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on the Law of the Sea, Authored By: Mr. Anshuman Das (BBA LL.B), KIIT
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ABSTRACT:

*“The paper addresses the development from the case of **Enrica Lexie (Republic of Italy v. Union of India¹)** which is a landmark case concerning the implications on the Law of the seas with connection the law of the nation, this is a very debatable case that concerned with the killing of two Kerala fishermen by two Italian marines on board in **Enrica Lexie** on **February fifteen, 2012**, nearly eight years ago. This incident has taken place **about 20.5 nautical miles** from the coast of the Indian territorial boundary, where **Enrica Lexie** was an oil tanker vessel flying the Italian flag had committed the crime in the sea. Following this event, the two mariners were booked under various charges as stated in the **Indian Penal Code** and also application of criminal jurisdiction over it. It was said by the **Republic of Italy** that India had no jurisdiction over this matter and also, they are violating the **United Nation Convention of The Law of Sea**, which both the country had ratified, which makes them a part of the convention. The contention has instigated a heavy discussion in the Italian Republic and the Republic of India moreover as in the entire International Community.*

*Consequently, the case provides the event to critical reflections on a debated subject of law of nations, the dilemma of state jurisdiction for crimes committed at sea conjointly, encompasses led to a perilous dispute between the countries which lead to a diplomatic crisis among the two-nations. The accompanying paper would discuss the legal implications of this dispute, and also the contradicting positions persisted between both nations and also some of the problematic disputes which arose regarding the rule laid in the interpretation of **United Nations Convention on the Law of the Sea (UNCLOS)**, also commonly called as the **Law of the Sea Convention** and other domestic law related to this.”*

Keywords: *The Law of Nation, Enrica Lexie, United Nations Convention on the Law of the Sea (UNCLOS); Law of Crime.*

¹ (2013) 4 SCC 721.

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I.INTRODUCTION:

Enrica Lexie case is one of the most controversial cases related to the killing of two Indian fishermen who had gone to the sea for fishing and they were opened fired by two of the navy marines who were on board the ship of Enrica Lexie and flying the Italian flag. This incident occurred along about *20.5 nautical miles* from the territorial cost boundary of India coast from a place near *Karla called Ambalapuzha*, proximate to the outer border of the *Republic of Indian Contiguous Zone* and within the confines of the *Exclusive Economic Zone (ZEE) of India* on fifteen February 2012.² This incident was divulged through "*Mercury Chat*". In the aftermath of the event the Vessel had nearly covered thirty-eight nautical Miles, the Vessel was solicited to enter Port Kochi to cooperation and establish suspected pirated that allegedly had been appreciated. The vessel turned course and headed towards Kochi port where it turned up concerning midnight of constant day.

The Master of the Vessel was afterwards privy that an *FIR (First info Report)* on the file of the *Circle Inspector, Neendakara*, has been registered *under section 302*³, which is for Murder under the Indian Penal Code and also with *section 34* as there was a common intention within the same FIR, filed under *section 154 of the Indian Criminal Procedure Code*.⁴ The Italian oil tanker *M.V. Enrica Lexie*, which had set to sail in the rout of Sri Lanka towards Djibouti on the Horn of Africa. On this following rout, they had an encounter with a boat named MV St Antony, which was an Indian fishing boat used for a commercial purpose. According to the Italian version of the story they had mistaken the boat as a pirate vessel, it was nothing but a case of the cold-blooded murder of innocent life. The accused were apprehended and put into custody by the Indian authority which led to diplomatic crises between the countries, the Italian government had claimed for exclusive jurisdiction on this matter for trial regarding the trial of the Italian marine. In response to this statement, the Indian government responded by prosecuting them before their court. This paper would analyze the jurisdiction management

² Eboli, Valeria & Pierini, Jean Paul. (2012). The "Enrica Lexie case" and the limits of the extraterritorial jurisdiction of India.

³ Section 302 of the Indian Penal Code.

⁴ Circle Inspector of Police, Neendakara, Kollam District, Kerala, F. I. R. No. 2 of 2012.

