

Contiguous Zone –Sovereignty versus Sovereign Rights [1]: The “Enrica Lexie” Incident (Italy v. India)

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Abstract: *Contiguous zone jurisdiction and its discussions have been in the process since the ‘Enrica case’ surfaced on the Indian scene. There has been an array of thoughts on both sides of the case, one supporting the sovereign rights concept and one for the concept of sovereignty. Going into the historical aspects the origin of contiguous zone lies in the concept of recognizing coastal state jurisdiction in offshore areas adjoining territorial sea, also called the buffer zone to regulate customs laws, to prevent smuggling activities etc. This differentiation between the treatment given to territorial sea and contiguous zone is the focus of study to bring in the actual purpose of contiguous zone with special reference to the case of Enrica. Though UNCLOS 1982 was signed by India in 1982 itself and ratified on 29th June, 1995 and when the Maritime zones Act 1976 also gives the similar explanation as UNCLOS, still this differentiation needs to be proper contemplated in India.*

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1. Introduction

Contiguous zone jurisdiction and its discussions have been in the process since the „*Enrica case*” surfaced on the Indian scene. There has been an array of thoughts on both sides of the case, one supporting the sovereign rights concept and one for the concept of sovereignty. Going into the historical aspects the origin of contiguous zone lies in the concept of recognizing coastal state jurisdiction in offshore areas adjoining territorial sea, also called the buffer zone to regulate customs laws, to prevent smuggling activities etc.

In the eighteenth century some evidence on this matter is found in the British Hovering Acts which were applied beyond the so called „*canon range*” so as to prohibit foreign ships. As early as in late eighteenth century in US, laws were enacted to interdict ships bound for United States port, in this area within the High Seas. One may recall a decision of the Supreme Court of United States [2] in which it observed that state jurisdiction only extends to the edge of the territorial sea and that governments only for the purpose of self – protection in time of war or for the prevention of frauds on its revenue, exercise an authority beyond this limit.

UNCLOS 111 (1982) clearly refers to the contiguous zone in reference to territorial sea. Studying the UNCLOS it is seen that Articles 17- 28 are dealing only with territorial sea wherein Article 27 explains the criminal jurisdiction of coastal states over foreign ships only if the consequences of the crime extend to the coastal State. While all the above Articles categorize the different rights in the territorial sea there is but only one Article that is Article 33 dealing with contiguous zone in UNCLOS [3]. The fact that contiguous zone is in the part dealing with territorial zone again makes it evident that its existence and object is to act as a buffer zone having the rights in extension of the territorial sea before entering into the EEZ, which is part of the high sea .

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in the actual purpose of contiguous zone with special reference to the case of *Enrica* .Though UNCLOS1982 was signed by India in 1982 itself and ratified on 29th June, 1995and when the Maritime zones Act 1976 also gives the similar explanation as UNCLOS, still this differentiation needs to be proper contemplated in India.

The Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976, Section 3(1) declares that the sovereignty of India extends, and has always extended, to the territorial waters of India: “The sovereignty of India extends and has always extended to the territorial waters of India and to the seabed and subsoil underlying, and the air space over, such waters.” Sub-section (2) states that the territorial waters are limited to twelve nautical miles from the nearest point of the appropriate baseline. Sub-section (3) authorises the Government of India to alter the limit of the territorial waters by a notification approved by both the Houses of Parliament, with due regard to the International Law and State practice. “Section 5(1): The contiguous zone of India is an area beyond and adjacent to the territorial waters and the limit of the contiguous zone is the line every point of which is at a distance of twenty-four nautical miles from the nearest point of the baseline referred to in sub-section (2) of section 3 .”

While Section 3 declares that “the *sovereignty of India* extends, and has always extended, to the territorial waters”, no such declaration is to be found in the context of contiguous zone. On the other hand, with reference to continental shelf, it is declared under Section 6(2) that “India has, and always had, *full and exclusive sovereign rights* in respect of its continental shelf”. With reference to exclusive economic zone, Section 7(4)(a) declares that “in the exclusive economic zone, the Union has *sovereign rights* for the purpose of exploration, exploitation, conservation and management of the natural resources, both living and non-living as well as for producing energy from tides, winds and currents.”

