THE ENRICA LEXIE INCIDENT: SEEING BEYOND THE GREY AREAS OF INTERNATIONAL LAW

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Abstract

The Enrica Lexie incident of 15 February 2012, off the coast of Kerala had attracted unprecedented media attention in India and abroad. The legal issues involved in bringing the Italian marines to justice for the killing of two Indian fishermen on board an Indian fishing boat in a shoot-out from Enrica Lexie, an Italian flagged commercial vessel, in the contiguous zone of India had been the subject matter of legal dispute before the Kerala High Court and the Supreme Court of India. The judgments of both Kerala High Court and the Supreme Court of India in regard to the Enrica Lexie incident dealt with the legal aspects of coastal state jurisdiction and the sovereign immunity available to the Italian marines under international law and the national law extensively. The views of the Supreme court on the coastal state jurisdiction with regard to Enrica Lexie incident appears to be final, despite the Court having allowed the Italian marines to re-agitate the jurisdiction issue in the Special Court, which will try the crimes committed by the Italian marines from Enrica Lexie . The investigation of the Enrica Lexie incident is now with the NIA and destined to go to the Special Court once the investigation is completed and charges are laid. This paper, therefore, deals only with the jurisdictional and other issues involving international law's interface with municipal law as dealt by the Kerala High Court and the Supreme Court of India. The legal aspects of other post judgment developments such as Italy's initial refusal to send back the Italian marines for trial in India and the consequential order of the Supreme Court restraining the movement of the Italian Ambassador outside India are also dealt with.

Obviously, an enquiry of this nature involves sifting judicial decisions on coastal State jurisdiction over crimes committed from a foreign vessel in an area beyond national jurisdiction in the light of UNCLOS, SUA Act and other relevant international conventions and national legislations.

Italy has been persistent in its statements to take the dispute up to an international tribunal for the interpretation of UNCLOS, in spite of the fact that Indian authorities started investigation on the Enrica Lexie incident and proceeded with legal processes leading to trial of Italian marines. We are however unsure, at this juncture, of Italy's inclination towards approaching the international tribunal for the interpretation of UNCLOS in relation to Enrica Lexie incident. In this regard, suggestions are made in the concluding part of this article as to how diplomacy can achieve a mutually beneficial resolution of dispute on a bilateral basis.

I. INTRODUCTION

The shoot out from Enrica Lexie, a commercial Italian flagged vessel on 15 February 2012 by Italian marines that killed two innocent fishermen on board an Indian fishing boat "St. Anthony" off the coast of Kerala has attracted unprecedented

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media attention in India and abroad. The starting point of the case can be traced back to the First Information Report (FIR) made by the owner of the boat to the Circle Inspector of Police, Neendakara, regarding the attack and the consequential death of two Indian fishermen involved in fishing in the Arabian Sea. A criminal case was registered as Crime No.2 of 2012 on the basis of the FIR against the Italian marines. The Italian marines were arrested, detained and later enlarged on bail. However, the marines and the Consul General of Italy sought, from the High Court of Kerala, the issuance of appropriate writ, or direction for declaration of the registration of First Information Report (FIR), the arrest and detention of two Italian marines: Massimalona Latorre and Salvatore Girone, and all further proceedings in pursuance of FIR, as null and void; and for quashing the FIR.[1] After the dismissal of this petition by the Kerala High Court, the Italian Ambassador approached the Supreme Court on a Special Leave Petition, which was disposed of on 18 February 2013 by the Supreme Court of India (by Chief Justice Altamas Kabir and Justice Jasti Chelameswar).[2]

II. JURISDICTIONAL AND OTHER LEGAL ISSUES RAISED BEFORE THE HIGH COURT OF KERALA

The argument of Italian marines and the Consul General (hereinafter referred to as Italian side) before the Kerala High Court was mainly on two grounds. *First*, that the offence was committed in international waters, and therefore, fell under Article 97 (read with Article 58(2)) of UN Convention on Law of the Sea, 1982 (hereinafter referred to as UNCLOS); accordingly, the flag State alone have the jurisdiction to try this offence.[3] *Second*, that the incident occurred beyond the territorial waters of India in the Contiguous Zone/Exclusive Economic Zone and in the light of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976, (hereinafter referred to as Maritime Zones Act 1976), the sovereignty of India extends only up to 12 NM from the nearest point of the baseline. The courts in India, therefore, have no jurisdiction over the incident. Further, it was pleaded that the Apex Court in various decisions on the application of Section 4 of Indian Penal Code (IPC) has held that the jurisdiction of the courts in India in relation to criminal offences is limited to the territory of India, (not to be extended beyond territorial waters) and any extra-territorial jurisdiction under Section 4 of Indian Penal Code, 1860 (IPC) is applicable only to Indian citizens and not applicable to the Italian marines who are Italian citizens and therefore the Circle Inspector of Police Neendankara has no authority to register a case against the two Italian marines or to conduct any investigation or to arrest them. Hence, all procedures in pursuance to FIR, including the arrest, were without jurisdiction, contrary to law, and, hence, null and void.

It was also argued that the marines, having been deployed by the Italian Defence Ministry for the purpose of protection of the vessel from piracy, were acting in their

1 W.P(C) No.4542 of 2012 – *Massimilano Latorre v. Union of India*, (2012) 252 KLR 794.

2 Special Leave Petition (CIVIL) No.20370 of 2012 *Massimilano Latorre & others v. Union of India & others.*

3 See para 3 of the High Court of Kerala Judgment.

official capacity under the principles of international law; they were, therefore only subject to the jurisdiction of the flag state vessel or their own state. It was contended that they entitled to functional immunity from prosecution anywhere else except before the courts and military tribunals of Italy.[4] It was also brought to the notice of the Court that a case had already been registered and that an investigation had been launched in connection with the Enrica Lexie incident in Rome, by the Ordinary and Military Prosecution Office.[5]

The Respondents (Union of India and others) contended that the Courts in India have absolute jurisdiction over the offence because the two Indian citizens killed by the Italian marines were on board a boat that was registered in India and should be treated as Indian territory. With regard to the application of Indian criminal law to the exclusive economic zone, a Central Government notification dated 27 August 1981 was cited by the respondents, according to which the Indian Penal Code (IPC) and the Criminal Procedure Code (Cr.P.C) have been extended to EEZ.

It was also brought to the notice of the Court that there were eleven persons in the fishing boat at the time of the shooting: one of the victims was driving the boat, the other was fishing, and the rest were asleep. During the investigation it became known that the commander had fired 12 rounds of 5.56 MM (nato bore) together with 8 rounds fired by his colleague. Although the Italian side asserted that before firing the fishing boat was warned by flashing a search light, and other necessary means, the Indian side contended that the Enrica Lexie did not undertake any Standard Operating Procedures (SOP) and Best Management Practices (BMP's) to dissuade the suspected pirates before the Italian side resorted to indiscriminate firing. It was contended further that, in any case, firing should have been the last option to be exercised only in extreme situations of self defence according to Privately Contracted Armed Security Personnel (PCASP) guidelines.[6] Simply put, it was unjustifiable to open a fire on a fishing boat which did not have arms.

The High Court of Kerala had considered all the issues threadbare including the issue of applicability of Suppression of Unlawful Acts against Safety of maritime Navigation and Fixed Platform of Continental Shelf Act (hereinafter referred to as SUA Act)[7], which was not included in the pleadings. Although there was a minor discrepancy in the pleadings of the parties as to the place where the incident occurred, the Court found that the discrepancy was insignificant as the place of occurrence could be estimated between 20.5 to 22.5 Nautical Miles from the corresponding base point off the Kerala coast. The Court was certain that the incident took place not in the Territorial waters but in the contiguous zone / exclusive economic zone, as per both the UNCLOS and the Maritime Zones Act 1976.[8]

4 See para 3 of the High Court judgment.

5 *Ibid.*

6 See the text corresponding to *note 15.*

7 SUA Act is the short form for "The Suppression of Unlawful Acts against Safety of maritime Navigation and Fixed Platform of Continental Shelf Act, 2002".

8 The Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act 1976 (This enactment was passed by the Parliament of India well before the UNCLOS 1982 was adopted).

The respondent side (Indian side) argued that India had absolute jurisdiction over the offence committed by the Italian marines on two Indian citizens on board a boat registered in India and that Article 97 of UNCLOS did not apply. It was argued further that Article 27 of UNCLOS specifically lays down that coastal States can exercise criminal jurisdiction on a foreign ship when the consequence of a crime perpetrated from the ship extend to a Coastal State. Accordingly, the Court held that the IPC would apply to the offence committed by the Italian marines.

