

Territorial & Extra-Territorial Jurisdiction of IPC, 1860 with special reference to Enrica Lexie Case

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Abstract

In this Article Researcher tries to through light on the Extra-territorial jurisdiction of the Indian Penal Code,1860 while analysing the Enrica Lexie Case of Italian Marines and Indian fishermen. In the case known as Enrica Lexie, an Italian vessel named Enrica Lexie was travelling off the coast of Kerala when it opened fire on a fishing vessel that was legally in India's jurisdiction. Two fishermen were instantly killed in the ensuing gunfire. Against the Italian mariners, an FIR was filed and the Italian ship marines were arrested and those involved were taken into custody. The Italian sailors responded by filing a writ petition with the Kerala High Court, arguing that the FIR should be quashed because the incident happened more than 20.5 nautical miles from India's coast. After finding that the Kerala Police have jurisdiction over such cases under Section 2 of the Indian Penal Code, the court quashed the writ. Subsequently, the Supreme Court ruled that the Union of India could proceed with prosecution of the defendants so long as they complied with Article 100 of UNCLOS 1982. In accordance with Article 100 of UNCLOS 1982, such proceedings are exclusively within the purview of the Federal or Central Government and cannot be brought before a State Government. Due to the lack of jurisdiction in the matter by the State of Kerala, the court ordered the Central Government to establish a Special Court to hear such cases

Keywords: Territorial Jurisdiction, Extra-territorial Jurisdiction, IPC Jurisdiction, Nautical Miles, Contagious- Zone of the Sea, exclusive economic zone etc

Introduction

The Indian Penal Code, enacted in 1860, is the country's official criminal code and governs every aspect of criminal law in India. Intra territorial jurisdiction and extraterritorial jurisdiction is given by the Indian Penal Code,1860 under Sections 3 and 4. Indian Penal Code,1860 speaks about Extension of Code to extra-territorial offences ie extra territorial jurisdiction under section 4 which determines whether the court has the right to hear matters that committed within a specific geographic area and involving residents of that area. In Court system there are mainly three types of Jurisdiction which are The subject matter of the jurisdiction, Territorial Jurisdiction, In personam Jurisdiction and Admiralty Jurisdiction. In this Article will focus on the admiralty jurisdiction. Admiralty Jurisdiction is the jurisdiction which confers the power to try offences which are committed on the high seas.

Incorporation of Admiralty Jurisdiction into the Indian statutes was the result of various charters and British statutes. For example Admiralty offences Act, 1849, Colonial Courts of Admiralty Act 1890 etc. The notion that a ship which floats on the high seas is like a floating island is the basic principle behind the Admiralty Jurisdiction. The extension of Admiralty Jurisdiction is over the cases which involves the following offences: Offences which are committed on the Indian Ships on high seas; Offences which are committed on foreign ships within Indian territorial waters.¹

In this Article researcher wants to throw light on the gray area of the extra-territorial Jurisdiction explained under Indian Penal Code,1860 with special reference to the Enrica Lexie Case. Let us look