2. Jurisdiction

It is the principle of 19th century (Criminal) English jurisprudence that; "all crime is local. The jurisdiction over the crime belongs to the country where the crime is committed".[6] The reasons are varied regarding affinity to the place of crime, collection of evidence and possibility of enforcement measures to bring in sanction in criminal matters as it is taken to be an offence against mankind.

Jurisdiction in the high seas was concretized in the *Lotus* case [7] by the Permanent Court of International Justice (PCIJ). The question is issue was a collision in the high seas between the French registered *Lotus* and the Turkish registered *Boz- Kourt*, which resulted in the latter vessel sinking. *Lotus* arrived at the Constantinople where its Master was arrested and convicted on criminal charges of manslaughter. France protested and the matter came before the PCIJ for consideration.

The court observed:

Jurisdiction is certainly territorial; it cannot be exercised by a state outside its territory except by virtue of a permissive rule derived from international custom or from a convention. *It does not however, follow that international law prohibits a state from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken abroad, and in which it cannot rely on some permissive rule of international law.*[8]

The court therefore rejected the exclusive jurisdiction concept of flag state on the high seas as was believed to be accepted till then in the realm of international law. The court observed that there was nothing in international law which prevented Turkey criminal law to take cognizance of an offence which affected a Turkish vessel in an area assimilated to Turkish territory, even if the offenders are foreigners.[9] Due to heavy criticism against this decision, Article 11 of the Convention on the High Seas 1958, which was recommended by the International Law Commission after the decision in the *Lotus* case and also the present Article 97 of the UNCLOS 1982, changed the position of law in this matter. This Article deals with the penal jurisdiction, in a collision case or any other incident of navigation in the High Seas, over the ships involved in it. It provides that the institution of any proceedings against the master or any other person involved in such an incident must be by the flag state or the state of nationality of the person involved. Thus only a flag state can issue a request for arrest or detention of a ship following such an incident. [10] The Commission had stated in its support that this was in line with seeking to protect ships and their crews from the risk of penal proceedings before foreign courts in the case of collision on the High Seas, as this may *constitute an interference with international navigation*. [11] The option in this instance for the aggrieved state is to request the flag state to exercise its jurisdiction properly. [12]

3. Bone of Contention

From the above discussions it is clear that Article 97 of UNCLOS is in respect of High Seas and not in respect of the Contiguous zone, which is an area adjacent to the

Territorial sea. Therefore the object as envisaged through the centuries was to create a buffer zone between the Territorial sea and the Exclusive economic zone which is part of the High seas. This zone though does give exclusive sovereignty to the coastal state as in the Territorial sea at the same time here it has more authority than the sovereign rights which are exercised by the coastal states in the EEZ and the High Seas. The authority vested in the coastal state in the contiguous zone is an extension of the jurisdiction in the Territorial sea. The authority in reference to ships can be categorized into regard to inward bound ships and outward bound ships. With respect to inward bound ships, the coastal state has within its contiguous zone the capacity to *prevent infringements of customs, fiscal, immigration and sanitary laws*. It does not confer extension of its other rights to this zone. Regarding outward bound ships the coastal ship has the capacity to punish infringement of laws and regulations relating to customs, fiscal, immigration and sanitary matters *which occurred within its territory or the territorial sea*. This gives the coastal state additional enforcement capacity with respect to these matters. Therefore, ships seeking to flee from the jurisdiction of the coastal state after an infringement of laws *do not enjoy any form of immunity in this zone*.