A. The Judgment of the High Court of Kerala: the Interface of International Law and National Law

In short, the High Court of Kerala found its jurisdiction on the basis of a joint reading of Section 3 of Indian Penal Code and Section 3 of SUA Act[9] and the notification issued by Government of India dated 27 August 1981.[10] It may be noted that the Court delved into certain applicable principles of international law, such as the "passive nationality" principle and "objective territoriality" principle that provide criminal jurisdiction to States in respect of offences committed outside their territory.[11] The Court, thus, applied Section 179 Cr.P.C, which effectively codifies "the objective territorial and effective principle".[12]

On the application of international law, especially with regard to Article 97 of UNCLOS the Kerala High Court interpreted the phrase, "incidence of navigation" as 'an event or happening, especially one causing trouble', which according to the court "generally occurs unexpected or unanticipated" and "…which has a bearing on navigation". The Court distinguished the present case for not being incidence of navigation and observed thus: "by no stretch of imagination it can be said that opening fire, unilaterally, at fishing boat 200 meters away from the ship, containing unarmed fishermen, most of whom were sound asleep, constitute an incidence of navigation. This is a case of firing against fishermen."[13]

The Court also considered whether the marines had followed the revised interim guidance to ship owners and, ship operators on the use of PCASP on Board Ships in the High Risk Area issued by the IMO.[14] The Court found that despite the rule according to which Private Military Contractors (PMC) must not use firearms against persons except in self-defence or defence of others against imminent threat of death or serious injury or to prevent the preparation of a particular serious crime involving grave threat to life, the marines fired on the fishing boat without any provocation

9 The Suppression of Unlawful Acts against Safety of maritime Navigation and Fixed Platform of Continental Shelf Act, 2002.

10 Para 24 of the judgment.

11 Para 34 to 38 of the judgment.

12 See para 38 of the judgment. Section 179 says, "Offence triable where act is done or consequence ensues. When an act is an offence, due to anything, which has been done, and of a consequence, which has ensued, the offence may be inquired into or tried by a court within whose local jurisdiction such thing has been done or such consequence has ensued."

13 Para 27 of the judgment.

14 *Ibid*.

and that this "amount[ed] to a patent violation of the revised interim guidance". Thus, the Court concluded that "the firing is nothing but a brutal killing of two defenseless fishermen on board the boat".[15]

With regard to the plea of petitioner's entitlement to immunity being personnel employed in Military navy, discharging sovereign functions, the Court observed that "the extent of immunity depends upon the circumstances in which forces are admitted by the territorial state, and in particular upon the absence or the presence of any express agreement between the host and sending state regulating the terms and conditions governing the entry of forces in the host territory".[16] The Court observed that, in the present case, there was no "entry" by Italian marines into the territory of India, yet the members of the military forces had committed wrongful acts, while engaging in non-military functions, therefore, it was quite appropriate for the aggrieved State to claim jurisdiction.[17] The Court was of the view that by no stretch of the imagination could it be held that the shooting of the two Indians by the Italian marines was an act in exercise of sovereign functions. Thus, the Court held that the Italian marines were not entitled to sovereign immunity.[18]

III. JURISDICTIONAL AND OTHER ISSUES RAISED BEFORE THE SUPREME COURT OF INDIA

Pending the decision on the writ petition filed before the High Court of Kerala, the Italian marines and others filed another writ petition under Article 32 of the Indian Constitution before the Supreme Court of India. However, while the writ petition was pending before the Supreme Court, the High Court of Kerala dismissed the writ petition filed by the petitioners. Aggrieved by the High Court of Kerala judgment, the petitioners filed a Special Leave Petition (Civil) No.20370 of 2012, challenging the dismissal of their writ petition by the High Court. The Supreme Court heard the writ petition already pending and the Special Leave Petition together since the subject matter in the petitions for relief were the same.[19]

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15 Para 27 of the Judgment.

16 Para 48 of the Judgment.

17 *Ibid.*

18 *Ibid.*

19 *Republic of Italy & others v. Union of India & others*, Writ Petition (CIVIL) No.135 of 2012 with Special leave petition (CIVIL) No.20370 of 2012. The reliefs sought by the petitioners (Italian marines and the Republic of Italy) are the following: "(i) declare that any action by all the respondents in relation to the alleged incident referred to in Para 6 and 7 above under Criminal Procedure Code or any other Indian law, would be illegal and ultra vires and violative of Articles 14 and 21 of the Constitution of India; and (ii) declare that the continued detention of Petitioners 2 and 3 by the State of Kerala is illegal and ultra vires being violative of the principles of sovereign immunity and also Article 14 and 21 of the Constitution of India; and (iii) issue writ of Mandamus and /or any other suitable writ order or direction under Article 32 directing that the Union of India take all steps as may be necessary to secure custody of Petitioners 2 and 3 (Italian marines) and make over their custody to Petitioner No.1."(Republic of Italy).

In disposing of the petitions, the Supreme Court appears to have exercised enough caution in dealing with extension of Indian law to continental shelf/exclusive economic zone (CS/EEZ). The main argument of counsel for petitioners was that the incident had not occurred within the jurisdiction of the federal units of the Union of India; and according to him, the incident occurred in a zone in which the Central Government was entitled under Maritime Zones Act, 1976 and UNCLOS to exercise sovereign right not amounting to sovereignty. He argued further that the Act nowhere contemplates the conferral of jurisdiction on any coastal unit forming part of any Maritime Zone adjacent to the coast. Accordingly, the arrest and detention of the petitioner Nos.2 and 3 (Italian marines) by the police authorities in the State of Kerala was unlawful and liable to be quashed.[20]

On the issue of flag state jurisdiction, counsel for petitioners argued that the provisions of the 1976 Act and UNCLOS recognize the primacy of flag State jurisdiction. Thus, petitioner No.1 (Republic of Italy) has a preemptive right to try petitioner Nos. 2 and 3 (Italian marines) under its local law. Counsel for petitioners pointed out that the flag state duties in Article 94 include "penal and disciplinary responsibility of the flag states" in the "event of a collision or any other incident of navigation" contained in Article 97 of UNCLOS. He also pointed out that the Central Government notification of 1981 departed from the provisions of Part V of UNCLOS. Thus raises the question of which of the provisions would have primacy in case of conflict between the Maritime Zones Act 1976 and UNCLOS.[21]

Counsel for petitioners urged for the harmonious construction between the UNCLOS and the 1976 Act. Reference was also made to 1952 Geneva Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collision, which overruled the application of concurrent jurisdiction over marine collisions. According to him, a joint reading of Articles 91, 92, 94, and 97 of UNCLOS "clearly establishes that any principle of concurrent jurisdiction that may have been recognized as a principle of Public International Law stands displaced by the express provisions of UNCLOS".[22] While arguing on the plea of sovereign immunity to the Italian marines, he argued that the Italian marines were part of Military protection Squads deployed in Enrica Lexie. The conduct of the marines, therefore "was in fulfillment of their official duties in accordance with national regulations, directives, instructions and orders as well as the rules of piracy contained in UNCLOS and relevant UN Security Council Resolutions on Piracy off the Horn of Africa".[23] In case of piracy attacks, the master of the ship would have no control over the actions of the Military protection Squads provided by the Italian Government; therefore, sovereign immunity needed to be extended to them.

Counsel for the Union of India and others argued that there was no conflict between domestic law and international law. Even if there were, Indian law dictated that the domestic law would prevail over international law. He argued further that

20 See Para 20 of the Supreme Court judgment op.cit. *note 17.*

21 Para 29 of the Supreme Court judgment.

22 Para 38, *Ibid.*

23 Paras 43 and 44 of the Supreme Court judgement.

one interpretation of Section 7 (7) and the notification would suggest that once the IPC has been extended to the Exclusive Economic Zone, which includes Contiguous Zone, the Indian courts have territorial jurisdiction to try offences committed within the Contiguous Zone. While the petitioners emphasized Article 56(1) (b) of UNCLOS, the respondent Union of India emphasized on Article 56(1) (a) read with Article 73 of UNCLOS to justify the action taken against the accused.[24] Even if it could be assumed that the rights asserted by India were beyond those indicated in Article 56 of UNCLOS, such conflict would have to be resolved on the basis of equity and in the light of all of the circumstances. Accordingly, even if both Italy and India had the power to prosecute the accused, it would be much more convenient and appropriate for the trial to be conducted in India, having regard to the location of the incident and the nature of the evidence and witnesses to be used against the accused.[25] Arguing on the non-applicability of Article 97 of UNCLOS counsel for the Union of India "urged that the expression 'incident of navigation' used in Article 97, did not contemplate a situation where a homicide takes place and accordingly, "the provisions of Article 97 of the UNCLOS would not have any application to the facts of the present case."[26] On the question of sovereign immunity, counsel for the Union of India argued that the action of Italian marines was not *acta jure imperii* but *acta jure gestionis* and hence, the scope of the various Italian laws would have to be established by way of evidence. He urged further that as per the policy of the Government of India, no foreign arms or foreign private armed guards or foreign

24 See Para 62 of the Supreme Court Judgment. The following are the relevant provisions in Article 56 of UNCLOS:

Article 56

Rights, jurisdiction and duties of the coastal State in the exclusive economic zone

1. In the exclusive economic zone, the coastal State has:

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

(b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:

(i) the establishment and use of artificial islands, installations and structures;

(ii) marine scientific research;

(iii) the protection and preservation of the marine environment;

(c) other rights and duties provided for in this Convention.

2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

3. The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI.

25 *Ibid.* It is pertinent to note that the view of the Court is consistent with international practice that in the field of criminal law, only the State that could gain custody of the presumed offender, will be able to effectively exercise its jurisdiction. See Cedric Ryngaert, *op.cit.*, p.127.

26 Para 64 of the Supreme Court judgement.

armed forces personnel accompanying merchant vessels were allowed diplomatic clearance. Nor is it the policy of the Government of India to enter into any Status of Forces Agreement (SOFA) by which foreign armed forces are given immunity from criminal prosecution. Thus, he concluded that the claim of functional immunity from criminal jurisdiction could not be maintainable.

