"ENFORCEMENT AND JURISDICTION ISSUES IN INTERNATIONAL MARITIME LAW"

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INTRODUCTION

Oceans since ages are a source of life and sustenance. Spanning an area of over 140 million square miles and occupying nearly three-fourths of the space of the Earth's surface, it has its own elegance and mystery. It catalyzes the process of generating food, discovery, travel and trade. It not only is a repository of food but is also largely responsible for connecting people and also, drifting them apart. In today's times, where travel and destinations are so accessible by virtue of enhancement in the quality of infrastructure, development and physical roads, rail and rivers, one cannot overlook the prevalence of oceans and seas.[1] Life at sea, since time immemorial, is considered to be a life full of passion, thrill and adventure.[2] Contrary to common perception, people have now begun to realize the various possibilities of perils that seamen (or simply anyone "at sea") are subject to. The dangers are many. Risk is high. But rewards match the vehemence equally well. Rewards in the form of money, contentment or just abiding by the law. More than the rewarding nature of this business, it is the lack of ghostly enforcement of the law which makes a seaman smile or just feel elated at the fact that his business or role at hand is successful and he can go home without carrying any legal or moral baggage. *"Maritime Law is as deep as the oceans itself"*. As resonating as it sounds and as true as this statement is, it is also known that maritime law is equally expansive in its aspects relating to 'jurisdiction' and 'enforcement'. Two terms that I shall explain and base the heart of my piece on. Jurisdiction, simply put is the aura or shade of power that an authority exercises over certain people, things, property or even seas. The basis of jurisdiction lies in the principle of territoriality. All places and things and classes of places and things were to be governed by a body of laws. These codes of laws may be domestic—applicable to disputes and events within a nation's territory or international—applicable to multiple member nations or "states" as they are usually referred to in international treatises and conventions. Enforcement, again, without complicating concepts, is the act of compelling obedience to a right or duty created by a rule or regulation (or developed by custom and practice) in the interests of justice, equity and good conscience. Aiming to settle the

[1]United Nations, *Introduction, Oceans and the Law of the Sea* (23rd September, 2020, 6:15 PM), https://www.un.org/en/sections/issues-depth/oceans-and-law-sea/.

[2] *History of Admiralty and Maritime Law, Admiralty and Maritime Law*, thefreedictionarybyfarlex,(23rd September, 2020, 6:45 PM), https://legal-dictionary.thefreedictionary.com/Admiralty+and+Maritime+Law.

'jurisdictional' doubts and ambiguities, what prevailed from the seventeenth century to mid-twentieth century was the freedom-of-the-seas doctrine. This doctrine spoke about the freedom or free-ness from sovereignty over water, specifically the waters outside the narrow belts surrounding the territorial boundaries of a coastal state— the high seas. *"The lust for sovereignty is the worst virtue of all"* gets pegged in the diegesis just apt and, as was seen, gradually the number of claims on the off-shore marine resources grew and law evolved in this aspect too. Unfortunately, today, fishing fleets, oil bunkers, cargo carriers and huge vessels emitting noxious wastes, land-based materials and carrying oil barrels (potential leaks attributing threats to the sea life) are on the verge of obliterating the sanctity of marine environment which—apart from piracy and the issue of arms—forms the crux of the maritime world creating jurisdictional and enforcement issues across the globe.

DUTIES OF FLAG STATES: AN OVERVIEW

Centuries ago, the Egyptians started using flags for identification.[3] When trade happened in the earlier ages, for spices, goods, commodities, oil, even people other things, the traders or trading states carried out this exercise without a source of identification or proof of identity and authenticity. This gave rise to several issues. The foremost, being of not knowing the genesis of a relationship, unswerving in nature, between the goods that entered the coastal waters and the party (probably and usually from another state or nation) that has shipped these goods. Other issues include those obvious ones that arise from absence of identity in the carriage of things. One of them being accountability — if the goods come out defective, then who is responsible for the damage or loss caused? Several formalities and technicalities, that have been cultivated after applying care and caution also demand a sense of parenthood. Leave alone the intricacies involved in the legal aspect but what structural and regulatory framework of customs, practice and procedure will the concerned vessel follow? In addition, how will one ascertain that these ships are free-of-threat vehicles and don't pose any threat or harm to the sea and states? Without an identity, like any other orphaned, discarded object, this ship would just float around being a stateless vessel carrying no significance or ramification. To turn to the development of the "flag state" — a term made up of two words of rich and deep heritage and history, it was first used in 1000 B.C. by the Egyptians for the simple purpose of identity. The flag, ultimately gained recognition as the legal regime of a ship. It was used as a tool of understanding where and how a