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and to what extent the state jurisdiction of seas would apply in the above case and interpret the relevant provisions in this regard, also the relevant provisions of the United Nations Convention on the Law of the Sea and special provision mention in the international law concerning state jurisdiction for a Martian act of terrorism, and stand of both country in this regard.

I.I THE LEGAL CONFLICT:

The Italian republic had delineated the incident by stating that the republic of India had violated a series of norms according to the International Law, there were various allegations by the Italian republic against India;

- i.* Indian administrative authority had acted by machination by asking the Enrica Lexie to change their course and return to the port of Kochi
- ii.* The Indian troops had taken a thorough examination and investigation of the Enrica Lexie ship and also had interrogated the crew member of the ship.
- iii.* The two naval officer who had committed the crime were apprehended and taken into custody by authorized authority, Italy argued that India had no jurisdiction in this matter and India countered it by saying that the victims were of Indian origin and war hence need to be given legal remedy to it, this case got a wide media coverage which made this an important matter the main question was raised that is India has the jurisdiction to punish them or not this matter was then sent to the tribunal.

II. THE JURISDICTION OF THE STATE REGARDING SEAS:

When we talk about the standing of state regarding the seas it can be differentiated into the different categories first is what is the opinion regarding it of the legislative body, the body which authorizes rule and regulation in the state and then comes to the judiciary body which works when this rule and regulation of law are not followed by giving punishment to them by either court order or and executive action. The State can exercise its jurisdiction over mater regarding anything taking place in its territory. It would be considered wrong if it crosses this line of exercising of power then it would be considered unlawful under this subject when a crime has taken place physically in the territorial boundary or has taken place inside the

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boundary of the state or the territorial border of it on the other hand when it comes to a crime committed abroad but has affected in the state can exercise territorial jurisdictions⁵. It has been seen that country invokes territorial jurisdiction quite often when it is inside the territory of India but in some cases, it can be used for extraterritorial jurisdiction this has got recognition under international law as well as in customary international law.⁶

There are certain criteria to invoke this principle;

- i. crime committed by a citizen in a foreign territory.*
- ii. foreigner committing a crime against nationals' interest of the state this is also known as the passive personality principle.⁷*

The last principle is extraterritorial is the universal principle which is when a state can exercise its jurisdiction when there is no connection with the crime at all but can be done only if the mater international crime and related to jus cogens norms but when it comes to the sea it is a debatable topic as seen in the past as well as now whenever we talk about sea it has various uses like for commercial use and other activity so it has to be kept free but finally, it was stated that territorial claim and sovereignty can be expressed near the coast of the sea there is a further development to this in international law.

III. THE LAW OF THE SEA IN THE GENEVA CONVENTION:

The United Nations Convention on the Law of the Sea (UNCLOS), which is also called the Law of the Sea Convention before this the principal of this had evolved in a case called the lotus case⁸ in which it was stated by the PICJ that when a dispute arises in the high sea then it must be considered as a dispute between two states in the judgment of the case it was stated a guilty act committed on the high sea where a vessel flying its flag of the country is should be considered as a dispute between to country there but no rule in international law states that state cannot apply territorial jurisdiction. And if the crime has been committed within the territory

⁵ C. RYNGAERT, 'The Concept of Jurisdiction in International Law', p. 1, at: <https://unijuris.sites.uu.nl/wpcontent/uploads/sites/9/2014/12/The-Concept-of-Jurisdiction-in-International-Law.pdf>.

⁶ C. RYNGAERT, 'The Concept of Jurisdiction in International Law', op. cit., p. 2.

⁷ G. R. WATSON, 'The Passive Personality Principle', Texas International Law Journal, 28, 1993.

⁸ The Lotus Case (Turkey v. France), Judgment, 1927, Series A. - No. 10.

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or the boundary of the state is entitled to claim jurisdiction on it but the after the world war II there was a need for a treaty regarding this in the 1958 Geneva convention on the high seas was established as a treaty which gave new rule and regulation to the international law this gave a new opinion regarding this concept it was stated that no state can impose its sovereignty over the high sea the convention also rejected the principle laid down by the ICJ in the lotus case.