In the issue relating to "M.V. Enrica Lexie", this incident of firing happened in contiguous zone at 20.5 nautical miles from the Indian sea coast off the State of Kerala. Criminal law demands as well as equity prescribes that this incident which involves the death of a citizen by a foreigner in the waters adjacent to its territorial waters should focus on the security of its citizens. *International law is very clear on this point as to when the act by ship causes harm to citizens or property of a coastal state then the coastal state has the authority to exercise jurisdiction*. This is a case of manslaughter which invokes fear in the fishermen to undertake their source of livelihood in their own waters. This right was not exercised in the High Seas but in the buffer zone between the Territorial waters and the High Seas and therefore they are entitled in justice under equity law and not under the technical demarcation of sea waters mainly undertaken for international trade purposes.

In India, Section 188 of the Code of Criminal Procedure prescribes the jurisdiction to deal with such offences[13]. Therefore, the Parliament, has the power to make and apply the law to persons, who are not citizens of India, committing acts, which constitute offences prescribed by the law of this country, irrespective of the fact whether such acts are committed within the territory of India or irrespective of the fact that the offender is present or not within the Indian territory at the time of the commission of the offence.

The object of UNCLOS is to propagate safe navigation for ships which is definitely not the issue in hand; therefore this matter should be studied and decided in the present context where safety of unarmed fishermen is more important than protection of merchant ships from state jurisdiction. The concept of contiguous zone has to be in today's time given more meaningful thought, when technology is at its peak and security of a country and its citizens is at a low point. There is a need for retrospection. The demarcation given in the

UNCLOS was with the object of providing a safe navigation and to prevent unwanted intrusion and intervention by a foreign country into the innocent navigation undertaken by the merchant ship. Manslaughter never constituted part of this theme. The question of sovereignty overweighs when the death of a citizen comes into confrontation with providing safe navigation to foreign ships. Any sovereign country would think likewise as security and safety of a country and its citizens is the foremost for any country. As is done in interpretation of any law the object of the Convention is to be considered when applying it to a fact situation thus here also the interpretation would weigh in favour of safety and security of a nation and its people.

References

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- [2] *Manchester v. Massachusetts* (1891) 139US240, 258.
- [3] *Article33: Contiguous zone*-1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:(a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;(b) punish infringement of the above laws and regulations committed within its territory or territorial sea.2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.
- [4] *Article27-Criminal jurisdiction on board a foreign ship*-1. The criminal jurisdiction of the coastal State **should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases:(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 by the master of the ship or by a diplomatic agent or consular officer of the flag State; or(d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.** 2. The above provisions do not affect the right of the coastal State to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters.3. In the cases provided for in paragraphs 1 and 2, the coastal State shall, if the master so requests, notify a diplomatic agent or consular officer of the flag State before taking any steps, and shall facilitate contact between such agent or officer and the ship's crew. In cases of emergency this notification may be communicated while the measures are being taken.4. In considering whether or in what manner an arrest should be made, the local authorities shall have due regard to the interests of navigation.5. Except as provided in Part XII or with respect to violations of laws and regulations adopted in accordance with Part V, the coastal State may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to

conduct any investigation in connection with any crime committed before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters.

- [5] *Id.* 3.
- [6] *See: Macleod v. Attorney General of New South Wales* (1891) AC 455, 451-58 and *Huntington*
- [7] *Attrill* (1893) AC 150.
- [8] *Lotus (France v. Turkey)* [1927] PCIJ Rep ser A no 10.
- [9] *Ibid* 18-19.
- [10] *Ibid* 23.
- [11] Article 97 (3).
- [12] International Law Commission, „Articles Concerning the Law of the Sea with Commentaries „ (1956) Yearbook of the International Law Commission, vol.2, 281.
- [13] Article 94(6), 94(7).
- [14] Section 188. Offence committed outside India. When an offence is committed outside India-(a) by a citizen of India, whether on the high seas or elsewhere; or (b) **by a person, not being such citizen, on any ship** or aircraft registered in India. He may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found: **Provided** that, notwithstanding anything in any of the preceding sections of this Chapter, no such offence shall be inquired into or tried in India except with the previous sanction of the Central Government.