[3] Nivedita M. Hosanee, *A Critical Analysis Of Flag State Duties As Laid Down Under Article 94 Of The 1982 United Nations Convention On The Law Of The Sea,* Division For Ocean Affairs And The Law Of The Sea Office Of Legal Affairs United Nations (23rd September, 2020, 8:00 PM) https://www.un.org/Depts/los/nippon/unnff_programme_home/fellows_pages/fellows_papers/hosanee_0910_mauritious.pdf.

right relating to a ship can be enforced and who, precisely, would be accountable for related actions. It also found formal codification in the High Seas Convention ('HSC') in 1958[4] and ultimately UNCLOS in 1982.[5] The concept of Statehood also, arguably created by Vitoria in *De Indis de Iure Belli Relectiones* found place in the Treaty of Westphalia (1958) which ended the Thirty Years' War.[6] The Portugese, in the mid-twentieth century had a monopoly over the Indian Ocean which was attempted to be broken by the Dutch by professing the theory of independent, sovereign states having undisputed, sovereign power and control. The doctrine of *Mare Liberum* also was seen as a milestone in the progress of freedom of global trade and navigation.[7] Gradually, these concepts came to be recognized as principles of customary international law and similar developments led to the foundation of the International Law Commission (ILC). The First Conference of the United Nations on Law of the Sea in 1958 led to the drafting of the High Seas Convention in 1958, the precursor to UNCLOS (1982). Flag State, fundamentally, is the state/nation in which the ship is registered and it is pertinent to note that the laws and national jurisdiction of that state extend over the vessel and to areas coming within its national jurisdiction and the areas outside the coastal jurisdiction of other states. In other words, the domestic laws of the flag state will apply to the vessel carrying its flag in high seas and in other areas covered specifically in international treaties. As the flag state exercises control over the vessel carrying its flag, it also has certain duties which are mentioned under Article 94 of UNCLOS. Article 94(1) extends the duty of flag states to "administrative, technical and social matters". It also has to maintain a register containing the names and particulars of all ships and ship owners. Such regulatory provisions are made to strengthen the genuine link existing between States and their flags, a concept that would be explained later on. Article 94(3) says that every ship must maintain and carry out certain measures to ensure safety of life at sea. What these measures precisely are is enumerated under Article 94(4). Moving from flag state obligations to marine pollution, the already-increased concern over pollution at sea shot up drastically after 1960 owing to 3 incidents — *Torrey Canyon* in 1967, *Amoco Cadiz* in 1978 and *Exxon Valdez* in 1989. Safety of life and the marine environment as a whole came under the spotlight and the need to protect the marine environment under Article 217 of UNCLOS is seen as a sufficient measure to protect and safeguard the marine environment from pollution caused by vessels. These incidents and the dire need to have a separate law for protecting the oceans and

[4] Convention on the High Seas, 29 April 1958. Entered into force on 30 September 1962. United Nations, Treaty Series, vol. 450, p. 11, p. 82.
[5] Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397
[6] Publ. 1696, ed. Simon ,James Crawford, "The Creation of States in International Law", 2nd Edition, Clarendon Press, Oxford p.9.
[7] Law of the Sea, Oceanic Resources, Jones p.9.