Article 11 of the convention states that whenever if there is a collision or any other incident regarding the navigation take place in a ship on the high sea which involves any kind of penal or a problem the person authorized to impose penal provision except the judicial authority⁹ or an administrative authority either by the flag state or the state of which he is a citizen of. This treaty ambit was further extended by signing the contiguous zone which says that the sovereignty of the state in extending to jurisdiction gets a bit wider to international water it extends to adjacent to its coast of the territory so applying the above to principle we can conclude by saying that the state has jurisdiction only to the extent of the limited area along with the coast of the territory no jurisdiction beyond this can be applied¹⁰.

III.I JURISDICTION OF SEAS ACCORDING TO THE UNCLOS:

It has been distinguished that the sea is divided into different jurisdiction it can be described as follows the territorial sea and the contiguous zone then is the exclusive economic zone (EEZ) and the final one is the high sea and exclusive flag state jurisdiction.

III.I.I THE TERRITORIAL SEA AND THE CONTIGUOUS ZONE:

It has been mentioned in the articles 2 and 3 of the UNCLOS¹¹, the territorial water is a belt of water which go along the coast it is considered to be 12 nautical miles from the baseline, which is as stated in the Geneva convention says that the state has all the jurisdiction over this area, this then further extended by a contiguous zone this starts from the outer edge of territorial water,

⁹ 1958 Geneva Convention on the High Seas, Article 1.

¹⁰ 1958 Geneva Convention on the Territorial Sea and Contiguous Zone, Article 1.

¹¹ 1958 Geneva Convention on the Territorial Sea and Contiguous Zone, Article 2.

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it is another 24 nautical mile from that baseline, it has been mentioned in the article 33 of UNCLOS accordingly as we interpret this according to UNCLOS the contiguous zone is where the state has limited control over it can be said not full sovereignty in that area they can only exercise some rule and regulation as mentioned in article 33.¹² UNCLOS Related to immigration and sanitary laws and within the territorial sea further can punish only for the above crime, it can be said that in the contiguous state may only enforcement power, no legislative or judicial power with them.

Article 27 lays down certain rule regarding the arrest of a person and application of criminal jurisprudence in the following article it has been mentioned that criminal jurisprudence won't be applicable on a foreign ship passing through the territorial sea to arrest any person or to investigate while passing the vessel.

- (a) if the consequences of the crime extend to the coastal State;
- (b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;
- (c) if the assistance of the local authorities has been requested;
- (d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances;

III.I.II EXCLUSIVE ECONOMIC ZONE (EEZ):

This basically for the benefit of the state this a zone Which is beyond 12 and 24 nautical miles it is done so that the coastal state can enjoy some natural resources within the bordered area but it should not overlap with the territory of another coastal state the maximum extends an EEZ can go is up to 200 nautical miles from the coast example like fishing or search for natural resources as mentioned in article 57 of UNCLOS¹³, here the jurisdiction concept is different as in it is only related to research and protection of natural resources according to article 73 it

¹² 1958 Geneva Convention on the Territorial Sea and Contiguous Zone, Article 33.

¹³ UNCLOS, Article 58(2). On the EEZ, see, inter alia, R. BECKMAN & T. DAVENPORT, The EEZ Regime: Reflections After 30 Years, LOSI Conference Papers, 2012.

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states that the state may have sovereignty right to explore and manage living resources the can legislate law related to this are to protect the natural resources and they can arrest do judicial proceeding too.¹⁴

III.I.III THE HIGH SEAS AND THE EXCLUSIVE FLAG STATE

JURISDICTION:

It is referred to as an area in the sea for which no state can claim sovereignty over it as per the Genera convention it has defined high sea as the place a territorial sea except the international water of the state but there was a debate regarding the EEZ zone as we have already discussed that EEZ has a limited jurisdiction this has been mentioned in article 86 of UNCLOS which states that high sea applies to all parts of the sea which is not a part of EEZ and also state water. Since no one has a sovereign claim over the high sea then what will happen when a crime is committed there, leads to the principal of Exclusive Flag State Jurisdiction (EFSJ).¹⁵

This rule has been a part for a long time as it is a customary international law this has been in existence even before the UNCLOS. It has been now interpreted into the article of UNCLOS as stated in article 92¹⁶ which says that the ship needs to sail under the flag of their respective state only and save in exceptional cases expressly provided in treaty or convention shall be subjected to the exclusive jurisdiction over the high seas.

