

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed Edition :

www.ijlra.com

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ISSN

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ENRICA LEXIE – JUSTICE **DELIVERED OR NOT?**

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Abstract

*The Permanent Court of Arbitration on 2 July, 2020 pronounced its **verdict** on the **Enrica Lexie – St. Antony** incident which took place on the fateful day of 15 October, 2012 which saw the death of two innocent fishermen apparently in guise of pirates in the eyes of the Italian marines. Much to the dissatisfaction of the entire country, the Court ordered **immunity** to the marines and stated Italy would investigate into the criminal charges and India would be entitled to compensation only. Whether or not justice has been served or not at every count is discussed in the paper. The **legal reasoning** behind the substantive and procedural issues and the arbitrators dissenting this issues is also dealt with.*

And the question of defeat or disappointment is not the focus of this paper but a consequential debate on fairness, equity and justice. After 8 years of long wait, justice must not only be done but manifestly should have seem to be done. Was it really done?

Keywords: Enrica Lexie, Italian Marines, fisherman, Justice, Permanent Court of Arbitration.

Genesis of the Issue

The Italian marines 'mistakenly' as chosen to understand, shot two India fishermen aboard the St. Antony boat in the Indian Contiguous zone thinking them to be pirates.

The month old award of the Permanent Court of Arbitration providing for the lack of jurisdiction for India and the presence of immunity of the marines held that the case must be tried in Italy instead. Not getting the facts juxtaposed, this reminds us of a gross Indemnity Act passed after the Jalian Wala Bagh massacre as a white washing bill in 1919.

The Permanent Court of Arbitration (PCA) published the extract of the final award of the ad-hoc tribunal constituted to settle disputes related to the United Nations Convention for the Law of the Sea (UNCLOS) regarding Italian marines.

There are several contentions raised by both parties and some have been unanimously or differentially decided acceding or rejecting certain claims. The Tribunal responded to the claims of both parties, on ten counts, six of which are procedural and four are substantive.

This paper analyses these ten counts in detail, referring to the pertinent clauses of domestic and international legislations as well as the findings of the Tribunal unanimously or partially as the case maybe.

Chronology of events

On February 15, 2012, St. Antony a boat from Kerala had set forth in the Arabian sea. Two of the Indian fishermen aboard the boat were killed off the Indian coast. Subsequently India detained two marines from the Italian commercial oil tanker MV Enrica Lexie. The stand taken by the Indians is that the marines killed the fishermen in Indian territorial sea. The Italian marines on the other hand claimed that they understood the fishermen to be pirates. There has been recurrent imbroglios between India and Italy with respect to jurisdiction, immunity, diplomatic relations and applicable laws.

On account of criminal charges the marines were detained in India, one till 2014 and the other till 2016. An independent Court of the United Nations followed through the charges to resolve the conflicts. Beyond the perspective of murder charges, human rights questions on detention and on boundaries, a tangent also broke into commercial relationships and trade by sea and the consequent impact on the blue economy of both nations.

ITLOS Order¹

The International Tribunal on the Law of the Sea passed an interim measure on August, 24 2015 ordering both Italy and India to suspend all court proceedings and to refrain from initiating new ones until the Permanent Court of Arbitration decides on the same.

¹ The 'Enrica Lexie' Incident (Italy v. India), Provisional Measures, <https://www.itlos.org/en/main/cases/list-of-cases/case-no-24/> (last visited October 16, 2022).

The arbitration before the PCA was instituted on June 26, 2015 when Italy served on India a Notification and Statement of Claim under Annex VII to UNCLOS in respect of “the dispute concerning the ‘Enrica Lexie’ Incident”.

Proceedings before the PCA²

From 8 to 20 July 2019, the Arbitral Tribunal held a hearing concerning its jurisdiction as well as the merits of Italy’s claims and India’s counter-claims at the headquarters of the PCA at the Peace Palace in The Hague, the Netherlands.

The nub of the issues raised by both parties are:

| ITALY’S STANDPOINT | INDIA’S STANDPOINT |
|---|--|
| India’s Maritime Zones Act ³ , 1976 and Notification, 1981 ⁴ is incompatible with UNCLOS, India has violated Article 87, 92, 97 and 100 under Part VII & Article 300 under Part XVI of the UNCLOS and India is in violation of the sovereign immunity of the Marines. | Dispute is with Immunity and not with UNCLOS Question of Convention not involved, therefore Tribunal lacks jurisdiction over the claim concerning the immu, India’s legislation not under radar as the same not raised by Italy on the date of filing claim concerning Indian law is inadmissible as it constitutes new claim not falling under this Dispute or this Tribunal. |

The arbitral tribunal can most certainly be said as a diverse set of members representing both the party states and other neutral states. The Tribunal consisted of

1. Judge Golitsyn, the President of this Tribunal from the Russian Association of Maritime Law and Professor at Moscow State University and Moscow State Institute of International Relations
2. Patrick Lipton Robinson, belonging to Jamaica and a member of the International Court of Justice for the term commencing from February 2015.