other developments in the field of international law led to the creation of the International Convention for Prevention of Marine Pollution from Ships, 1973[8] which later came to be modified by the Protocol of 1978[9]. These enactments have been mentioned by the author as they create a jurisdictional and regulatory mechanism extending to all ocean-going vessels and their activities. Some of the more relevant and prevalent issues being absence of recognition of fishing operations and fishing vessels under Article 94 or any other provision in the UNCLOS, lack of ownership identification in ship registration, as a matter of fact, exist in the UNCLOS. The lack of ownership identification and a mere name-sake encapsulation of the genuine link concept under Article 91 make it even more difficult to come up with a concrete mechanism of ensuring and enforcing genuine links, which is the dire need of the hour in the maritime world today. Not only does these observations need to be the implemented by a deep jurisprudential approach and practical outlook that incorporates currently prevailing aspects of international maritime law. Observing the fashionable trend that certain member states, reluctant to the idea of defining the criteria for establishing a 'genuine link' between the ship and its flag, (as it would obliterate the open registries of that nation thereby preventing foreign influx of finances and lead to lesser and lesser registrations) prefer to keep the issue of ship registration vague and at the discretion of member states (which is why these states are known as 'flags of convenience'). However, the International Tribunal of Law of the Sea (ITLOS) in 1999 in *M/V Saiga No. 2 Case* (*St Vincent and the Grenadines* v *Guinea)*[10] reiterated that the 'genuine link' concept is to be viewed in the context of effective implementation of the flag State obligations and not for determining the criteria for deciding when it would be apt for States to allow ships to fly its flag.[11] After considering Article 5 of the 1958 HSC, the deliberations of the ILC and UNCLOS I on the subject, and Article 94 of UNCLOS 1982, ITLOS stated that:

"The purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States."[12]

[8] International Convention for Prevention of Pollution from Ships, Nov. 2, 1973, 34 U.S.T.3407, 1340 U.N.T.S. 61.
[9] Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, Feb. 17, 1978, 1340 U.N.T.S. 61.
[10] ITLOS Case No 2 (Official Case No) ICGJ 336 (ITLOS 1999) (OUP reference)
[11] Nivedita M. Hosanee, *Defining the genuine link, The Right Of The Flag State To Sail Ships And The Genuine Link Concept*, United Nations (23rd September, 2020, 8:20 PM), http://www.un.org/Depts/los/Judg_E.htm.
[12] Ibid.

IMPLEMENTATION OF UNCLOS: CHALLENGES FACED

The United Nations Convention on Law of the Sea (UNCLOS), 1982 provides a debatable starting point for a regulatory analysis of public maritime security. It is a broad regulatory framework of international law stipulating checks and balances and rights and obligations for the member states. It provides for broad concepts of international maritime law that helps us understand the safety measures postulated under the treaty. It confers obligations not only on non-state actors but also for state actors with respect to warfare and other threats.[13] As significant and important creating a broad regulatory framework for law of the sea is, its implementation and enforcement is equally prominent and comes under the criticism checklight. Its implementation and enforcement, in today's times, can exhibit a worrisome image. Effective yet potentially covered with challenges, UNCLOS serves us with problems that are ancillary to its regulations. The problems come with thinkable solutions and the stage has not passed a red alert point but it is sufficient to be guarded up for facing and eradicating those challenges. The UNCLOS is not only full of "rules of the road" but it also demarcates the oceans and seas into five different sections. These are internal waters, territorial sea, continental shelf, exclusive economic zone (EEZ) and the high seas or international waters.[14] "Greed knows no bounds" is true and indeed applicable in the light of marine law enforcement as quite a few nations are trying to claim greater and greater area of the seas adjacent to coasts as well as the adjoining bits and portions. Its claims stemming out of pure avarice is wrong and unfair. I can conveniently divide this lust for greater territorial sovereignty and additional space of control into claims of three types — excessive claims over unsustainable rocks and reefs (for instance the claim over a part of South China Sea), the one for an increasing size and length of straight baselines and straight-out unfair and wrong claims which, by virtue of existing on the wrong side of law, are not accommodable in the maritime legal regime.[15] It is well understood that if a legal regime is too lenient or slightly 'over-permissive' of its checks and balances, rules and regulations, metes and bounds, rights and obligations (that it creates), there is bound to be consternation and such that its degree or extent may stretch up to unpardonable limits. A permissive legal regime (in the light of marine law enforcement) — meaning a freely behaving regime with no strict watchdog compliance with marine laws can create problems and more particularly, serious ones. Some of the recent examples being North Korea sponsoring illegal criminal activity and both

[13] Module 4 of Enhelion Diploma in Maritime Law, UNCLOS, Page 1 (24th Sept, 2020, 9:02 PM), https://enhelion.com/online-courses/mod/page/view.php?id=8870.
[14] Ibid.
[15] Tom Røseth, *Challenges to UNCLOS and Order at Sea* (24th Sept, 2020, 9:00 PM), https://forsvaret.no/ifs/challenges-to-unclos-and-order-at-sea.