This exclusive jurisdiction can impose as well as enforce it but to some restriction as mention in convention and customary law. It can be safely concluded from the above that a ship is a floating island of the state so it can be said that it is a part of the territory of the state it would include everything on the ship the people are treated as an entity of the flag state.¹⁷

¹⁴ UNCLOS, Articles 73.

¹⁵ A. N. HONNIBALL, 'The Exclusive Flag State Jurisdiction: A Limitation on Pro-Active Port States?', The International Journal of Marine and Coastal Law, 31, III, 2016, pp- 499 et ss.

¹⁶ UNCLOS, Articles 92.

¹⁷ 7 M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea), (Judgment) [1999] ITLOS Rep 10, para. 105.

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IV. THE ISSUE OF JURISDICTION IN THE ENRICA LEXIE

CASE:

The case Enrica Lexie Case is related to a cardinal question that is based on the exclusive jurisdiction which is both prescriptive and enforcement jurisdiction in India as well in the case of Italy. In this following case, the Italian republic had to claim exclusive jurisdiction regarding the EFSJ. India had countered this argument by interpreting the passive personality principle this part of the paper will deal with the relevant provision of international law and its application in this case.

IV.I EXCLUSIVE JURISDICTION APPLICATION IN THE CONTIGUOUS ZONE AND EEZ:

The application of contiguous zone and EEZ was brought into the picture as we have already discussed the above terms and their importance, it has much more importance here as in this case both the country had many dispute and argument about the facts and the case but agreed to one point which was that the incident had taken place 20.5 nautical miles from the Indian sea coast of Kerala by this it could be said that it falls within the contiguous zone and also the EEZ but outside the Indian territorial water which is up to 12 nautical miles from the coast as we have discussed earlier in this paper.¹⁸

Italy said that India had no jurisdiction over the case, it was a part of the UNCLOS and had no sovereign right over it as interpreted in article 33 and also in 56 of UNCLOS¹⁹. The opinion of Italy was as India did not have any sovereignty in respect to the territorial jurisdiction in the contiguous zone and even considering the EEZ they have the only jurisdiction up to natural resources nothing else there is no territorial jurisdiction on both cases so it has no right to impose penal law regarding any criminal act so beyond the contiguous zone it is basically the high seas which is open to all as it is the freedom of navigation. So, it can be said that Italy

¹⁸ Supreme Court of India, Writ Petition No. 135 of 2012, Republic of Italy & others v. Union of India & others.

¹⁹ Supreme Court of India, Writ Petition No. 135 of 2012, para. 20.

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considers that contiguous zone and the EEZ are areas outside the territory of Indian, it has only a partial jurisdiction in it as per the UNCLOS this were some of the main arguments of Italy against India to summarise the above it can be pointed out that;

- i.* this incident falls outside the scope of jurisdiction of India as per articles 33 and 57 of the UNCLOS in regard to the Contiguous Zone and EEZ;
- ii.* this incident had taken place outside the territorial water of India and even the vessel was flying an Italian flag and so will get protection under EFSJ which gives the right to the Italian court to prosecute them;

India argument against Italy whereas follows;

- i.* India had sought protection under sec 7.7(a) of the Maritimes Zones Act which stated that the central government can extend its restriction or modification as it thinks fits for the time being in India or EEZ but need to publish in the official gazette;
- ii.* the offence was directed toward India which violates the passive personality principle;
- iii.* has affected the security of the country;
- iv.* the death of the fisherman did not happen in the board of Erica Lexie but on the Indian fisherman boat this the application of the effect's doctrine;

Indian argument is based on the principle laid down in the lotus case so according to this, the state can extend its jurisdiction through local law as far as no specific rule mentioned in international law by backed by article 59 of the UNCLOS where it says that if there is no jurisdiction mention by the convention to the coastal state or state within the EEZ if there is a conflict then it must be resolved through equity and in light to all relevant circumstances. India argued that it had jurisdiction according to article 56 which laid down that the coastal state can make law related to the EEZ. Keeping this in mind it would also include the safety and security of the fishermen. According to Italy view, it has been laid down in the following articles 91,92,94,97 of the UNCLOS, which have been established under public international law and to which India is a part of UNCLOS, is obliged to recognize the primacy of the flag state jurisdiction unless it is explicitly entitled to exercise sovereign rights.²⁰

²⁰ Supreme Court of India, Writ Petition No. 135 of 2012, para. 32.

