this Lotus Case¹⁰ where the PICJ stated that if a dispute arises in the high Sea, the disputes between two countries must be considered, in a judgment of the case, as the offence committed against the United Nations was declared guilty.

And when crimes have taken place within the territory or the State's border has the right to requested jurisdiction over the matter, but in 1958, after the second World War, a Treaty on this subject was established as a Treaty establishing a Geneva Convention on the high seas which granted the International Law the new rule and regulation.

According to Article 11 of the convention, whenever a collision or other incident involving navigation occurs in a ship on the high sea that involves any kind of penal or a problem, the person authorized to impose penal provisions, other than the judicial or administrative authority¹¹, is either by the flag state or the state of which he is a citizen. This treaty ambit was further expanded by signing the contiguous zone, which states that the state's sovereignty in extending to jurisdiction gets a bit wider to international water it extends to adjacent to its

⁸ C. RYNGAERT, 'The Concept of Jurisdiction in International Law', op. cit., p. 2.

⁹ G. R. WATSON, 'The Passive Personality Principle', Texas International Law Journal, 28, 1993.

¹⁰ The Lotus Case (Turkey v. France), Judgment, 1927, Series A. - No. 10.

¹¹ 1958 Geneva Convention on the High Seas, Article 1.

cost of the territory, so applying the above to principle we can conclude that the state has jurisdiction only to the extent of the limited area along with the cost of the territory¹².

Jurisdiction of Sea According to the UNCLOS

The distinction was that the sea was divided into different jurisdictions, and that it was then described, as the territorial sea and the contiguous zone were the only economic zone (EEZ).

III. INTERNATIONAL ARBITRATION & ITS APPLICABILITY

On June 26, 2015, the Republic of Italy filed a Dispute with the Permanent Court of Arbitration in The Hague under Annexe VII of the United Nations Convention on the Law of the Sea (UNCLOS), and on July 21, 2015, the Italian Government sought provisional measures before the International Tribunal for the Law of the Sea (ITLOS) in Hamburg, Germany.

As per the ITLOS, India and Italy should halt all legal proceedings in the case and, in accordance with the UN Convention on the Law of the Sea, refer the dispute to the Permanent Court of Arbitration. As a result, the case was brought before the PCA, and a tribunal was formed to conduct an investigation.

The Tribunal's proceedings at the PCA began with the case – The Italian Republic v. The Republic of India¹³. Both countries claimed that the UN Convention on the Law of the Sea (UNCLOS) was being violated in a number of

ways.

- **Applicability**

The incident is said to have happened about 20.5 nautical miles off the Indian coast, within India's CZ and EEZ but outside its territorial waters. According to UNCLOS Article 97 read with UNCLOS Article 58, any offence committed in international waters may be prosecuted by the flag state with jurisdiction (2).

The Territorial Waters, Continental Shelf, Exclusive Economic Zone, and Other Maritime Zones Act, 1976 (“Maritime Zones Act 1976”) states that India's sovereignty extends up to 12 nautical miles from the nearest point of the baseline, making these international waters where India can try crimes committed by Indian citizens rather than foreigners.

According to Section 4 of the Indian Penal Code, the jurisdiction of an Indian court is limited to the “Territory of India,” which includes the country's territorial waters. As a result, all criminal and judicial proceedings in India are illegal and null and void. The actions of the Indian authorities also violated UNCLOS articles 87 1(a), 89, 92, and 100.

The Permanent Court of Arbitration upheld the well-established objective territoriality premise in its final ruling. The marines were determined to be employed by the Italian navy at the time of the incident, regardless of whether the tanker was privately owned. Regardless of India's claim, the marines were performing their duties as a “Vessel Protection Detachment” (VPD), and as

¹² 1958 Geneva Convention on the Territorial Sea and Contiguous Zone, Article 1.

¹³ PCA Case No. 2015-18

such, as state employees, only their employer/home state has the authority to prosecute them.

The PCA, in the form of a final award, requested that the Italian Republic pay compensation to the victims in the amount of Rs. 10 crore, and that India discontinue all judicial and criminal proceedings because the marines had sovereign immunity and all legal proceedings would be handled by Italy.

IV. THE ISSUE OF JURISDICTION IN THE ENRICA LEXIE CASE

The Enrica Lexie Case is related to a cardinal question that is based on the exclusive jurisdiction that is both prescriptive and enforcement jurisdiction in both India and Italy. In the following case, the Italian republic was required to assert exclusive jurisdiction over the EFSJ. India responded to this argument by interpreting the passive personality principle. This section of the paper will discuss the relevant international law provision and its application in this case.

Exclusive Jurisdiction Application in the Contiguous Zone and EEZ

It has become much more relevant in this case since both the country had a large number of disputes and arguments about the facts and the case. But one point we have agreed was that the event had been occurred 20.5 nautical miles away from the Indian coasts of Kerala c the

application of adjoining zone and EEZ was brought to light.¹⁴

Italy asserted that India lacked jurisdiction over the case because it was a signatory to the UN Convention on the Law of the Sea and lacked sovereign authority over it, as defined in articles 33 and 56 of the Convention on the Law of the Sea¹⁵. The opinion of Italy was that because India lacked sovereignty in terms of territorial jurisdiction in the contiguous zone and even in the EEZ, they only had jurisdiction over natural resources and nothing else. Because there is no territorial jurisdiction in both cases, it has no right to impose penal law on any criminal act committed beyond the contiguous zone. Italy asserted that India lacked jurisdiction over the case because it was a signatory to the UN Convention on the Law of the Sea and lacked sovereign authority over it, as defined in articles 33 and 56 of the Convention on the Law of the Sea. The opinion of Italy was that because India lacked sovereignty in terms of territorial jurisdiction in the contiguous zone and even in the EEZ, they only had jurisdiction over natural resources and nothing else. Because there is no territorial jurisdiction in both cases, it has no right to impose penal law on any criminal act committed beyond the contiguous zone.