environmental and economic instability caused by illegal fishing in West Africa and Somalia, the dispute between China and Philippines over claims in South China Sea (which could lead to a compromising position of China).[16] Finally, one of the purely statutory jurisdictional gaps created by the UNCLOS is its classification of pirate threats as acts being committed only on the high seas. This creates a problematic vacuum when piracy occurs within the jurisdiction of a coastal state.[17]

THE *ENRICA LEXIE* CASE: THE JUSTNESS IN THE AWARD

Dr Kate Lewins, a specialist in international maritime law at Murdoch University, submitted:

> *"The result, more often than not, is that there might be multiple [countries] entitled to claim jurisdiction over a particular criminal act, based on the flag and location of the ship and the nationalities of the people involved. [Which country will take the lead] may well end up being one negotiated through diplomatic channels, largely based on pragmatism."*[18]

Eight years after two Italian marines shot down two innocent fishermen on their fishing vessel 'St. Antony', several probative enquiries arose. One of the prominent issues that came up was the one with respect to jurisdiction. Who would have the rightful jurisdiction to try the two Italian marines who, under the impression of construing the two fishermen as pirates had killed them? After a flood of newspaper articles and other media reports, a few side issues that were up for consideration were where did the incident take place? Was it the high seas as claimed by Italy or was it the exclusive economic zone of India as contended by India? Did the International Tribunal of Law of the Sea have jurisdiction to entertain the dispute between the two countries? Did Italy breach India's rights and particularly, its right to navigate on its own EEZ? All these questions have been put to rest by the Award passed by the five-member tribunal referred to by ITLOS. In this sub-space, we shall have a look at the contentions put forth by both the countries at loggerheads before the arbitral tribunal and the decision of the esteemed tribunal. After the disputes were referred to the esteemed five-member tribunal by ITLOS, it decided the matter with all competence and justness. Before the tribunal some of the key contentions of Italy were as follows:

- By acting in consonance with certain provisions of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976[19] and with the

[16] Ibid.
[17] Module 4 of Enhelion Diploma in Maritime Law, UNCLOS, Page 4 (24th September, 2020, 9:04 PM), https://enhelion.com/online-courses/mod/page/view.php?id=8870.
[18] Dr Kate Lewins, *Submission 1*, p. 2 (26th September, 8:07 PM).
[19] Act No. 80 of 1976

Ministry of Home Affairs Notification No. S.O. 671(E) dated 27 August 1981, India had acted in breach of Articles 33(1), 56(1), 56(2), 58(2), 87(1)(a) and 89 of UNCLOS;

- By forcefully directing *Enrica Lexia* to Kerela coast, it had acted in violation of Italy's freedom of navigation viz. Article 87(1)(a) and Italy's exclusive jurisdiction over the commercial vessel in breach of Article 92 of UNCLOS and Article 300 read with Article 100 of UNCLOS, it had abused its right to seek Italy's cooperation in the repression of piracy;
- By instituting penal proceedings against the marines of Italian nationality, India was in breach of Article 97(1) of UNCLOS;
- By ordering arrest and detention of Enrica Lexie, India was in breach of Article 97(3) of UNCLOS.

India, on the other hand, contested all these submissions and said that by throwing open fire at its non-commercial vessel 'St. Antony' and killing two Indian fishermen on board, Italy violated:

- India's sovereign rights under Article 56 of UNCLOS;
- India's rights to explore and navigate in its EEZ under Article 58(3);
- India's right and freedom of navigation under Articles 87 and 90;
- India's right to have its EEZ maintained for peaceful reasons and conditions under Article 88 of UNCLOS.

After considering the submissions of both the countries, the arbitral tribunal passed its award. In the award it, primarily, by a 4:1 vote ratio, held that it has the appropriate jurisdiction to entertain the dispute and that it found India's counter-claims admissible, that India has not violated Articles 87(1)(a) and 92 para 1, 97 paras 1 & 3, 100 and consequently 300. It, in a somewhat blow to India's teeth, held that the Italian marines were entitled to immunity. But this was the only point against India's interests as it went further on to hold that as Italy had committed to initiate criminal proceedings against the marines, India should cease all criminal proceedings initiated against them, that Italy, by breaching Articles 87 and 90, had wrongfully interfered with the navigation of 'St. Antony' and finally, that India is entitled to compensation for loss of life, physical harm, material damage to property and moral harm suffered by captain and other crew members of 'St. Antony' which, by the nature of the offence, cannot be repaired through compensation.[20] If not anything, the compensation awarded to the families may counter the grief they have borne for the sudden and sad demise of our two countrymen.[21]

