International Tribunal for the Law of the Sea, Case 24, *The “Enrica Lexie” Incident (Italy v. India), Provisional Measures*

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The case at the basis of the order delivered by the International Tribunal for the Law of the Sea (ITLOS) on 24 August 2015 arose from the shooting and consequent death, on 15 February 2012, of two Indian fishermen (Valentine Jelastine and Ajeesh Pink) on board the Indian-flagged fishing boat *St. Antony* and the subsequent arrest and detention of two Italian marines deployed on board the Italian oil tanker *Enrica Lexie* to counter the risk of piracy attacks.

Whilst it is accepted by all parties involved that the events took place in the Arabian Sea at about 20.5 nautical miles off the Indian coast, the Indian and Italian versions differ greatly as to many other aspects of the factual background. According to the former, the weapons fire that caused the death of the two fishermen came from two uniformed persons on board an oil tanker, later identified as Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone. Police authorities recommended charges to be pressed against the two officers for various crimes, including murder. According to the Italian account, an unidentified craft was detected by the *Enrica Lexie* crew, as it was rapidly heading towards the tanker in a manner consistent with a pirate attack. This prompted a series of visual and auditory signals, the activation of the usual safety procedures and the firing of warning shots into the water.

Different accounts also exist regarding the circumstances in which the *Enrica Lexie* reached the Indian port of Kochi in the aftermath of the event. Whilst India maintains that the vessel was requested to join the investigations, Italy contends that Indian authorities did not explain that the *Enrica Lexie* and its crew were themselves being investigated and that the vessel was asked to sail to Kochi to identify alleged pirates following the capture of two suspected boats. The two Italian marines were arrested a few days later on 19 February.

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2012 and, whilst Sergeant Girone is presently detained in the Italian Embassy in India, Sergeant Latorre has been allowed to travel to, and remain in, Italy for a given period of time on health grounds.

The application to ITLOS and the ensuing order are inscribed in a complex contentious pattern, which includes legal proceedings taking place in India (at state and federal level) as well as in Italy and internationally. Italy and the two Italian marines instituted proceedings in the Supreme Court of India for the purpose of challenging Indian jurisdiction and asserting sovereign immunity. The Court delivered its judgment on 18 January 2013 in which it confirmed the jurisdiction of the Union of India over the case in question and directed its government to set up a Special Court for the hearing of the criminal trial.

At the international level, Italy submitted the dispute with India to the arbitral procedure provided for in Annex VII of the United Nations Convention on the Law of the Sea (LOSC) by notification under article 287 and Annex VII on 26 June 2015. According to Italy, India had made a series of breaches of LOSC relating to Italy’s right of exclusive jurisdiction to entertain the criminal proceedings as the flag State of the Enrica Lexie and the State of which the marines are agents and officials (in the meantime, the Office of the Prosecutor of the Military Tribunal in Rome had initiated an inquiry into the incident including an investigation for the crime of murder). Italy also alleged a violation of the principle of immunity of States and their officials and agents, as per article 293(1), and the impossibility to settle the case pursuant to article 283(1) of the LOSC.

In the framework of such proceedings, on 21 July 2015, Italy requested ITLOS to prescribe the following remedies pursuant to article 290(5) of the LOSC:

(i) that “India shall refrain from taking or enforcing any judicial or administrative measures against [the Italian Marines] in connection with the Enrica Lexie Incident, and from exercising any other form of jurisdiction over the Enrica Lexie Incident”; and

(ii) that “India shall take all measures necessary to ensure that restrictions on the liberty, security and movement of the Marines be immediately lifted to enable Sergeant Girone to travel to and remain in Italy and Sergeant Latorre to remain in Italy throughout the duration of the proceedings before the Annex VII Tribunal”.

This submission was contrasted by India in its written pleadings of 6 August 2015 as it requested the Tribunal “to refuse prescription of any provisional measure in the present case”.

The order delivered by ITLOS deals with a number of issues raised by the parties in their written briefs and during the presentation of their oral