

**Il caso dei marò italiani in India
La decisione dell'Alta Corte del Kerala
[29 maggio 2012]**

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Fogli di lavoro
per il Diritto Internazionale



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Il 19 febbraio, due fucilieri di marina italiani, Latorre e Girone, imbarcati sulla petroliera italiana Enrica Lexie in servizio di scorta armata vengono arrestati dalle autorità indiane con l'accusa di omicidio per aver ucciso (scambiandoli per pirati) due pescatori indiani il cui peschereccio si era avvicinato alla petroliera in navigazione al largo delle coste indiane del Kerala.

Pubblichiamo qui di seguito alcuni passi della decisione resa il 29 maggio 2012 dall'Alta Corte del Kerala nella quale si riconosce la giurisdizione esclusiva dell'India sui fatti di causa e si nega l'immunità ai due fucilieri di marina italiani

La redazione

(omissis)

Passive Nationality Principle and Objective Territorial Principle:

34. Here, in this case, as the victims are Indians, Passive Nationality Principle is applicable, and under it the Italian Marines are liable to be prosecuted in India. The justification for applying Passive Nationality Principle is that each State has a perfect right to protect its citizens abroad and if the territorial state of the locus delicti, neglects or is unable to punish the person causing the injury, the State of which the victim is a national is entitled to do so if the persons responsible come within his power. The following are the illustration given in the Report of Sub Committee of League of Nations Committee of Experts for the Progressive Codification of International Law (1926) on Criminal Competence of States in respect of offences committed outside their Territory.

- a. a man firing a gun across a frontier and killing another man in a neighbouring State.
- b. a man obtaining money by false pretends by means of a letter posted in one country to another country.

Further, the Objective Territorial Principle is also applicable in cases where an act commences in one State but is consummated or completed within the territory of another State, producing gravely harmful consequences in the latter. Professor Hyde has defined the objective territorial theory as follows:

"The setting in motion outside of a state of force which produces as a direct consequence on injurious effect therein justifies the territorial sovereign in prosecuting the actor when he enters its domain."

Applying the Objective Territorial Principle, the Permanent Court of International Justice in 1927 decided the Lotus case (1927 PCIJ series A, No.10). In that case, a French mail steamer, the LOTUS collided on the high seas with a Turkish Collier. It was alleged that the collision was due to the gross negligence of the officer of the watch on board the LOTUS. As a result of the collision, the Turkish Collier sank and 8 Turkish nationals on board perished. The Turkish Authorities instituted the proceedings against the officer of the watch, basing the claim to jurisdiction on ground that the act of negligence on board the LOTUS had produced effect on Turkish Collier and thus applying the Objective Territorial Prin-

ciple the case could be tried in Turkey. By a majority decision the Permanent Court held that action of the Turkish Authorities was not inconsistent with the International Law.

35. The learned senior counsel appearing for the petitioners had contended that the LOTUS case was overruled by Article 97 of the UNCLOS. It is true that in cases of collision or incident of navigation, by virtue of Article 97 of the UNCLOS, the law declared in the LOTUS case may not be a good law. But as stated earlier, Article 97 of UNCLOS relates only to collisions or incidents of navigation, in high seas and not to a case of firing at fishermen fishing in CZ/EEZ.

36. The 'effective principle' had been the consideration in Dooth's case (1973(1) AER 940) Director of Public Prosecution Vs. Dooth and others. In that case, the respondents who were American citizens conspired in Belgium to import cannabis resin to England with the object of re-exporting it to the United States. No part of agreement occurred in England where the import of cannabis resin without licence was unlawful under the Dangerous Drugs Act. The respondents were convicted by the jury. Court of appeal allowed the appeal holding that there is no jurisdiction as the agreement alleged had occurred abroad. Crown preferred an appeal against this, which was allowed by the House of Lords and conviction was sustained.

37. In this case, the victims along with the others were engaged in the lawful activity of fishing, within India's EEZ, where they had the full right to engage in such fishing. All of a sudden, they were, without any justification, shot down by Petitioners 1 and 2. There is no gainsaying the fact that the effect and consequences of such a gruesome act ensues in the territory of India. This incident has a direct bearing on the lives and livelihoods of that section of Indian population engaged in fishing. As apprehended by the petitioners in I.A 2928/2012, I.A 3017/2012, 3178/2012 and I.A 3186/2012, this incident has instilled in the fishermen community of India a sense of fear and insecurity about the safety and security of their lives at sea. Thus it is clear that the objective territoriality principle is applicable in this case.

38. In this context, Section 179 CrPC is relevant. It reads:

"179. Offence triable where act is done or consequence ensues.--When an act is an offence by reason of 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."

The above provision stipulates that an offence is to be inquired into or tried by a court within whose locality such offence was committed or such consequence has ensued. In this case since the fishermen on board the fishing boat registered in India were murdered at the CZ/EEZ of India, Section 179 CrPC squarely applies. Section 179 CrPC in effect codifies the objective territorial and effective principle.