Counsel for the Kerala State maintained that despite a similarity between the UNCLOS and 1976 Act, there was a conflict between them. When there is a conflict between international law and national law, the latter will prevail over the former. The 1976 Act read with the notifications issued thereunder extended the IPC and Cr.P.C to the EEZ and the officials of State of Kerala were exercising jurisdiction under the IPC and Cr.P.C and were within the jurisdiction. The St. Anthony, which was berthed at Neendakara, had commenced its voyage from within the jurisdiction of Neendakara Police Station and had come back and berthed at the same place after the incident of 15 February 2012. The said facts brought the entire matter within the jurisdiction of Neendakara Police Station and, in consequence, the Kerala State Police.[27]

A. The Judgment of the Supreme Court of India

The Supreme Court, decision focused mainly on the jurisdiction of the Kerala Police to investigate and try this case, the compatibility of UNCLOS with the 1976 Act and, to some extent the application of Article 97 of UNCLOS. There was no substantial discussion on the sovereign immunity plea raised by the Italian marines. The Court found that the incident occurred not within the territorial waters of the coast line of the State of Kerala but rather within the Contiguous Zone, over which the State police of the State of Kerala ordinarily has no jurisdiction. The Court observed thus: "The State of Kerala had no jurisdiction over the contiguous zone and even if the provisions of the Indian Penal Code and the Code of Criminal Procedure Code were extended to the contiguous zone, it did not vest the state of Kerala with the powers to investigate, and thereafter to try the offence. What, in effect, is the result of such extension is that the Union of India extended the application of the Indian Penal Code and the Code of Criminal procedure to the Contiguous Zone, which entitled the Union of India to take cognizance of, investigate and prosecute persons who commit any infraction of the domestic laws within the Contiguous zone. However, such power is not vested with the State of Kerala."[28] On the issue of compatibility between UNCLOS and the Maritime Zones Act 1976, the Court concluded that "The provisions of the UNCLOS is in harmony with and not in conflict with the provisions of the Maritime Zones Act, 1976…."[29] Accordingly, the Court observed that "India is entitled both under its domestic law and the public international law to exercise rights of sovereignty upto 24 nautical miles from the base line …The incident of firing from the Italian vessel on the Indian shipping

27 Para 80 of the Supreme Court judgment.
28 Para 84 of the Supreme Court judgment.
29 Para 92 of the Supreme Court judgment.

vessel having occurred within the Contiguous Zone, the Union of India is entitled to prosecute the two Italian marines under the criminal justice system prevalent in the country". However, the same is subject to the provisions of Article 100.[30] Further, the Court found that the area of difference between the provisions of the Maritime Zones Act 1976 and UNCLOS occurs in Article 97 of UNCLOS which relates to the penal jurisdiction in matters of collision or any other incident of navigation. But this difference appears to have no bearing on this case because the Court is of the view that the incidence of navigation referred to in Article 97 of UNCLOS "cannot involve a criminal act in whatever circumstances".[31]

The Supreme Court, therefore, held that the State of Kerala has no jurisdiction to investigate the incident and that it is the Union of India that has jurisdiction to proceed with the investigation and trial of the Italian marines.[32] The Union of India was directed by the Court, "in consultation with the Chief Justice of India, to set up special court to try this and to dispose of the same in accordance with the provisions of the Maritime Zones Act, 1976, the Indian Penal Code and the Code of Criminal Procedure and most importantly the provisions of the UNCLOS 1982, where there is no conflict between the domestic law and UNCLOS 1982."[33] In the judgment, the Supreme Court made it clear that views taken in the judgment relate only to the question of jurisdiction. According to the judgment, once evidence has been recorded, it would be open for the petitioners to re-agitate the question of jurisdiction before the Trial Court.[34] The court was categorical that, in the special court, the petitioners would not be prevented from "invoking the provisions of Article 100 of UNCLOS 1982, upon adducing evidence in support thereof, whereupon the question of jurisdiction of the Union of India to investigate into the incident and for the Courts in India to try the accused may be reconsidered."[35]

Justice Jasti Chelameswar, in his concurring judgment, discussed in detail the "limitation based on territory" and observed that "territorial sovereignty and the ability of the sovereign to make, apply and enforce its laws to persons (even to non-citizens), who are not corporeally present within the sovereign's territory, are not co-extensive … as the principle is not accepted as an absolute principle any more".[36] By citing Section 3 of Anti Hijacking Act 1982 and Section 3 of Geneva Conventions Act, 1960, Justice Chelameswar observed that "Parliament always asserted its authority to make laws, which are applicable to persons, who are not corporeally present within the territory of India (whether or not they are citizens) when such persons commit acts which affect legitimate interests of this country".[37] By citing

30 Para 100 of the Supreme Court judgment.

31 See para 94 of the Supreme Court judgment, wherein the Court said, "… incident of navigation" in Article 97 cannot be extended to a criminal act, involving the killing of two Indian fishermen on board an Indian fishing vessel, although, the same was not flying the Indian flag".

32 Para 101 of the Supreme Court judgment.

33 *Ibid*.

34 Para 102 of the Supreme Court judgment.

35 Para 101 of the Supreme Court judgment.

36 Para 17 of separate opinion of Justice Jasti Chelameswar.

37 Para 25, *Ibid*.

precedents from United Kingdom and United States of America he observed that similar assertions are also made in various other countries. On the applicability of Article 97 of UNCLOS, he was of the opinion that irrespective of the meaning of the expression "incident of navigation" Article 97 had no application to the Exclusive Economic Zone because coastal states have authority to prescribe the limits of the Exclusive Economic Zone.[38]

IV. POST JUDGMENT DEVELOPMENTS

As per the order of the Supreme Court, the Italian marines came to Delhi and reported to the Station House Officer of the Chanakyapuri Police Station[39] once a week, with the same terms and conditions of bail imposed by the Court in Kerala. The Passports of the Italian marines surrendered to the trial court in Kollam were also ordered to be sent to the Home Ministry. On 23 February 2013, based on an affidavit filed by the Ambassador of Italy, the Supreme Court allowed the Italian marines to go to Italy for two weeks, mainly to exercise their franchise in the Italian election on 24 and 25 February 2013.[40] However, all of a sudden the Italian Foreign Ministry announced on 11 March 2013 that the marines would not return to face trial in India. The reason given for the decision by the Foreign Ministry was as follows: "India's decision to try the pair in India would violate their rights in paticular,the principle of immunity for foreign State actors."[41] In addition to this, Italy mentioned that "it was 'open' to let an international arbitrator to assess the case".[42] In response to this, the

38 *Ibid.*, para 35.

39 Earlier before the Supreme Court judgment/order the Marines were reporting to the Police Station at City Commissioner at Kochi.

40 See < http://www.financialexpress.com/news/sc-allows-italian-marines-to-go-home-to-cast-votes/1078415> accessed on 5 April 2013.

41 See <http://www.nytimes.com/2013/03/12/world/europe/italian-marines-will-not-be-returned-to-india-for-trial.html?_r=0> accessed on 5 April 2013. But Ministry of External Affairs in a statement indicated that Italy had informed that "since a controversy between the two States has been established, the two Italian Marines, Latorre and Girone, will not return to India on the expiration of the permission granted to them". See <http://www.thehindubusinessline.com/news/india-demands-return-of-marines-italian-stand-unacceptable/article4501355.ece> accessed on 5 April 2013.

42 *Ibid*. This aspect has been elaborately dealt in the statement made by the Minister of External Affairs in the Parliament on 22 March 2013 in the following manner: "A communication was received by the Ministry of External Affairs from the Embassy of Italy in New Delhi late in the evening of 11 March 2013 conveying, *inter alia*, that Italy deems that there is an existing controversy with India concerning the applicability of the provisions of the United Nations Convention on the Law of the Sea of 1982 and the general principles of international law applicable to the Enrica Lexie incident. For these reasons, it requested the Indian Government to set up a meeting at diplomatic level in order to reach an amicable solution of the said controversy, and conveyed that "since a controversy between the two States has been established, the two Italian Marines, Mr. Latorre and Mr. Girone, will not return to India on the expiration of the permission granted to them". See <http://mea.gov.in/Speeches-statements.htm?dtl/21461/Statement+in+Loksabha+by+External+Affairs+Minister+on+return+of+two+Italian+ marines+ to+India+ accused+ in+the+killing+of+two+Indian+ fishermen> accessed on 5 April 2013.

Indian Ministry of External Affairs summoned the Ambassador of Italy and stated firmly that Government of India "does not agree with the position conveyed by the Italian Government on the return of the two Marines to India,"[43] The Italian Ambassador was also told by the Foreign Secretary of India that the Italian Government was "obliged to ensure their return".[44] These chain reactions occurred once the Prime Minister of India, Dr. Manmohan Singh, told the visiting delegation of Parliamentarians from Kerala that the decision of Italy was "unacceptable" and during a discussion in *Lok Sabha* later he warned Italy of "consequences".[45]

On 14 March 2013, the Attorney General of India filed an Affidavit before the Supreme Court conveying these developments in this matter. The matter was heard by the Supreme Court on 18 March 2013.

