



Case Comment: *Enrica Lexie's Case- India v Italy*

Abhinav Mishra*

I. Introduction

Under the admiralty law, piracy is considered as a *hosti humani generis* which means 'enemy of all mankind'. It is considered to be the 'peril of the sea' under the customary international law. Suppression of piracy is one of the primary concerns of the international law. Before the adoption of public international law, pirates could be prosecuted by any State through the doctrine of universal jurisdiction.¹

The provisions of United Nations Conventions on the Law of the Sea (UNCLOS) are in harmony with the provisions of the Maritimes Zones Act, 1976. Under UNCLOS, the limit of territorial sea of a State extends to 12 nautical miles from the baseline,² the Contiguous Zone extends to 24 nautical miles from the baseline³ and the breadth of Exclusive Economic Zone (EEZ) extends to 200 nautical miles from the baseline from which the breadth of the territorial sea is measured.⁴

The Indian coast of Kerala formed a part of 'High Risk Area' for the pirate attacks in 2012 and as such pirate attacks were quite

* Damodaram Sanjivayya National Law University, Visakhapatnam, India; mabhinav23@gmail.com

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

² Article 3, section 2, Part II, UNCLOS

³ Article 33, section 4, Part II, UNCLOS

⁴ Article 57, Part V, UNCLOS

frequent. Due to insufficient mechanisms to deal with piracy, use of force becomes necessary and this use of force under the International Law is cause of 'legal battle' between many countries including India and Italy.

II. Brief Facts

The incident took place on 15th February 2012, when *MV Enrica Lexie*, an Italian flagged shipping vessel was on its way to Djibouti and it came across *St. Antony*, an Indian fishing vessel. *Enrica Lexie* was sailing with an Italian Military Protection Department on board whose duty was to protect the vessel from piracy attacks. The ship was sailing close to the Indian border in the Indian Contagious Zone, when it reported a piracy attack through the 'Mercury Chat'.

The marines mistook *St. Antony* to be a pirate vessel and killed two Indian fishermen at a distance of about 20.5 nautical miles from the sea coast. The Italian vessel had proceeded about 38 nautical miles on the high sea towards Djibouti, when it was contacted by the Maritime Rescue Co-ordination Centre, Mumbai, asking it to return to Kochi port, to assist with the enquiry into the incident. Responding to the message, *Enrica Lexie* changed its course and returned to Kochi port, on 16th Feb, 2012. Upon docking in Cochin, the Master of the vessel was informed about the First Information Report being filed with respect to the firing incident leading to the death of two Indian Fishermen. On 19th February, the two marines, Massimiliano Latorre and Salvatore Girone, were arrested and charged for murder under the Indian Penal Code.⁵

III. Italy's Contentions

Italian Marines claimed sovereign functional immunity. They contended that as they are the naval guards on an Italian ship, they were functioning under the instructions of Italy. This argument was rejected by the Supreme Court in the absence of any forced agreement between India and Italy. Further each country is to decide the bounds of such immunity for itself.

⁵ Indian Penal Code, 1860 (Act No. 45 of 1860), s 302.

Counsel for Italy relied on Article 97 of UNCLOS which provides for 'Penal Jurisdiction in matters of collision or any other incident of navigation'. Since India is a signatory of the UNCLOS, it is bound by its provisions and both UNCLOS and Maritimes Zones Act, 1976 to recognise the primacy of Flag State Jurisdiction.

It was also highlighted that Maritimes Zones Act, 1976 provides use of territorial waters by foreign ships (other than warships including submarines and other underwater vehicles). They have a right to innocent passage.⁶ The incident occurred at a place which was 20.5 nautical miles from the coast of India which was outside territorial waters and therefore, the incident did not occur within the jurisdiction of one of the federal units of the Union of India.

IV. Decision of Supreme Court of India

The Court relied heavily over the principle laid down in the case of *S.S. Lotus* (France v. Turkey)⁷ and ruled that India had jurisdiction. In the said case, the question relating to the extent of the criminal jurisdiction of a State was brought to the Permanent Court of International Justice in 1927. 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, on board 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, on board 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 which was contrary to International Law, since the act committed on board the *Lotus* had effect on the *Boz-Kourt* flying the Turkish flag.⁸

⁶ Section 4(1), Maritimes Zones Act, 1976

⁷ *S S Lotus* (France v Turkey) (Judgment) [1927] PCIJ (ser A) No 10.

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

The Court also ruled that since the incident took place within the Contiguous Zone, over 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 State of Kerala had no jurisdiction to try this case, but Union of India could try this case through a special court. A special court was set up to try this case in accordance with Maritimes Zones Act, 1976, Code of Criminal Procedure, 1973, Indian Penal Code, 1860 and UNCLOS, 1982 unless there is no conflict between the provisions of domestic law and UNCLOS. It also said that the shooting incident is neither a 'matter of collision' nor 'any other incident of navigation' as mentioned under article 97 of the UNCLOS. However, the Court also ruled that the petitioners could re-agitate the question of jurisdiction before the special court, by adducing further evidence.