The following is India's argument against Italy:

- i. India sought protection under Section 7.7(a) of the Maritime Zones Act, which states that the central government can extend or modify

¹⁴ Supreme Court of India, Writ Petition No. 135 of 2012, Republic of Italy & others v. Union of India & others

¹⁵ Supreme Court of India, Writ Petition No. 135 of 2012, Para. 20.

restrictions or modifications as it sees fit for the time being in India or EEZ but must publish in the official gazette;

ii. The offence was directed toward India, which violates the passive personality principle; and

iii. The offence was directed toward Italy, which violates the passive personality principle.

The Indian argument is based on the principle laid out in the Lotus case, which states that if there is no specific rule mentioned in international law, the state can extend its jurisdiction through local law. This is supported by article 59 of the UNCLOS, which states that if there is no jurisdiction mentioned by the convention to the coastal state or state within the EEZ, if there is a conflict, it must be resolved through local law. India argued that it had jurisdiction under article 56, which states that the coastal state has the authority to make laws concerning the EEZ. Keeping this in mind, it would also include the fishermen's safety and security. According to Italy's position, it has been established under public international law in the following articles 91,92,94,97 of the UN Convention on the Law of the Sea, to which India is a signatory, that India is required to recognize the primacy of the flag state jurisdiction unless it is explicitly entitled to exercise sovereign rights¹⁶.

The Application of Article 97 in the Enrica Lexie Case

The Italian Republic favors the application of this

provision, which states in this Article that the ship cannot be detained other than by flag state and also for the arrest and investigation that are taking place at sea. It is an incident of incidental navigation that occurred on the high seas, according to Italy. It also claims that the EEZ and contiguous zone should be considered high seas for the purposes of applying Article 97, and that applying Article 97, as well as the Lotus doctrine, prevents India from exercising criminal jurisdiction.

However, India responded that article 97 would not apply here because this is a case of murder, which cannot be brought into the definition of incidental navigation because incidental navigation requires that the event be unexpected and unanticipated, and firing on an unarmed fisherman boat that was about 200 metres away is not a justification for this. The Republic of India's second point was that article 97 only applies to the high seas and not to the EEZ and Contiguous Zone, as stated in the definition of the high sea in UNCLOS article 86, Arguments After all, the Supreme Court decided that India had competence in this respect as the EEZ was 200 metre but stated that in India¹⁷, it can be triable and that, in this case, that jurisdiction is exercised only by the Indian Government, not the Kerala Government.

The Outcome of this Enrica Lexie Case

The Italian republic was caught off guard, and they had no other option but to take the matter to the International Tribunal for the Law of the Sea (ITLOS). Even here, they claimed that India

¹⁶ Supreme Court of India, Writ Petition No. 135 of 2012, Para. 32.

¹⁷ Kerala High Court, WP(C) No. 4542 of 2012, Para. 27.

lacked jurisdiction over the case. This issue causes a political crisis and a diplomatic dispute between the countries. Finally, on July 2, 2020, the Permanent Court of Arbitration issued its final decision, stating that India had not violated any of the grounds in articles 87,92,97, and 100, as the opposition had claimed. "India is barred from exercising jurisdiction over the Marines," and must stop doing so as a form of sufficient remedy. It also stated that the Italian republic had violated UNCLOS articles 87 and 90. The tribunal ruled that India is entitled to seek compensation for physical, mental, and moral harm suffered by the captain and crewmembers. As a result, the Italian Republic paid a compensation of one crore rupees to the victim's family.

V. CONCLUSION

Analyzing and interpreting the relevant law in the case of *Enrica Lexie*, the case still has some open strings in it, gives us the impression that there is a major conflict of jurisdiction involved here in international law. The demarcation of jurisdiction, or the distinction of jurisdiction, must be more precise and accurate. When it comes to the law of the sea, it does not deal with a single law or statute, but it does have a connection to other legal instruments and criminal jurisdictional law, but the primary case mostly deals with the UNCLOS. The application of criminal jurisdiction cannot exceed the territorial boundary of the sea, nor can it be applied on a foreign vessel, but it can be applied in some cases. In addition, in terms of the *lotus* doctrine, is it still a valid doctrine because it was removed by the UNCLOS when it came into

power, as it was in this case by the Indian republic? An international tribunal can only resolve this issue.

Has India got justice or was that a loss? Most may agree that India got justice but I don't agree because this was cold bloodshed killing and because this event took place in the EEZ region of India they could have placed criminal competence over the killing of India, but the PCA award did not allow India to rule on the matter as the PCA did not charge Italy with Article 56 of UNCLOS. The settlement offered by the Italian republic is in no way providing justice to the family of the fisherman who died on that fateful day, and paying off can never provide justice.