The Supreme Court once again affirmed that India had the jurisdiction to try the case and reminded the petitioners to raise the issue of jurisdiction by adducing evidence before the Special Court to be set up for trial in this case. The Italian requests for diplomatic or expert level meetings to consider the issue of jurisdiction or referring the case to arbitration or any other judicial mechanism was, therefore, not accepted.[46] In addition, the Supreme Court restrained the Italian ambassador from leaving India until the next hearing on 2 April 2013. Divergent views have been expressed with regard to the Supreme Court order restraining the Ambassador from leaving India until the next hearing.[47]

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43 See *note 41*.

44 See <http://www.thehindu.com/news/national/rome-must-stand-by-commitment-envoy-told/article4500466.ece >accessed on 5 March 2013.

45 See < http://indiatoday.intoday.in/story/send-marines-to-india-for-trial-or-face-consequences-pm-warns-italy/1/257696.html >accessed on 7 April 2013.

46 mea.gov.in speaches *op.cit note 42*.

47 For example the former Attorney General of India Soli Sorabjee said that the actions of the Italian ambassador and his Government were "nothing short of being a fraud of the court." Senior advocate Harish Salve who was the counsel for the Italian Government until they violated their sovereign guarantee, felt that the ambassador bargained away his diplomatic immunity once he made a plea before the Supreme Court. He was of the opinion that "The position of a diplomat or a country, who is being sued, is very different from the position of a diplomat who has petitioned. You cannot say, I will move your court, I will take relief from your court but when my turn comes to pay, I have diplomatic immunity." But former Foreign Secretary Kanwal Sibal noted, that the Vienna Convention which guarantees immunity from prosecution for all diplomats is inviolable and adding further said, "Only the Italian Government can waive the ambassador's immunity. It would set a terrible precedent (to arrest the ambassador)," Certain other senior diplomats opined that the only realistic course of action is to expel the Italian ambassador and downgrade ties with Italy. See <http://indiatoday.intoday.in/story/italy-india-italian-marines-fishermen-killing/1/258998.html> accessed on 6 April 2013. Mr. Natwar Singh, Former Minister of External Affairs in an interview said," I don't think the Italian ambassador can be prevented from leaving India if he so wishes as long as he is an ambassador. Only the Italian government can withdraw his diplomatic immunity. We can't. Take it from someone who's been in the diplomatic game very long, it will be very difficult to try and prevent him from leaving India," available at <http://articles.timesofindia.indiatimes.com/2013-03-17/interviews/37786543_1_italian-envoy-italian-ambassador-marines-issue> accessed on 6 April 2013.

However, in the meantime, the Government of India decided not to send its ambassador-designate Basant K. Gupta to Italy. When the deadline set by the Supreme Court was about to expire, the Government of Italy decided to send the Italian marines back to India to face trial. Reports appeared in the media suggesting that the Italian Government bought some time to get two fold assurances from India. Although the term "assurances" was differently used by the External Affairs Minister in his statement before the Parliament as "clarifications", his statement did clear the air of distrust before the Italian marines reported in New Delhi on 22 March 2013, shortly before the Supreme Court deadline ended.

The EAM's (External Affairs Minister) Statement on the assurance/clarification was as follows: "It (Italy) sought from India clarifications regarding the conditions applicable to the marines on their return and the provisions regarding the death penalty that could be applicable in this case which was an Italian concern. Notwithstanding the pending proceedings, the Government has informed the Italian Government that the two marines will not be liable for arrest if they return within the time frame laid down by the Supreme Court of India, and shall once again be bound by the conditions contained in the order passed by the Court on 18th January 2013; and that, according to well settled Indian jurisprudence, this case would not fall in the category of matters which attract the death penalty, that is to say the rarest of rare cases. Therefore, there need not be any apprehension in this regard."[48]

It may be noted that as per the direction by the Supreme Court in the present case, the Ministry of Home Affairs (MHA), took a decision on 1 April 2013 ordering the National Investigating Agency (NIA) to investigate the Italian marines case.[49] On 2 April 2013, the Supreme Court had vacated its order restricting the travel of Italian Ambassador in view of the return of Italian marines on 22March 2013 (within the stipulated time). The NIA filed an FIR on 4 April 2013, replicating the original FIR filed by the Kerala Police, which includes Sections 302 (murder), 307 (attempt to murder), 427 (mischief causing damage) read with Section 34 (acts done by several persons in furtherance of common intention) of IPC. In addition to the IPC Sections, the NIA also invoked Section 3 of the SUA (Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002).[50] Slapping murder changes on two Italian marines by NIA resulted in the right wing parties in Italy mounting pressure on the Government of Italy to take up the matter with Indian authorities. Italian Prime Minister Mario Monti called up the EAM on 5 April 2013 and discussed the implication. On a parallel track, Italian Deputy Foreign Minister Staffen de

48 See <http://mea.gov.in/Speeches-statements.htm?dtl/21461/Statement+in+Loksabha+by+External+Affairs+Minister+on+return+of+two+Italian+ marines+to+India+accused+in+the+killing+of+two+Indian+fishermen> accessed on 6 April 2013.

49 See < http://www.hindustantimes.com/India-news/NewDelhi/Probe-into-Italian-marines-case-handed-over-to-NIA/Article1-1035573.aspx> accessed on 8 August 2013.

50 See <http://www.hindustantimes.com/India-news/NewDelhi/NIA-files-FIR-in-the-marines-case/Article1-1037523.aspx> accessed on 8 August 2013.

Mistura met the EAM Mr. Salman Khursid to seek a speedy trial and also ascertained the status of the trial court. According to media reports, once the charge sheet is filed, the Chief Metropolitan Magistrate Court in Delhi will take cognizance of the case, issue summons to the marines and commit the case to the Sessions Court, which would be the Special Court for this purpose.[51]

V. THE EXTENSION OF COASTAL STATES'CRIMINAL JURISDICTION UNDER UNCLOS AND GENERAL INTERNATIONAL LAW: GREY AREAS OF INTERNATIONAL LAW

The preceding sections dealt with the decisions of the High Court of Kerala and the Supreme Court with regard to jurisdiction, the availability of sovereign functional immunities to the marines and subsequent developments since the disposal of the petition in the Supreme Court. However, other important questions of international law have been raised in the Supreme Court, namely, whether the Supreme Court can restrict the movement of the Ambassador of Italy by a Court order and whether the Ambassador's appearance in the Court on behalf of the Italian nationals should be treated as part of his diplomatic function or as a personal appearance unconnected with his official function.[52] These issues have been debated at length in India and abroad. Yet, there has been no uniform opinion has emerged mainly because the exercise of extraterritorial jurisdiction in the maritime zones by a coastal State not only involves the law of the sea but also entails the application of general international law when the Law of the Sea does not prohibit the coastal State from exercising such jurisdiction or when the applicable law itself proved to be vague or unclear.

Yet another important question that arose before the Supreme Court was whether the notification issued under the Maritime Zones Act, 1976 extending Indian Penal Code and Criminal Procedure Code, 1973 (Cr.P.C) to the EEZ/CZ was consistent with UNCLOS 1982. The Court was not clear on this aspect, although it was certain that there was no conflict between Maritime Zones Act and UNCLOS. According to the Court, Article 97 of UNCLOS was the only provision which the Maritime Zones Act did not deal with. This was the only inconsistency the Court did acknowledge.

The Supreme Court did not address the legality of the extension of IPC and Cr.P.C to the entire EEZ. Although the High Court of Kerala had accepted the argument that such an extension was legal, the Supreme Court found its jurisdiction on the basis of the extension of IPC and Cr.P.C to the CZ. Both the High Court of Kerala and the Supreme Court were unanimous on the determination that the Enrica Lexie shooting incident involved homicide and that it fell outside the scope of Article 97 of UNCLOS because that provision deals with collision and any other incident of navigation. The Courts adjudicating on the Enrica Lexie incident touched upon a number of grey areas of international law, such as extraterritorial jurisdiction,

51 *The Hindu*, (city edition) Delhi, Saturday, April 6, 2013, p.1.

52 See *note 47.*

sovereign (State) immunity applicable to an agent of a state and diplomatic privileges and immunities pertaining to a diplomat's right of movement.