V. Diplomatic Fallout between India and Italy

The decision of the Supreme Court of India resulted in a diplomatic fallout between India and Italy. The Italian ambassador was summoned to the Indian Foreign Ministry and an official protest about India's disappointment was lodged.⁹ Italy recalled its ambassador from India in May, 2012. The Indian ambassador to Italy was summoned to the Italian Foreign Ministry and was informed about Italy's disappointment over Supreme Court's decision on the issue of Jurisdiction.¹⁰ On 22nd February, India allowed the marines to visit Italy to vote in the elections. It allowed the marines on the guarantee of Italian Ambassador. On 11th March, Italy refused to send back the marines, which triggered the crisis. However, on March 21st, it agreed to send back the marines for trial.¹¹ Latorre was sent to Italy on health grounds and the

⁹ "Italy warns India of European response to marines trial". BBC. 10 February 2014.

¹⁰ "Indian Ambassador Saha summoned by MFA SG Ambassador Valensise". Italian Ministry of Foreign Affairs. 13 December 2012.

¹¹ Sangnik Chowdhary, 'Italian Marines case: two killings at sea, an international legal battle' *The Indian Express* (20th Jan 2016)

Supreme Court of India had allowed him to stay till 30th April 2016.¹²

VI. The Case before ITLOS

In June, 2015, Italy instituted proceedings against India, before an arbitral tribunal to be constituted under UNCLOS¹³ and gave a written notification regarding the same to India. In July, it submitted a report before the International Tribunal for the Law of the Sea (ITLOS)¹⁴ seeking 'provisional measures'. It asked ITLOS to direct India not to take any judicial or administrative step against the marines, and to allow Gironi to leave and let both men stay in Italy, until the end of the Tribunal's proceedings. India contended that Italy had not 'exhausted' all remedies before, which is an essential criterion for invoking jurisdiction of the ITLOS.

However, ITLOS granted interim relief and said "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."¹⁵ It asked both countries to submit initial report of the incident. However, it rejected Italy's request to release the marines, as the case was being adjudicated. ITLOS rejected this request because, for making such an order, it had to go into the merits of the case.¹⁶

VII. Conclusion

Vessel Protection Detachments (VPD) are law enforcement units on a civilian ship in order to ensure its protection against potential

¹² 'Supreme Court extends marine Massimiliano Latorre's stay in Italy till April 30' *The Hindu* (13th January, 2016)

¹³Annexure VII of the UNCLOS

¹⁴Under Article 290, Paragraph 5 of UNCLOS

¹⁵Vijaita Singh, 'UN court grants status quo' *The Hindu* (24th August, 2015)

¹⁶"Maritime tribunal rejects Italy's call for India to free marines" *EuroNews*. 24 August 2015.

attacks¹⁷. However, use of force by VPD's has to be limited to self-defence only. Simply being a member of country's armed forces does not confer the right to use lethal force other than in self-defence.¹⁸ However, the lack of counter-piracy measures makes it necessary for the countries to use force.

The Indian domestic law seems to be in conflict with international law in many aspects and the decision was based on domestic law. The decision of the court cannot be said to be fundamentally incorrect because it had to harmoniously interpret both the laws, unless international law is in conflict with the domestic. In case of conflict of law, domestic law prevails over international law. Even then, it may be argued that Indian law would not be applicable in the present, as the incident occurred outside the territorial waters of India.

However, under the international law, Italy has jurisdiction to try the case as it recognizes the exclusive right of the flag State. After the decision of The Permanent Court of International Justice (PCIJ) in the case of *S.S. Lotus*, ships are now considered as floating territories.¹⁹ Therefore, the flag State laws are applicable to that ship. However, the principle of jurisdiction laid down in this case has been diluted by Article 97 of the UNCLOS which further strengthens the argument of 'flag State jurisdiction'. The decision of Supreme Court of India excessively relied over this case, which was delivered in 1927 and has now become a bad law.

Under the international law, the members of the armed forces are considered to be organs of the State and till the time they discharge their official duties, they are entitled to 'functional immunity'. In

¹⁷Lord Jopling (United Kingdom) - General Rapporteur, The Growing Threat of Piracy to Regional and Global Security, NATO Parliamentary Assembly, 169 CDS 09 E rev 1, 2009.

¹⁸D. Olser, 'Enrica Lexie Guards and Officers not Immune from Criminal or Civil Law', *Lloyd's List*, 16 February 2012, <http://www.lloydslist.com/sector/shipoperations/article391571.ece>.

¹⁹*S.S. Lotus (Fr. v. Turk.)*, 1927 PCIJ (ser. A) No. 10 (Sept. 7), Publications of the Permanent Court of International Justice, Series A - No. 10; Collection of Judgments, A.W. Sijthoff's Publishing Company, Leyden, 1927.

the present case, the marines were discharging their official duties and their acts were strictly related to the very purpose of the deployment of Vessel Protection Department (VPD). The Indian Vessel, *St. Antony* was sailing in international waters without showing any flag in a 'High Risk Area' for pirate attacks. Under such circumstances, the action of the marines is justified and valid and if they have to be prosecuted, they should be prosecuted under the laws of Italy and not under the Indian Laws.