¹<https://blog.ipleaders.in/jurisdiction-under-ipc/>

at the background of India-Italy relations before we explore the case at hand. Before the "Enrica Lexie case," which occurred in 2012, ties between the two countries were relatively amicable. Since the Enrica Lexie case, strained relations between the two nations have been settled by the historic decision made by "The Permanent Court of Arbitration (PCA) in The Hague." however, for various reasons, there is a sense of dissatisfaction in India. It is contrary to the Indian Penal Code of 1860. It implies that India's sovereignty is at stake. Even though several Indian and international laws are relevant to this case, we will concentrate our research on the Indian Penal Code 1860's jurisdiction. On 15 th feb, 2012 around 4.30 p.m. A passing ship fired shots at the Indian-registered fishing boat named "St. Antony" when it was fishing off the coast of Kerala. As a result, two of the 11 fishermen on the boat—named Valentine Jelestine and Ajeesh Pink were instantly killed. The vessel immediately returned to Neendakara, where the owner provided a First Information Statement to the Circle Inspector of Police, Neendakara. The Circle Inspector of Police recorded the statement and registered a case as offence of murder, which is punishable under Section 302 of the Indian Penal Code. It was claimed that while fishermen were out at sea 33 nautical miles (NM) at the sea. they were abruptly and repeatedly shot at for two minutes by a ship with a black and red paint job. Since the attackers could not be found, the case was brought against some of the ship's crew. Neendakara, the Coast Guard, and the Indian Navy were alerted by the Circle Inspector of Police, and they conducted a comprehensive search that revealed the ship fire was coming from. They instructed the captain to take the ship to the Cochin Port, which was done. The vessel travelled from Singapore to Egypt and was registered in Italy. The Captain and other ship members eventually helped with the investigation after initially being reluctant to do so. Investigation results showed six marines on board the ship, working as security guards in addition to the crew. Two of them, Massimiliano Latorre and Salvatore Girone, were Italian marines, and they were the ones who fired at the fishing boat. They were taken into custody by Circle Inspector of Police Neendakara and presented with a remand report before Chief Judicial Magistrate Kollam. They were remanded to detention by the police at first, then by the court afterward.²

Research Problem

- 1) Whether the Italian marines who shot and killed two Indian fishermen on a boat registered in India in its territorial sea, contiguous zone, or exclusive economic zone are subject to criminal prosecution under the Indian Penal Code and other domestic Indian laws.
- 2) Whether the Italian Marines on board have the eligibility for sovereign immunity from Indian prosecutors

Research Methodology

In this article researcher will follow purely doctrinal methodology

Background of the case

It is abundantly evident from section 4(2) of the IPC that the incident took place on a boat with an Indian registration. Therefore, all applicable Indian laws are relevant. It is accepted practice that "Indigenous law" takes precedence over "international law." Around 4.30 pm a passing ship fired shots at the Indian-registered fishing boat "St. Antony" on February 15, 2012, when it was fishing off the coast of Kerala about 33 Nautical miles. The firing came from MT ENRICA LEXIE, a ship in the open sea. The standard procedure is to find criminals wherever they are and bring them before the law to the correct country. According to the IPC, it was evident that India has the right to try the case in Indian courts and under Indian law. The security staff on the MT ENRICA LEXIE were private security contractors because the ship had a private registry. Because they were independent contractors, those security men could not claim diplomatic immunity. The accused claims that the

² Case facts can be found at [indiankanon.org/doc/191738505

event took place in the Contiguous Zone/Exclusive Economic Zone, outside of India's territorial seas. According to the 1976 Territorial Waters Act (hereafter referred to as the "Territorial Waters Act"), India's sovereignty only extends up to 12 nautical miles (NM) from the closest point of the baseline. Since the incident occurred further than that, Indian courts lack jurisdiction over it. It was argued that the Apex Court has ruled in several instances on Section 4 IPC that the Indian courts' jurisdiction over criminal offences is restricted to Indian Territory, and any extraterritorial jurisdiction solely applies to Indian residents. The third responder lacks the legal power to file a complaint against the defendants, launch an inquiry, or place them under arrest because they are Italian citizens and the incident occurred outside of Italian territorial waters. Therefore, any actions taken in response to the FIR, including the arrest, are illegal and invalid. The Circle Inspector of Police at the Neendakara Coastal Police Station does not have the authority to file a case against the Italian marines or have them arrested even though those provisions are contained in Article 97, read with Article 58 of the United Nations Convention on the Law of the Sea (in the future referred to as the UNCLOS). India has already ratified the UNCLOS, which states that high-seas incidents must be reported; hence the complaint must be filed in Italy. The Ordinary and Military Prosecution Office in Rome, Italy, has already opened an inquiry after receiving information, it was further reported. As a result, in accordance with the rules of international law and international comity, only Italian courts have the authority to try and convict accused people.