It may be noted that a strict reading of UNCLOS gives the sense that the coastal State's territorial jurisdiction cannot be exercised beyond the territorial sea. Although there is no conflict between the Maritime Zones Act and UNCLOS, the notification under the Maritime Zones Act extending IPC and Cr.P.C to the entire EEZ can be questioned when the coastal state's penal jurisdiction is extended for purposes not contemplated by UNCLOS. However, the exercise of extraterritorial jurisdiction can be justified on a case - by - case basis[53] since UNCLOS does not seem to have provided an ultimate frame of reference "for every legal question".[54]

The extraterritorial application of a state's penal law outside its territory is not uncommon.[55] One important condition for this kind of prescriptive jurisdiction is

53 It may be true that as a constitutional document, it may not, in Lowe's words, provide "the ultimate frame of reference for every legal question that arises within its scope". See Vaughan Lowe, *Foreword* to *The Law of the Sea: Progress and Prospects* (David Freestone et al. eds., 2006) cited in David Freestone, "Decade of the Law of the Sea Convention: Is it a Success", *Geo. Washington Intl. L Rev*, vol. 39 (2007), p. 499. There has been no uniform practice with regard to extension of jurisdiction by coastal states beyond Territorial waters. Ivan Shearer observe thus: "With the creation by inter-national convention in the second half of the twentieth century of such new maritime zones as the continental shelf, the exclusive economic zone and archipelagic waters, and the more detailed definition of the nature and extent of the territorial sea and contiguous zone, the problems of defining and regulating the exercise of jurisdiction have become even greater and more urgent. Yet, as Professor O'Connell has observed: While the texts of the Geneva Convention and the Montego Bay Convention are explicit up to a point respecting these several scales of jurisdiction, they are, in many respects, not infused with a coherent theory of jurisdiction which would add to their precision. The result is a danger of the phenomenon familiar to international lawyers of "creeping jurisdiction." If this is so, another consequence of the doctrinal incoherence may be to inhibit the emergence of customary law from the 1982 Convention, thus creating further areas of jurisdictional uncertainty as between parties and non-parties to the Convention." See I. A. Shearer, "Problems of Jurisdiction and Law Enforcement against Delinquent vessels", *ICLQ,* vol. 35, no. 2 (1986), pp. 320-343 at pp. 321-322. See also Charlette Breide and Phillip Saunders, Challenges to the UNCLOS Regime: National Legislation Which is Incompatible with International Law, available at *<http://www.gmat.unsw.edu.au/ablos/ABLOS08Folder/Session5-Paper2-Breide.pdf>* accessed on 13 February 2013.

54 *Ibid.*

55 See Rosalyn Higgins, *Problems & Process: International Law and How to Use It*, (1995), pp.73-77 at p. 77. See also Danielle Ireland-Piper, "Extraterritorial Criminal Jurisdiction: Does the Long Arm of the Law Undermine the Rule of Law?", *Melbourne Journal of International Law,* vol. 13, pp.1-36.

that such an extension should not have been expressly prohibited by a treaty[56] (in the present case, by UNCLOS). UNCLOS imposes twofold explicit limitations on a coastal state's prescriptive jurisdiction. *First*, the coastal state may not prescribe laws relating to foreign vessel design, construction, manning or equipment unless they merely implement international regulations. Pursuant to Article 94 of UNCLOS, such matters are the province of the flag state. *Second*, the coastal state may not prescribe laws so burdensome that they have the practical effect of preventing vessels from exercising a fundamental navigational right in foreign territorial seas, that is, the right of innocent passage.[57] It follows that in the absence of any limitation/ prohibition expressly imposed on the coastal state by UNCLOS, the coastal state is permitted under international law to prescribe the penal jurisdiction beyond its territory, even to high seas. In this regard, suggestions have been made that penal jurisdiction may be extended to the entire EEZ. This seems untenable,[58] however, in so far as such an extension is permitted only to the territorial sea under UNCLOS.[59]

56 The application of general international law, most importantly prescriptive jurisdiction and objective nationality principle for the purpose of extending extraterritorial criminal jurisdiction by the coastal state require that there is no expressed prohibition by the relevant treaty law for such an extension. Under the effects doctrine extraterritorial application of law is permissible wherein a state may have prescriptive jurisdiction over conduct occurring outside its territory that causes an effect within. The effects doctrine is limited to rare circumstances when conduct is generally recognized as a crime; the effect within the territory is direct, substantial, and foreseeable; and the rule is consistent with the principles of justice in states that have reasonably developed legal systems. See the details of and commentary on effects doctrine incorporated in the 2nd and 3rd US Restatement of Raw in Kathleen Hickston, "Extraterritorial Jurisdiction under the Third Restatement of Foreign Relations Law of the United States", *Fordham International Law Journal,* vol 12, no. 1(1988), p. 133. See also *SS Lotus* decision in which the Court observed that "there is no rule of international law in regard to collision cases to the effect that criminal proceedings are exclusively within the jurisdiction of the State whose flag is flown." *SS Lotus*, PCIJ p. 30.

57 Commander Andrew J. Norris, U.S. Coast Guard, "The "Other" Law of the Sea", p. 82; See <http://www.usnwc.edu/getattachment/735168b5-3883-49fb-a537-e02fa1f4a347/The—Other—Law-of-the-Sea.aspx >accessed on 1 June 2013.

58 See <http://www.thehindu.com/todays-paper/tp-opinion/its-our-boat-our-courts/article4540312.ece > wherein Prof. V.S Mani recommended: "Acting under the Maritime Zones Act, the Government of India should extend the criminal law of the land to the entire EEZ to all cases in which:
(1) the victim is an Indian national,
(2) the consequences of the crime extend to the coastal State;
(3) the crime is of a kind to disturb the peace of the country or the good order of the maritime zones of India;
(4) the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or
(5) such measures are necessary for the enforcement of other laws of India such as those relating to suppression of illicit traffic in narcotic drugs or psychotropic substances, organized crimes, and WMD Act."

59 This has been admitted by Prof. V.S Mani himself in his article, yet he has not looked into whether such as an extension of jurisdiction contradicts UNCLOS or not. See also Anne Bardin, "Coastal State's Jurisdiction over a Foreign Vessel", *Pace International Law Review*, vol. 14, issue 1 (Spring 2002), p. 11.

Those who have suggested that the coastal State can extend the penal jurisdiction to EEZ rely upon the UNCLOS provisions applicable to Territorial Sea. This does not mean that the extension of penal law beyond the territorial sea is not permissible. It is very much permissible under general international law, but it would be more appropriate to extend the penal law of a coastal state beyond its territorial waters on the basis of general international law rather than any other basis.

As has been stated earlier, in *Enrica Lexie* the court applied the "effects doctrine", according to which it is justified for States to have extraterritorial jurisdiction when the effects (consequences) of the crime are felt in the nation. This is based on the decision in *SS Lotus*.[60] It may be noted that there have been arguments as to whether the decision in SS Lotus is applicable only to high seas or all other places outside a national jurisdiction[61] and whether it is good law or bad law.[62] However, empirical evidence suggests that States increasingly extend their penal law outside their territory on the basis of the "effects doctrine".[63] National laws extending extraterritorial jurisdiction to the place where a crime has been committed also necessitate an important prerequisite, namely, some nexus (reasonable connection) between the

60 The IBA Report of the Extra Territorial Jurisdiction summarizes the conflicting view points in the following manner: "Two views exist on international law's approach to prescriptive/ legislative jurisdiction. On the first view, articulated in the1927 decision of the Permanent Court of International Justice in the *Lotus* case, a state is entitled to extend its prescriptive jurisdiction outside its territory, subject to any rules prohibiting such prescription in certain cases. However, some commentators questions whether this approach applies to cases under international law in general, as opposed to cases regarding the exercise of extraterritorial jurisdiction on the high seas.

The second view is that a state is not able to extend its prescriptive jurisdiction outside its territory unless permissive rules support such an exercise. Proponents of this view argue that states tend to justify their exercise of prescriptive jurisdiction on these permissive bases, rather than leave it to other states to object to the exercise of jurisdiction based on a prohibitive norm. Accordingly, assertions of extraterritorial jurisdiction are permitted only where there is a nexus between the state seeking to assert jurisdiction and the regulated persons or conduct falling within one of the established bases of jurisdiction. This report generally adopts this second approach."

61 *Ibid.*

62 Ivan shearer observes that the 1958 Convention on High Seas and UNCLOS 1982 have altered the view taken in the *SS Lotus* and argues that Article 97 is new customary law relating to collision of ships in the High Seas. See. I. A. Shearer, "Problems of Jurisdiction and Law Enforcement against Delinquent Vessels", *The International and Comparative Law Quarterly*, vol. 35, no. 2 (Apr. 1986), pp. 320-343 at p. 338. See also Valeria Eboli and Jean Paul Pierini, The "Enrica Lexie Case" and the Limits of the Extraterritorial Jurisdiction of India, Centro di documentazione europea - Università di Catania - *Online Working Paper* 2012/n. 39 Marzo 2012, available at <http://www.lex.unict.it/cde/quadernieuropei/giuridiche/39_2012.pdf > accessed on 3 June 2013.