² The ‘Enrica Lexie’ Incident (Italy v. India), <https://pca-cpa.org/en/cases/117/> (last visited October 15, 2022).

³ The Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 (India)

⁴ The Notification of the Ministry of Home Affairs of the Republic of India, No. S.O. 671(E), dated 27 August 1981 (India)

3. Paik Jin-hyun of South Korean origin and the current President of the International Tribunal for the Law of the Sea,
4. Sreenivasa Rao Pemmaraju, the only member of the Tribunal belonging to Indian origin. Interesting he was also the member of *Bay of Bengal Maritime Boundary Arbitration* tribunal (Bangladesh/India)
5. Francionior Francesco of Italian origin, from the, European University Institute, Florence, Italy.

Order of the Tribunal

Firstly,

On the procedural contention raised by India regarding the jurisdiction or lack thereof of the Tribunal excepting Arbitrator Robinson, the remaining four members of the Tribunal has acceded to the finding that there is a dispute between the Parties involving the interpretation and application of the UNCLOS.

The most pre-emptory question before any adjudicating authority is the constitution or the authority of it in deciding the issue raised by it. India lost it in this count and therefore the subsequent decisions taken by this tribunal in this issue is binding on both parties.

Secondly,

By rejecting yet another stance of the Indian submission, the Tribunal leaving out Arbitrator Robinson has declared that it has jurisdiction over the dispute, subject to its decision on the specific objections to its jurisdiction raised by India.

Thirdly,

All the arbitrators have concluded that Indian's claims are admissible and rejected the stand of Italy in the third procedural issue.

Fourthly,

Italy had invoked Article 2 Para 3, Article 56 Para 2 and Article 58 Para 2, first belonging to law of territorial sea and last two pertaining to the applicability of this Convention and the regard to law of other states when it comes to exercise of authority in the exclusive economic zone.

However, the Tribunal on a vote of 3:2 struck down this argument as the incident did not take place in the territorial sea or the exclusive economic zone but in the contiguous zone.

Fifthly,

The members Golitsyn, Paik and Francioni Tribunal in furtherance of the question of jurisdiction holds that it has necessary jurisdiction on the immunity of the marines Sergeant Massimiliano Latorre and Sergeant Salvatore Girone.

Sixthly,

The Tribunal uniformly decided that there was no necessity to go into the compatibility of Indian' Maritime Zone Act, 1981, the Notification passed thereunder and the UNCLOS. At this point it is pertinent to note that the Maritime Zones Act was passed in 1976 and the UNCLOS was subsequently passed in 1982. There is no incompatibility between the two as held by Supreme Court in *Republic of Italy v Union of India*.⁵

Seventhly,

The argument of Italy that India has violated the freedom of navigation guaranteed under Article 87 Paragraph 1 (a) was not entertained by the Tribunal. In the substantive issues relating to the merits of the case, the tribunal has unanimously held that India has not violated Italy's freedom of navigation and also that India has not violated Article 92, paragraph 1, of the Convention, pertaining to its jurisdiction in high seas.

As a matter of fact the Tribunal has went on to hold that in the issue of penal or disciplinary responsibility, Article 97 which provides for the applicability of flag state or the state of person's nationality is not applicable in this case. Jurisdiction, that Article 97, paragraphs 1 and 3, of the Convention are not applicable in the present case;

It is dubious as to the invocation of Article 100 by the Italy as there was no element or nexus of any pirate or threat of pirate within the contiguous zone of India. Without any relevance the state of Italy has scathingly stated that India has not cooperated for the repression of piracy. However, the tribunal has uniformly agreed that India has not violated Article 100. Invocation of Article 300, the ubberimae fiddie clause in the UNCLOS cannot be done by Italy.

⁵ Republic of Italy v Union of India (2013) 4 SCC 721

Eighthly,

Arbitrators Golitsyn, Paik and Francioni have decided that the Italian marines are infact eligible for immunity for the acts committed by them in connection with Enrica Lexie. And thus, has absolutely excluded India exercising its criminal law over the marine. This particular obiter dicta is quite disturbing for India as the state opines that India has lost in getting justice for its dead fishermen.