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Navigational Freedom

45. I may also mention that the history of the Law of the Seas has always been an attempt to balance two conflicting interests- i.e. the freedom of navigation on one hand, and the rights of the coastal states on the other. Neither of them are absolute. Freedom of navigation does not mean that the vessels have absolute rights or freedom to navigate through the seas, unconcerned about the rights of others. The freedom of navigation, as in the case of any other rights is qualified. It was in the context of this balancing of conflicting interests that the rules relating to jurisdiction has been created in the UNCLOS. As long as the vessel is engaged in 'an innocent passage', she cannot be interdicted, but when her passage hinder the security of the State, or when it affects the public order of the coastal State, the Coastal State cannot be asked to be a mute spectator. Going by this aspect of balancing of conflicting interest also, I am inclined to accept the view that the respondents 2 and 3 have jurisdiction to try the case, and that it is not an invasion into the navigational freedom.

46. For the foregoing reasons, and in the light of the precedents quoted above, I answer the first issue in favour of respondents and against the petitioners, by finding that the Italian Marines who had shot dead two Indians on board the fishing boat, registered in India while fishing in CZ/EEZ of India are liable to the penal jurisdiction before the Indian courts; and that the 3rd respondent was

right in registering a case and proceeding with the investigation, irrespective of the fact that they were on board a foreign vessel. Issue No. 2.

47. The plea of the petitioners 1 and 2 that they are personnel employed in Italian Military Navy, discharging sovereign functions and hence entitled to immunity, has been denied by the respondents. Regarding the nature of the employment, no document other than Exhibit P1 identity card was produced. The cards however do not give any information regarding the nature of the employment of the marines. It is not disputed that the vessel on which the Italian marines were on board, is not a vessel owned by the Republic of Italy. The vessel belongs to a private person and was engaged in commercial activities, which are in no way connected to any sovereign function of the Republic of Italy. The respondents relied on the Protocol Agreement between the Ministry of Defence - Naval Staff and the Italian Shipowners' Confederation (Confitarma). Drawing attention to Article 2 of the Addendum to the Convention attached to the Protocol Agreement signed in Rome dated 11/10/2011, it was argued that the service of military personnel was provided to the ship owner on a daily payment basis.

Article 2 of the Addendum to the Convention reads:

"Art.2-Daily service fee In order to assure the performance of the activity, the requesting Owner will, on top of what is indicated in para 2.2 of the Convention, reimburse the charges connected with the use of NMP, including the accessory expenses for the personnel, the functioning and logistic management in the area, equal to a daily on board fee of 467,-per person."

Article 2 would show that the Italian marines, deputed from the Navy were working on a contract basis for the protection of the private interests of the ship owner. According to the respondents, this can in no way be treated as a discharge of sovereign functions. Having due regard to the nature of the dispute regarding sovereign immunity, I find that it is a matter of evidence and an adjudication in a writ petition on the basis of the disputed facts will not be appropriate.

48. Municipal law as well as International law recognizes sovereign immunity. But the extent of immunity depends upon the circumstances in which the forces are admitted by the territorial State, and in particular upon the absence or presence of any express agreement between the host and the sending State regulating

the terms and conditions governing the entry of forces in the coastal territory. In this case there was no 'entry' by the Italian Marines to the territory of India, but a merciless attack of gunshots at fishermen, while passing through the CZ/EEZ of India, breeching all established guidelines and norms, and without any cause. It can be treated only as a case of brutal murder and can in no way be masqueraded as a discharge of the sovereign function. Where the members of military forces of a country commit wrongful acts, while engaging in non-military functions, it is quite appropriate for the aggrieved state to claim jurisdiction and subject them to the local law. International Law does not recognize any absolute waiver of jurisdiction by the aggrieved State. In the case at hand, petitioners 1 and 2 were under the control of the Captain of the ship and hence were to act only under his orders. There is nothing on record to show that the Italian marines were allowed absolute freedom to shoot and kill any person, even in cases of piracy attacks. In other words, the marines were not under the command of their immediate Superior Officer, but under the Captain of the vessel. Since, there is nothing on record to come to a conclusion that the Captain had given them any instruction to open fire at the boat, it has to be inferred that they did so at their own whim, and not under the command of either the Captain or of their superior officer in the Navy, so as to be able to claim sovereign immunity. In the peculiar facts and circumstances of the case, I find that by no stretch of imagination can it be held that the shooting of two Indians by petitioners 1 and 2 is an act in exercise of sovereign functions. It is neither an action in defence of the State nor one in defence of the vessel, but a private, illegal and criminal act. Therefore, I answer the second issue against the petitioners and in favour of the respondents, by holding that petitioners 1 and 2 are not entitled to any sovereign immunity.

In the result, the writ petition fails. Accordingly, it is dismissed with the costs of respondents 1 and 2 which is determined at Rs.1,00,000/- (One lakh) each payable by the 3rd petitioner. The 3rd petitioner shall deposit the costs within two weeks. Though the acts of respondents 4 to 6, as well as the guardian of the 5th and 6th respondents deserve to be severely dealt with for wasting the valuable time of this Court, this Court is refraining from imposing heavy costs, in view of the losses that have been suffered by them and considering the fact that they are ladies belonging to the weaker section of the society. The 4th respondent, as well as the guardian of 5th and 6th respondents shall deposit a sum of Rs.10,000/-

(Ten thousand) each to the State Legal Aid Fund of the Kerala State Legal Services Authority within two weeks. All the pending impleading petitions would stand dismissed. The observations made in this judgment on facts are based on the documents produced, and without prejudice to the defence of petitioners 1 and 2 and are for the limited purpose of disposal of this writ petition. The trial court shall consider the contentions of petitioners 1 and 2 on merits, untrammelled by the observation on facts.