63 IBA Report, pp.144-146. It is pertinent to note that European Court of Justice in W*ood Pulp case* avoided the application of effects doctrine by favouring the basis of jurisdiction that was "significantly narrower than the 'effects' doctrine in its most extreme form". See Objective Territorial Principle or Effects doctrine? Jurisdiction and Cyberspace, available at <http://www.morlacchilibri.com/inlaw/downloads/in.law_08_2.pdf>.

state seeking to assert jurisdiction and the regulated persons conduct falling within one of the established bases of jurisdiction. The Court in the Enrica Lexie case found a reasonable nexus between the State and the incident: where the victims were Indian fisherman involved in fishing activity in the EEZ. In other words, the Court seemingly applied "objective personality" and the "effects doctrine". There have been arguments made during Court proceedings and also in academic writings to the effect that Indian law extending jurisdiction is not in accordance with UNCLOS (because, according to Article 97 of UNCLOS, the flag State has exclusive jurisdiction to deal with this issue), is vague and contradicts earlier precedent.[64] Both the High Court of Kerala and the Supreme Court had considered such arguments placed before them and concluded that Indian courts have jurisdiction to try the offence which had occurred outside the territory of India on the basis of Indian penal and other laws extended to the place of its occurrence (most importantly, the SUA Act). The Courts categorically rejected the argument that Italy had exclusive jurisdiction to try the offence by virtue of Article 97 of UNCLOS. The courts did distinguish the "collision or any other incident of navigation" from the commission of the crime of homicide. It may be noted that the correctness of the interpretation of the phrase "collision or any other incident of navigation" by the Indian courts cannot be seriously questioned given that the predominant view of Article 97 is that it is customary international law only with regard to the collision of ships on the high seas.[65] This means that Italy and India may have concurrent jurisdiction to try the offence, where the collision of ships on the high seas is not involved, in accordance with general principle of law.[66]

To sum up, while UNCLOS permits the coastal State to extend its penal jurisdiction when criminal acts occur on a foreign ship in the territorial sea when the consequences of the crimes extend to the coastal State, general international law permits the extension of penal law wherever the crime is committed. Moreover, there seems to be no rule of international law that requires States to reasonably exercise their jurisdiction[67] Cedric Ryngaert says that "a classical doctrine of international jurisdiction, a doctrine which defines 'the legally relevant point of contact' as indicating the State which has a close, rather than closest, connection

64 Valeri Eboli and Jean Paul Pierini, op.cit. pp.7-17 at p.15.

65 See Ivan Shearer, op.cit. *note 62*.

66 This has been explained in a candid manner by Douglas Guilfoyle thus: "In *Lotus* the PCIJ found, unremarkably and by analogy with crimes that cross land borders, that an offence commenced on a vessel of flag State A which has fatal consequences aboard the vessel of flag State B can be subject to the criminal law of both A and B. A treaty law exception was later created for the masters of vessels in respect of crimes resulting from collision and incidents of navigation. In such cases a master can only be prosecuted by his state of nationality or license-issuing authority (UNCLOS, Art. 97). Otherwise the general principle stands. In this sense the principle of the "exclusive jurisdiction" on the flag State can mislead those unfamiliar with the law of the sea. It is not an absolute prohibition on concurrent jurisdiction." Available at < http://www.ejiltalk.org/author/dguilfoyle/> accessed on 3 June 2013.

67 Cedric Ryngaert, *Jurisdiction in International Law* (2008), p.129.

with the facts."[68] In today's practice, it is common for national legislation to extend penal law extraterritorially to implement international conventions, such as Geneva Convention, international agreements concerning weapons of mass destruction and treaties relating to Internet - based crimes or just for the sake of implementing national policy.

A. Vessel Protection Detachments and Sovereign Immunity

The Italian plea of sovereign immunity for the Italian marines on duty was a key issue both in the High Court of Kerala and the Supreme Court. The provisions of UNCLOS and UN Security Council resolutions on Piracy off the Horn of Africa were cited in support of the legality of Italian marines serving in commercial vessel.[69] However, whenever the security mission of the Italian marines in Enrica Lexie was discussed the attention of the Courts was drawn to the applicable rules and standards for PCASP[70] and not to the applicable rules and standards for the VPD (Vessel Protection Detachment). Neither the High Court of Kerala nor the Supreme Court of India was enlightened by counsel that the PCASP arrangement and the VPD,[71] despite aiming at countering piracy, are dissimilar and have different connotations in law.[72] For example, the International Maritime Organization (IMO) has been categorical that MSC.1/Circ.1405/Rev.1, MSC.1/Circ. 1406/Rev.1 and MSC.1/Circ.1408,whch deal with armed guards in anti-piracy operations, are guidelines and "are not intended to endorse or institutionalize the use of armed guards" or to replace BMPs (Best Management Practices).[73] The Courts do not seem to have appreciated the fact that only a few countries in the Europe[74] have a VPD- like arrangement.[75]

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68 *Ibid.*

69 See para 45 of the Supreme Court judgment.

70 See para 27 of Kerala High Court judgment.

71 VPD's are referred to, in the context of the Enrica Lexie, as Military Protection Squads (NMP's) paras 43 and 44 of the Supreme Court judgment.

72 PCASP may not involve the question of state immunity under international law or national law and VPD might involve the issue of state immunity. However, BMP will be applicable for both PCASP and VPD and there are common rules to be followed in the case of use of force both by PCASP and VPD.

73 See <https://www.cimicweb.org/Documents/CFC%20Anti-Piracy%20Thematic%20Papers/CFC_Anti-Piracy_Report_Armed%20Guards%20October%202011_Final_rmb.pdf > accessed on 11 August 2013.

74 According to the document available in the Parliament of UK, some States, including France, Spain, Israel and Italy, already provide VPDs to some of their shipping, and Netherlands, Germany and Norway are reportedly considering providing them. Available at <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmfaff/1318/131807.htm> accessed on 8 August 2013.

75 VPD is referred to in BMP4 (Best Management Practice against Somalia based Piracy), which has been developed and agreed by the Industry. The Guidelines contained in BMP4 are for internal consumption of the ship owners and the industry, perhaps applicable only to Somalia region as suggested in the title of BMP4. For BMP4 see <https://www.cimicweb.org/cmo/Piracy/Documents/OCIMF_BMP4_Low%20(1).pdf > accessed on 11 August 2013.

The major problem with VPD is that it does not work under the command and control of the captain or master of the vessel but under the control of the Department of Defence. This arrangement appears to rather, conflict with international maritime law and rules laid down by IMO.[76] For these reasons, the institution of VPD may be questionable under international law.[77] A State that provides legal status to VPD may treat this arrangement as legal under its national law, but in the eyes of international law, VPD does not seem to have any legal status. This means that States are not, therefore, duty - bound to accept the institution of VPD in the absence of an agreement. The question arises, in these circumstances, whether the Italian marines who serve in the commercial vessel under a trilateral agreement[78] for remuneration paid by the ship owner should be treated on official duty for the Department of Defence or not. The Supreme Court did not consider the Italian marines on board Enrica Lexie were on official duty and obviously did not go into the question of immunity that could theoretically have been available to them as pleaded.[79] The

76 Annex to IMO MSC.1/Circ.1443 25 May 2012, Interim Guidance to Private Maritime Security Companies Providing Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area (para 5.6), says that PMSC should have the policy and procedures regarding command and control on board ship. "In particular the policy and procedures should contain: a "clear statement recognizing that at all times the master remains in command and is the overriding authority on board, and an agreed procedure in the event of the master being unavailable;" See <http://www.imo.org/OurWork/Security/SecDocs/Documents/Piracy/MSC.1-Circ.1443.pdf > accessed on 11 August 2013.

77 See, Roger Philips, "Use of Private Guards and VPDs Remains Controversial", available at <http://piracy-law.com/2012/04/09/use-of-private-guards-and-vpds-remains-controversial/> accessed on 4 April 2013. However, some international lawyers like Prof. Rudiger Worfrum say that "…the detachment of military personnel on board merchant vessels as such is not contrary to general international law or the legal regime governing the sea". See Rudiger Wolfrum, "Military Vessel Protection Detachments under National and International Law", paper presented in the Contact Group on Piracy off the Coast of Somalia (CGPCS) in the 12th Meeting of Working Group 2 on Legal Issues held in Copenhagen on 10-11 April 2013. None the less it is pertinent to note that Prof.Wolfrum agrees to the view that VPD's can be seen from different point of view. In his concluding remarks he says, "The detachment of a military contingent on board a vessel raises in particular the question how to reconcile the territorial sovereignty of a coastal State with the sovereignty of the home State of the contingent. The Convention does not offer a comprehensive solution for this new situation. It seems advisable to try to achieve a solution through bilateral agreements, but it is certainly recommendable that international fora, such as this one, develop a blue print for such agreements."

78 See para 47 of the High Court of Kerala Judgment which refers to Protocol agreement between the Ministry of Defence-Naval Staff and the Italian Shipowner's Confederation (Confitarma). The Protocol provides for service of military personnel on daily payment basis by the ship owner.

79 It may be noted that under common law no distinction is made between state official acting as organ of State or as an agent. State agents enjoy the immunity in foreign courts in all civil matters. However, "the scope of immunity from foreign criminal jurisdiction is yet to be conclusively determined", for there appears to have been diverse practices in regard to criminal jurisdiction. See, James Crawford, *Brownlie's Principle of Public International Law*, (8th edn., 2012), p. 439 and 499.

executive arm of the Government of India also made it clear to the Court that it neither recognized the VPD nor consented the VPD carrying arms in Indian waters.[80]

Another important issue that arose in this case was the immunity and inviolability