However, it is pertinent to note that 2 of the panellists were against the said finding. And it could be stated that merely by one vote, India is unduly disappointed.

Ninthly,

More as a consolation prize given to justice, the Tribunal decided that Italy should proceed on with the investigation of the occurrence in Indian contiguous zone and that India must cease the exercise of its criminal jurisdiction over the marines, much the chagrin of India. However, even in this ground two of the Tribunal members, Robinson and Sreenivasa Rao are against the finding.

Tenthly,

Article 56 of the UNCLOS provides for the *Rights, jurisdiction and duties of the coastal State in the exclusive economic zone*, that is, the sovereign right of a state. The Tribunal holding that India's rights has not been violated is erroneous in law as the incident in February, 15 2012 has occurred admittedly at 20.5 nautical miles, which is within the contiguous zone and very much within the exclusive economic zone yet again with the assent of only Golistyn, Paik and Francioni. The same has been the stance taken even with respect to Article 58 which deals with the *Rights and duties of other states in the exclusive economic zone*.

Furthermore, the Tribunal unanimously held that Italy has not violated Article 88, which is the use of high seas only for peaceful purposes. The marines have crossed the exclusive zones of their flag country, ventured into high seas, entered into India's exclusive zone and even treaded upon India's contiguous zone and most certainly not reserved for any sort of peaceful means. That is probably an irony on the part of the Tribunal.

Eleventhly, Unanimously

The Tribunal further held that as far as the marines' act has been concerned, Article 87 paragraph 1, (a) and Article 90, that is, the right to sail ships has been violated, which is the freedom of high

seas and right of navigation. Clearly two innocent poor fishermen were murdered in the contiguous zone of India, and the Right of Navigation is most certainly affected maybe not in the high seas as stated in Article 90.

India is a peninsular state with three of its sides covered in water. The fact that Indian sailors and fishermen are at a threat of their lives for conducting their regular business in the territorial zone and contiguous zone is in fact alarming. The sustainability of India's blue economy is has also come to a threat of vulnerability to life and property.

Lastly, on the twelfth count,

The PCA has unanimously held that on ground of Italy's violation of Article 87, paragraph 1 (a) and Article 90 of UNCLOS, there has been an injury upon India's interest for which India is entitled to payment of compensation in connection with loss of life, physical harm, material damage to property and moral harm suffered by the captain and other crew members of the "St. Antony". However, the Tribunal also held that the amount of compensation so discussed would be subject to an agreement of both the parties and kept a period within one year to arrive at a specific compensative quantity.

Conclusion

This judgment evidently cannot be seen in a win or lose angle. There are some points as to the violation of India's rights which has been acknowledged by the Tribunal. The most disappointing fact is that justice was expected with respect to the murder of fishermen in India. And India lost its jurisdiction to try the criminal case. The National Fishworkers' Forum (NFF) and the Kerala Swatantra Matsyathozhilali Federation⁶ have expressed their dissent and dissatisfaction over not allowing India the authority to try the case of the death of their own people.

On a multilateral perspective this incident is a furthermore greater eye opener with respect to the problem of deploying armed men on commercial vessels when their protocols are not found to be in any way responsible or accountable while firing their weapons. There needs to be an

⁶ Enrica Lexie verdict leaves fishers enraged, <https://www.thehindu.com/news/national/kerala/enrica-lexie-verdict-leaves-fishers-enraged/article31984474.ece> (last visited October 10, 2022, 11:34 PM).

apparent threat and only after warning can extreme action be taken by marines in general. It has been reported that globally, approximately 30,000 armed men are employed in vessels and ships.⁷ Another lacuna in law is the hierarchical military officials who are allowed to navigate and attack, if situation calls for instead of non-officials or private guards calling command. Moreover, where and who is the master of this ship and should not there be an accountable structure through which orders flow. Therefore this judgment does in no way give a solution to the future probability of death or hurt to seafarers and fishermen and likely loss of property or even the movement of foreign vessel in the EEZ, Contiguous zone and territorial waters of the coastal states.

Eventually, there did come an end to an open Pandora box after an eight year long wait.



⁷ R. Krishnakumar, Enrica Lexie case: Justice denied, Frontline, (November 24, 2022, 12:32 PM), <https://frontline.thehindu.com/the-nation/article31987157.ece>