It was further argued that the accused were only subject to the jurisdiction of the flag state of the vessel or their own state because they were acting in their official capacity and in accordance with the rules of international law when they were sent by the Italian Defense Ministry to protect the vessel from piracy. They were argued to be entitled to functional immunity from prosecution, except for before Italian courts or military tribunals. The accused asserted that the filing of the FIR, the arrest and imprisonment of the accused, and all subsequent actions taken in connection with the FIR were invalid and should be quashed. In the case known as *Enrica Lexie*, an Italian vessel named *Enrica Lexie* was travelling off the coast of Kerala when it opened fire on a fishing vessel that was legally in India's jurisdiction. Two fishermen were instantly killed in the ensuing gunfire. Against the Italian mariners, an FIR was filed and the Italian ship marines were arrested and those involved were taken into custody. The Italian sailors responded by filing a writ petition with the Kerala High Court, arguing that the FIR should be quashed because the incident happened more than 20.5 nautical miles from India's coast. After finding that the Kerala Police have jurisdiction over such cases under Section 2 of the Indian Penal Code, the court quashed the writ. Subsequently, the Supreme Court ruled that the Union of India could proceed with prosecution of the defendants so long as they complied with Article 100 of UNCLOS 1982. In accordance with Article 100 of UNCLOS 1982, such proceedings are exclusively within the purview of the Federal or Central Government and cannot be brought before a State Government. Due to the lack of jurisdiction in the matter by the State of Kerala, the court ordered the Central Government to establish a Special Court to hear such cases.³

According to Article 27, a coastal state may exercise criminal jurisdiction over a foreign ship if the repercussions of a crime committed from the ship also affect the coastal state. Furthermore, there was no attempt to attack the Italian ship with pirates. The Kerala coast is free of piracy, and there are many fishing boats that operate there. The poor fisherman was ruthlessly attacked in the open without prior notice or compliance with any protocol established in that regard. According to the applicable treaties, conventions, customs, and usages of maritime law, the accused was also accused of failing to notify the closest coast guard or any other authority in the event of a piracy attack.

Additionally, it was revealed that the location of the incident, as described in the FIR, is roughly close to the police station. Actually, the incident took place at 20.5 nautical miles from the baseline; hence the crime was committed in Indian territorial waters rather than on the open seas. As a result, UNCLOS Article 97 is not applicable. Since they were not performing any official duties in the exercise of sovereign powers, the accused are not entitled to any claims of immunity for the alleged

³<https://blog.ipleaders.in/jurisdiction-under-ipc/>

acts. They were sent to help a private shipping company's business operations in exchange for payment. Thus it was impossible to assume that they were doing official duties in order to be granted immunity. They are therefore governed by Indian law.

The Italian Penal Code does not appear to be applicable to an incident that happened in India's exclusive economic zone (CZ/EEZ), in which Italian marines on board the ship fatally shot two Indian fishermen on a fishing boat with an Indian registration. It is also important to know that the Republic of Italy did not launch any investigations to bring the Italian Marines to justice, with the exception of the request for the delivery of specific documents. No attempt has been made to speak with the ship's captain or otherwise learn the facts about the situation. If an investigation has even been started in Italy, it seems to be moving very slowly. All of them, together with the lack of a request for the Marines' extradition, exposes the complete lack of merit in the claim made at the hearing of the writ petition that the Italian Marines will face criminal charges in Italy.

According to Kerala's High Court, The remarks made in this factual ruling are supported by the documents submitted, without prejudice to the accused's defence, and are solely for the purpose of concluding this writ petition. Trial courts must give accused parties' claims serious consideration without regard to factual observations.