80 Besides arguments submitted before the Court that India has not accepted VPD, one may also see the consistent view taken by India with regard to the use of weapons in its EEZ. The Indian declaration to UNCLOS given hereunder clearly resonates on this Point:
Declaration made upon ratification (29 June 1995):
(a) The Government of the Republic of India reserves the right to make at the appropriate time the declarations provided for in articles 287 and 298, concerning the settlement of disputes;
(b) The Government of the Republic of India understands that the provisions of the Convention do not authorize other States to carry out in the exclusive economic zone and on the continental shelf military exercises or manoeuvres, in particular those involving the use of weapons or explosives without the consent of the coastal State.
Whereas the relevant portion of the Italian Declaration has a different resonance as follows:
"Declarations made upon signature (7 December 1984) and confirmed upon ratification (13 January 1995):
"Upon signing the United Nations Convention on the Law of the Sea of 10 December 1982, Italy wishes to state that in its opinion part XI and annexes III and IV contain considerable flaws and deficiencies which require rectification through the adoption by the Preparatory Commission of the International Sea-Bed Authority and the International Tribunal for the Law of the Sea of appropriate draft rules, regulations and procedures. Italy wishes also to confirm the following points made in its written statement dated 7 March 1983:
- - according to the Convention, the Coastal State does not enjoy residual rights in the exclusive economic zone. In particular, the rights and jurisdiction of the Coastal State in such zone do not include the right to obtain notification of military exercises or manoeuvres or to authorize them. Moreover, the rights of the Coastal State to build and to authorize the construction operation and the use of installations and structures in the exclusive economic zone and on the continental shelf is limited only to the categories of such installations and structures as listed in Article 60 of the Convention.
- - None of the provisions of the Convention, which corresponds on this matter to customary International Law, can be regarded as entitling the Coastal State to make innocent passage of particular categories of foreign ships dependent on prior consent or notification."
Upon ratification (13 January 1995):
Upon depositing its instrument of ratification Italy recalls that, as a State member of the European Community, it has transferred competence to the Community with respect to certain matters governed by the Convention. A detailed declaration on the nature and extension of the competence transferred to the European Community will be made in due course in accordance with the provisions of Annex IX of the Convention.
Italy wishes also to reconfirm the following declarations made when it signed the Convention:
According to the Convention, the coastal State does not enjoy residual rights in the exclusive economic zone. In particular, the rights and jurisdiction of the coastal State in such zone do not include the right to obtain notification of military exercises or manoeuvres or to authorize them. Moreover, the rights of the coastal States to build and to authorize the construction, operation and the use of installations and structures in the exclusive economic zone and on the continental shelf is limited only to the categories of such installations and structures as listed in Article 60 of the Convention.
None of the provisions of the Convention, which corresponds on this matter to customary international law, can be regarded as entitling the coastal State to make innocent passage of particular categories of foreign ships dependent on prior consent or notification…"

of the Ambassador of Italy. As has been stated earlier, the Italian marines who were on bail in New Delhi were allowed to go to Italy by the Supreme Court of India to exercise their franchise in the Italian election on the basis of an affidavit filed by the Italian Ambassador to the Court. In the affidavit, the Ambassador personally undertook responsibility for the return of the marines by 22 March 2013.[81] After the Italian Government decided not to return them to India,[82] the Indian Supreme Court ordered[83] the Ambassador of Italy to remain in India until the marines reported back.[84] Indian Airports were on alert to monitor the movement of the Ambassador.[85] Although the Supreme Court direction to the Italian Ambassador was criticized by Italy[86] and some practitioners of the law of diplomacy as a violation of diplomatic privileges attached to the Italian Ambassador under international law[87] and national law, the situation was fortunately not exacerbated due to the reversal of a decision by Italy and the return of Italian marines before the deadline set by the Supreme Court. Italy justified its delay in sending back the marines for trial by saying that it helped to get necessary assurance from the Government of India that the Marines would not be charged for a crime that would result in the death penalty.

As has been stated elsewhere, the NIA which is in charge of the investigation of Enrica Lexie incident, has charged the Italian marines, among other things, for committing homicide under IPC and under Section 3 of SUA Act. The NIA will have a difficult task in translating huge volumes of documents in Italian and recording of statements from Italian witnesses. Some of the witnesses in Italy have sought exemption from visiting India for questioning and recording their statements and

81 The Telegraph, April 3, 2013 <http://www.telegraphindia.com/1130403/jsp/nation/story_16741604.jsp> accessed on 10 August 2013.

82 <http://www.thehindu.com/news/national/marines-wont-return-to-india-for-trial-says-italy/article4497965.ece> accessed on 9 August 2013.

83 See <http://india.blogs.nytimes.com/2013/03/14/india-and-italy-share-blame-in-marines-case-experts-sa/?_r=0 > accessed on 11 August 2013.

84 <http://india.blogs.nytimes.com/2013/03/15/indias-airports-told-to-not-let-italian-ambassador-fly/?_r=0> accessed on 9 August 2013.

85 <http://articles.timesofindia.indiatimes.com/2013-03-16/india/37766793_1_italian-vessel-enrica-lexie-indian-fishermen-shot-dead-two-fishermen> accessed on 9 August 2013.

86 <http://expressindia.indianexpress.com/latest-news/Italy-says-India-violating-diplomatic-immunity/1090247/> accessed on 9 August 2013.

87 See *note 47*. Most importantly see the views of Mr. Natwar Singh. It is pertinent to note that the Vienna Convention on Diplomatic Relations is silent on foreign travel of a Diplomat from host country. It deals only with movement within the host country (Article 26 of the Vienna Convention on Diplomatic Relations). However, the diplomatic practice indicates that travel restrictions within the host country are not contrary to Article 26. If the host State restricts the freedom of the ambassador of a sending State the sending State can also impose restrictions on the Ambassador representing the host state in the sending State on the basis of reciprocity. See Eleen Denza, *Diplomatic Law* (3rd Edn.) 2008, pp. 205-210. The scope of this freedom has also been elaborately discussed in *Case Concerning United States Diplomatic and Consular Staff at Teheran*, ICJ Reports (1980). When the Convention does not speak about the movement of the diplomat outside the host country, hence the freedom of the diplomat to move freely outside the country cannot be interfered with.

suggested three alternative options, namely facing an NIA team in Rome, questioning via video conferencing or replying to mailed questionnaires. However, the Ministry of Home Affairs seemingly turned down all of these options.[88] The fact of the matter remains however is that, a few Italian witnesses have not appeared for NIA questioning despite having been served notices.[89]

In cases of this nature wherein jurisdictional claims are made by two countries, things need to be sorted out through international co-operation between the States concerned.[90]

The application of national law of one state to persons purportedly performing the sovereign functions of another state outside the territory of the states concerned will typically create difficulties in the states relationship.[91] However, when the judiciary is seized of the matter, the executive branch of Government of India has no say or control on the decision making- process of the judiciary. Nonetheless, foreign affairs are conducted by the executive branch of the Government and not by the judiciary. Any friction in the relationship between India and Italy in regard to the Enrica Lexie incident needs to be sorted out by the executive branch. The Governments of Italy and India, therefore, have a duty to find ways and means to resolve their differences.

Of course, India has asserted its jurisdiction and made a point that the flag State does not have exclusive jurisdiction to deal with an illegal act or incident/ crime on

88 See, *The Times of India*, New Delhi, Wednesday, July 24, 2013, p.14. However on 9th August, complying with summons issued by NIA, Novillio Carollo, Second Master of the ship, appeared before the NIA's Investigating Officer Vikraman and gave a statement. With this, all the six ship crew — Master of the vessel, Umberto Vittelli, Chief Officer James Mandley Samson, Second Officer Sahil Gupta, Seman Fulbaria Marendra Kumar Naren and former ordinary seaman Kantamuich Tirumal Rao, who were summoned to appear before NIA as witnesses, have completed their deposition. See <http://www.dnaindia.com/india/1872277/report-italian-ship-s-second-master-deposes-before-nia> accessed on 11 August 2013. See also <http://newindianexpress.com/nation/Marines-case-at-snails-pace-as-witnesses-fail-to-appear/2013/08/06/article1720514.ece> accessed on 13 August 2013.

89 <http://zeenews.india.com/news/nation/delay-in-trial-of-italian-marines-as-witnesses-don-t-appear_867033.html> accessed on 10.8.2013. Recently the Italian Defence Minister Mario Mauro appeared to have said that the four marines who were on board Enrica Lexie when the shooting incident occurred "would not travel to India" to depose as witnesses. See, *Times of India*, New Delhi, 23 August 2013, p.15.

90 Report of the Task force on Extraterritorial Jurisdiction, p.27 available at <http://documents.law.yale.edu/sites/default/files/Task%20Force%20on%20Extraterritorial%20Jurisdiction%20-%20Report%20.pdf >.
According to Prof. Vaughan Lowe, principled self restraint in asserting the jurisdiction, harmonization of national law and providing procedures for negotiated settlement of disputes are some of the methods applied by States to sort out the differences. See Vaughan Lowe, *International Law*, (2007) p.183. During the panel discussion conducted by the Indian Society of International Law (ISIL) on Enrica Lexie Incident, one of the panelists Rear Admiral (Retired) O. P. Sharma, had mentioned that in the past India adopted some self-restraint with regard to visiting foreign sailors committing crimes even in the territory of India, when the country to which the offender is a national assures trial for the offence committed in India.

91 Danielle Ireland- Piper, *op.cit. note 55*, p. 3.

the high seas. India demonstrated its firmness and resolve to try the marines in New Delhi. However, the outcome of the trial will be unpredictable. What is predictable is that the trial will be time consuming, and cumbersome, requiring foreigners and foreign language speaking people to testify in the criminal court in New Delhi. Even witnesses from Kerala need translators as they do not speak Hindi.

The following questions, therefore, may be raised in this context: what will happen if the marines are sentenced at the end of the trial? Would the Italian Government allow the marines to undergo their sentences in India on the face of heavy criticism and condemnation by its people, or would it make use of Agreement on the Transfer of Sentenced Persons between India and Italy (not yet ratified by India)[92] to avoid embarrassment? If the marines are acquitted by the Court after considerable delay, what would be Italy's response? What would be India's stand then? Could the entire process leading to the trial of Italian marines in India be criticized as a wasteful exercise that only facilitated the straining of the relations between two otherwise friendly countries?