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IV.II THE APPLICATION OF ARTICLE 97 IN THE ENRICA LEXIE CASE:

The application of this provision is in favour of the Italian republic as it states in this article that no other than the flag state can detain the ship and also in respect of arrest and investigation to taken place in the high seas. Italy states that it is an incident of incidental navigation taken place in high seas. It also argues that the EEZ and the contiguous zone should be considered as high seas for the application of article 97, it further stated that applying of article 97 and also the lotus doctrine prevents India from exercising criminal jurisdiction. India however responded to this by that article 97 won't be applicable here as this is a case of a murder which cannot be brought in to the definition of incidental navigation as incidental navigation is to be interpreted says that the event must be an unexpected and unanticipated one but firing on unarmed fisherman boat who were about 200 metres is not a justification to this.²¹ The second point raised by the Republic of India was the article 97 only applies to the high seas not to the EEZ and Contiguous Zone as stated in the definition of the high sea in article 86 of UNCLOS, after all, arguments Supreme Court ruled that India has the jurisdiction over this as 200 mile EEZ belongs to them but stated that it can be triable in India and also that only the Indian government can exercise this jurisdiction not the Kerala government in this case.

IV.III THE OUTCOME OF THIS ENRICA LEXIE CASE:

The Italian republic was blindsided and they had no other way to escape from this mater so they took it to the international tribunal for the law of the sea (ITLOS). Even here they contended that India had no jurisdiction in the case. This issue leads to a political crisis between the country and a diplomatic dispute between them. Finally, on July 2, 2020, the Permanent Court of Arbitration gave its final verdict, in this case, it stated that India had not violated any ground in articles 87,92,97 and 100 as the opposition had contended to do so. "India is precluded from exercising its jurisdiction over the Marines "and must cease doing so as a form of sufficient remedy. It also said that the Italian republic had breach articles 87 and 90 of

²¹ Kerala High Court, WP(C)No. 4542 of 2012, para. 27.

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UNCLOS. The tribunal said India is entitled to claim damages for physical harm, mental harm, and also moral harm suffered by the captain and crew member after this the Italian republic gave monetary compensation to the victim family of 1 crore rupees.

V. CONCLUSION:

Analysing and interpreting the relevant law related to the case of Enrica Lexie, the case has still some open strings in it, it gives us an idea that there is a big conflict of jurisdiction involved here regarding this in international law. The demarcation or the distinction of jurisdiction, it has to be more precise and accurate. When it comes to the law of the sea, it does not deal with a single law or single statute but it is also has a connection to other legal instrument and criminal jurisdictional law but the prima face case mostly deals with the UNCLOS the application of criminal jurisdiction cannot exceed the territorial boundary of the sea or it can also not be applied on a foreign vessel but it can in some cases where there is justification to this there have been lots of flaws related to this law most particularly the EEZ zone jurisdiction has not yet been cleared out. And also, regarding the lotus doctrine, is it still a valid doctrine as it was removed by the UNCLOS when it came into power as in this case it was brought into the picture by the Indian republic this mater can only be sorted out by the international tribunal.

Did India get justice or it was a lose? Most may agree that India got justice but I don't agree with this as this was a case of cold-blooded murder and since this incident had taken place in the EEZ zone of India, they could have placed criminal jurisdiction over it but the PCA award did not allow as India was asked to preclude its jurisdiction over this matter as the PCA did not charge Italy with the article 56 of UNCLOS which is regarding the jurisdiction and duties of the coastal State in the EEZ which was denied, it was violating India's sovereign right. The settlement given by the Italian republic is no way giving justice to the family of the fisherman died that day justice was denied and paying off can never give justice.