SC States that, It was against Indian government policy to sign a Status of Forces Agreement (SOFA). Foreign military personnel is exempt from criminal prosecution under this agreement. The issue of functional immunity would not be tenable as a result.⁴

The claim of an attempted piracy attack is made in a very general way, with no mention of the specifics of how it was allegedly undertaken. It is important to note that there is no evidence that the marines ever threatened the ship's captain with piracy or that the captain ever recorded the threat before shooting the fishermen down

International Court of Justice

The Italian government pleaded with the International Tribunal for the Law of the Sea ("ITLOS") to turn over the two Italian marines so they may remain in their own country while the case was being heard. The Italian government requested a stop order against India's criminal investigations.⁵

The Enrica Lexie case's domestic processes in Italy and India were frozen on August 24, 2015, in accordance with an ITLOS request, as they would have an adverse effect on the arbitral tribunal's ruling.

According to UNCLOS, there are four possible procedures to settle any disagreements, and one of them is the ad hoc arbitration provided for in Annex VII of the Convention. A special tribunal comprised of five members was created on November 6, 2015 in compliance with UNCLOS.

The Union of India argued before the ITLOS that because the alleged crime was "committed against Indian nationals that too on an Indian flagged boat, which is part of India's territory for the application of criminal law, and the Marines have been found on India's territory" immunity of marines is considered the exception of territorial tort and comes into play. In particular, India stated that the fact that the criminal jurisdiction is exercised on either a territorial or personal basis makes the legal theory of combining ship and territory for the specific system of criminal law extremely logical and widely recognized. Any offence committed on a ship is solely subject to territorial jurisdiction. India defended the assertion that its state's territory saw the effects of the harm.

According to the arbitral tribunal, the two Italian marines who shot two Indian fishermen on the high seas in 2012 were entitled to immunity under the general principle of customary international law that

⁴ In India's Supreme Court, it was contended that, Conflict-International-Law-Indian Law-Applicable-Counter-Piracy-Analysis-Enrica-Lexie-Incident/ (blog.iplers.in)

⁵International Court of Justice

stipulates that state officers are immune from prosecution. The obvious 'ultra viral' conclusion was this.

The Permanent International Court of Justice held in 1926 that a state may assert its jurisdiction with regard to crimes committed outside of its territory but committed on its territory. The Arbitral Tribunal cited this principle in its analysis of the jurisdictional arguments. The evidence shows that at the time of the incident, the marines were under the suspicion of a piracy attack and were thus performing their official duties as members of the Italian Navy as well as those of a Vessel Protection Detachment, so it was determined that it is irrelevant whether the marines' actions were unlawful or not. The Arbitral Tribunal's decision was not unanimous. It would be important to take notice of the judges' viewpoints that differed from the majority. The marines were acting in accordance with a commercial contract, not as representatives of the Italian government, according to Judge Rao. They were, therefore, ineligible for immunity from foreign jurisdiction when carrying out their official duties. Another tribunal member, Judge Patrick Robinson, commented that the panel had not made a distinction between the immunity of a state official and the immunity of the state for the actions of its officials. In general, a state official's immunity is based on the assumption that the state itself is immune from liability for the actions of its officials; but if the state is not immune from liability for a particular act, how can the official be granted immunity?

He claims that it is Italy's responsibility to prove that the marines' assistance was provided when they were working for the Italian government and not the ship-owners. The marines were not entitled to any protection from India's criminal jurisdiction because there was no agreement between the two countries regarding their immunity.

Conclusion

India views the order's requirement that Italy makes up for violating the UN Convention as its only good aspect. Additionally, the court urged the two nations to confer and come to an agreement on the amount of compensation to be given to India. The tribunal's decision is a serious setback for Indian law and sovereignty. In the future, if a similar incident takes place in Indian coastal waters, law enforcement authorities could have trouble defending the rights of their citizens, who commonly rely on the EEZ for their livelihood. Additionally, India's sovereign rights within its EEZ have been neglected, which jeopardizes the rights of lawful fishermen. The order's interpretation does not result in the compatibility of local and international law.

The victims of the Enrica Lexie case may have won because they will each receive 4 crore rupees, but is this huge sum really worth it? It can never make up for the loss of a life caused by senseless violence. However, India's acceptance of international laws and tribunals has come at the expense of the country's right to determine its own fate. Would you recommend it? It is unclear what the answers are to these issues.⁶

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