It may be noted that Supreme Court in its judgment unequivocally made clear that the Italian marines can re-agitate the question of jurisdiction in the Trial Court. Needless to say, the Trial Court will have to factor in India's obligation to cooperate in the repression of piracy operation under Article 100 of UNCLOS. India has been very active in countering piracy and has joined hands in all the global efforts to repress piracy, including deploying warships off the coast of Somalia and in the Gulf of Aden to protect trade routes and the global supply chain.[93] India fully supports all international efforts at the UN and several other initiatives at the regional level, as well as the Contact Group on Piracy off the Coast of Somalia, which is coordinating anti-piracy efforts.[94] After all, Article 100 of UNCLOS has been widely interpreted that it imposes on State Parties a more general obligation.[95] Therefore, the invocation of Article 100 of UNCLOS and Somalia - specific resolutions of the UN Security Council, which are region and time specific, may not be helpful[96] to preclude the jurisdiction of Indian Courts with regard to acts done by the Italian marines.

However, what other possibilities might be open to Italy once the trial is over? It may be noted that after the exhaustion of local remedies, Italy would be within its rights to challenge the assumption of jurisdiction by India over Enrica Lexie incident

92 According to Article 20 (1) of the Agreement, "the agreement shall come into force on the first day of the second month of the date of the last notification".

93 Upendra Acharya, "Humanitarian Aid and Assistance to Constrain Piracy in Somalia: Ignored Facts and the Political Delivery of Charity", in Bimal N. Patel and Hitesh Thakkar (eds.), *Maritime Security and Piracy* (2012), p.87.

94 M.Gandhi, "Indian Ocean and Menace of Piracy: Government Maritime Legislation", in Bimal N. Patel and Hitesh Thakkar (eds.), *Maritime Security and Piracy* (2012), p. 369.

95 It does not even require States to legislate criminalizing Piracy. See Jose Luis Jesus, "Foreword", *American University Law Review*, vol 59, p. 1216; available at <http://www.wcl.american.edu/journal/lawrev/59/5jesus.pdf>.

96 See,Tullio Treves, "Piracy, Law of the Sea, Use of Force: Developments Off the Coast of Somalia", *EJIL,* vol. 20, no. 2 (2009), pp. 399-414; for the detailed analysis of limits of use of force in combating piracy.

before an international tribunal on the basis of Article 97 and other provisions of UNCLOS.[97] Since the Italian Declaration on Settlement of Disputes concerning the application or interpretation of the UNCLOS (Article 287) provides for the jurisdiction of International Tribunal for Law of the Sea (ITLOS) and International Court of Justice (ICJ)[98] as opposed to Indian default option favouring arbitration in accordance with Annex VII of UNCLOS,[99] Italy could weigh the possibility of challenging India on the interpretation of the provisions of UNCLOS through Annex VII arbitration route.

In this context, it is pertinent to note that Italy has been making a number of political statements on jurisdiction and the sovereign (state) immunity issue in various forums since the Enrica Lexie incident.[100] There has been no marked difference between the Italian political statements and the arguments made before the Courts in India. It should also be acknowledged that the European Union has supported the Italian view on the incident of Enrica Lexie in a political forum.[101]

One cannot afford to ignore the possibility that Italy might initiate proceedings against India in an international adjudicatory forum.[102] The national law of one

97 See Rudiger Worfrum, *Military Vessel Protection Detachments under National and International Law*, *op.cit. note 77.*

98 Declaration Italy made after ratification (26 February 1997).
"In implementation of Article 287 of the United Nations Convention on the Law of the Sea, the Government of Italy has the honour to declare that, for the settlement of disputes concerning the application or interpretation of the Convention and of the Agreement adopted on 28 July 1994 relating to the Implementation of Part XI, it chooses the International Tribunal for the Law of the Sea and the International Court of Justice, without specifying that one has precedence over the other.
In making this declaration under Article 287 of the Convention on the Law of the Sea, the Government of Italy is reaffirming its confidence in the existing international judicial organs. In accordance with Article 287, paragraph 4, Italy considers that it has chosen "the same procedure" as any other State Party that has chosen the International Tribunal for the Law of the Sea or the International Court of Justice".

99 Article 287(3) says, "A State party which is a party to a dispute not covered by a declaration in force shall be deemed to have accepted arbitration in accordance with Annex VII."

100 Matteo Crippa, "From New Delhi to Rome (and Back)via Hamburg or the Hague: The Enrica Lexie Incident and the UNCLOS Dispute settlement Mechanism"< http://piracy-law.com/2013/03/21/from-new-delhi-to-rome-and-back-via-hamburg-or-the-hague-the-enrica-lexie-incident-and-the-unclos-dispute-settlement-mechanism/> accessed on 10 August 2013.

101 See,< http://www.un.org/News/Press/docs/2012/sc10820.doc.htm> accessed on 11 August 2013, for the summary of statements of EU and Italy and reply by Indian Permanent Representative to UN during the 6855th Meeting of the Security Council on 19 November 2012.

102 In an international law matter where States are involved it is only fair to leave it to the decision of an impartial international tribunal than judiciary of a State to adjudicate the matter. Andre Nollaemper says, "The rule of law cannot allow the very party whose compliance in question to determine whether it is transgression, and thus at least creates a presumption against entrusting national courts with the task of sitting in judgment on the state of which they are a part;" Andre Nollaemper, *National Courts and the International Rule of Law* (2011), p. 47.

country is only a fact before an international tribunal.[103] Therefore, the interpretations given by the Indian Supreme Court on UNCLOS and the non-availability of state immunity to the Italian marines as an agent of a foreign State are binding only in Indian law. Once the legal issues relating to the Enrica Lexie incident, including extraterritorial jurisdiction are taken before an international adjudicatory forum, a different decision could emerge given that the subject matter of the dispute involves certain grey areas of international law. There is a possibility that such a decision could be in conflict with the Supreme Court judgment in Enrica Lexie.

VI. CONCLUSION

The Supreme Court judgment on Enrica Lexie case protects India's interests in more than one way. First, in the Enrica Lexie judgment, the Supreme Court settled once and for all that there is no conflict between the provisions of UNCLOS and Maritime Zones Act of 1976, despite arguments advanced in the Court that the " Maritime Zones Act, … is a departure from and inconsistent with UNCLOS…" [104]. Second, the Supreme Court concluded that "…India is entitled both under its Domestic Law and the Public International Law to exercise rights of sovereignty up to 24 nautical miles from the baseline on the basis of which the width of the territorial sea is measured…"[105] The Court further held that in so far as "(T)he incident of firing from the Italian vessel on the Indian shipping vessel having occurred within the Contiguous Zone, the Union of India is entitled to prosecute the two Italian marines under the criminal justice system prevalent in the country…" [106] Third, the Supreme Court confirmed that Article 97 of UNCLOS applies only in case of collision of ships and not where a criminal act has been committed on an Indian national from on board a foreign commercial vessel in the sea beyond a state's national jurisdiction. These interpretations are important for India to protect its nationals from crimes committed in areas beyond its national jurisdiction.

If the Supreme Court decision is allowed to be challenged by an international adjudicatory forum, a different interpretation could emerge, and possibly what has been achieved in the Supreme Court in Enrica Lexie could seldom be preserved. How could Italy be prevented from challenging India before an international adjudicatory forum in regard to assumption of jurisdiction over Enrica Lexie incident? Indian Courts cannot possibly ensure this. However, it is a well-known fact that countries seldom approach a dispute settlement forum when a dispute is settled by other peaceful means. If the marines are allowed to be governed by Italian law, at least after the end of the Indian trial, then the dispute might come to an end. This cannot be done through law. Law has its own limitations in settling disputes in an adversarial setting. Yet, diplomacy can work towards finding an acceptable solution where both Italy and India can mutually benefit: India by preserving the interpretation

103 James Crawford, *op.cit*. p. 52.

104 Paras 33 and 50 of the Supreme Court judgment.

105 Para 100 of the Supreme Court judgment.

106 *Ibid.*

of the Supreme Court in the Enrica Lexie case, and Italy by allowing the Italian marines to be governed by the Italian law after the trial is over in India.

There have been a number of reported incidents in which fishermen have been killed by anti-piracy forces.[107] What is unique in the Enrica Lexie incident is that an incident of this kind has been brought under judicial scrutiny. In spite of the fact that guidelines have been formulated and notified by the IMO that restrict the use of force in anti-piracy operations, we do not have credible statistics to appreciate how strictly these guidelines have been followed by commercial vessels. We must also be conscious of the fact that Enrica Lexie case is unprecedented and that its resolution according to law entails an arduous journey through grey areas of international law. To find a satisfactory solution, we have to see beyond the grey areas of law. Where the limits of law are exhausted, it is for the diplomacy to mend friendly relations so that desired results may be achieved.

107 According to a media report at least eight fishermen from India and Yemen have been killed since 2008 by soldiers assigned to deter pirates or by guards responsible for keeping ship cargos and crews safe. See <http://www.bloomberg.com/news/2012-11-29/brother-shot-dead-fishing-tests-armed-guards-accountability.html> accessed on 13 August 2012.