[20] The Italian Republic V. The Republic Of India; PCA Case No. 2015-28

[21] Award between India and Italy: https://docs.pca-cpa.org/2020/07/a6b16920-award-extracts-for-advance-publication-on-2-july-2020.pdf (25th September, 8:30 PM)

CONCLUSION: THE WAY AHEAD

As there are two sides to a coin, there exists the other face of the shipping regime and this face being slightly dark in respect of its ramification and consequences. There are quite a few hitches in the shipping industry that invite and require attention. Firstly, the issue of sub-standard shipping exists and more so in today's times as the level of sub-standard shipping has risen by a considerable margin. While this problem, superficially, may seem to be one concerned with ship owners and their conscionable ability to provide up-to-the-mark shipping vessels it also delves into the inter-mingling relationship between ship owners, states and industry entities. As the ship owners are not answerable to the States, they easily escape the test of accountability, though international law requires them to have these details recorded in the register. Secondly, with a surge in the number of classification societies, it has made escape from performing statutory liabilities very convenient. Thirdly, the very nature of shipping is such that as the ships and owners are conceptually and practically guarded by a corporate veil, it motivates criminal minds to sell sub-standard ships to illegally pocket profits. Thirdly, shipping is so global and large by nature that regulation of the unscrupulous entities by ship owners becomes very difficult and motivates criminals for additional profit sharing.[22] In the recent years, quality compliance issues have risen by an alarming rate. The working relationship amongst flag states, between a flag state and the ship owner, the flag state and the industry entity and between ship owners and unscrupulous industry entities has become complex and unworkable. The solution to the rising problem of sub-standard shipping lies in ensuring elimination of unscrupulous entities, quality partnership between classification societies, co-ordination between ship owners and States, amongst States and industry entities and ships. While the problem may seem to be getting solved easily by ensuring compliances, the uncertain issues of unscrupulous entities remain to be eradicated. And unless this hindering factor is completely eradicated from its roots, it will continue to creep in in larger demonic faces. Secondly, the IMO Ship Identification Number Scheme must be made mandatory both on paper and tangibly on ships. Finally, it majorly depends on the willingness and good faith of each State to eradicate and prevent sub-standard shipping.[23] Coming to the more recent issues and their solutions, while a lot can be done to curb marine pollution, polar issues and piracy a lot *is* being done for its eradication and prevention which deserves appreciation and elaboration. Talking about marine pollution, the jurisdictional authority with regards to marine environmental pollution comes under the International

[22] George S. Reynolds, Current Issues, Chapter 8: Conclusions and Recommendations: Managing for Quality (2000) (Unpublished Ph.D. Dissertation, World Maritime University) (On file with The Maritime Commons: Digital Repository Of The World Maritime University)
[23] Ibid.

Maritime Organization (IMO) which is a UN specialized body/agency. Some of the programmes initiated by the United Nations are: Regional Seas Programme and Global Programme of Action for Protection of the Marine Environment from Land-based Activities. The United Nations Economic, Social and Cultural Organization (UNESCO) through Intergovernance Oceanographic Commission co-ordinates programmes on marine research, observation systems, hazard mitigation and better managing ocean and coastal states. MARPOL, 1973 as modified by the Protocol of 1978 and 1954 International Convention for the Prevention of Pollution of the Sea by Oil. For the purpose of ensuring safety and regulation of the travel and governance between the two poles, the UN has entered The International Code for Ships Operating in Polar Waters (Polar Code.)[24] While environmental pollution and polar-centric regulatory activities are significantly relevant in the list of UN activities, Piracy takes the cake. In recent years, there has been a surge in piracy off the coast of Somalia and in the Gulf of Guinea. The consequences of piracy are: loss of life, physical harm or hostage-taking of seafarers, significant disruptions to commerce and navigation, financial losses to ship owners, increased insurance premiums and security costs, increased costs to consumers and producers, and damage to the marine environment. To curb and prevent piracy, the IMO and UN have adopted additional resolutions to complement rules in UNCLOS, the UNODC through its Global Maritime Crime Programme combats transnational organized crime of the coast of Horn of Africa and Gulf of Guinea. Some of the suggestions the author would like to make to the credible and laudable activities of the UN are: to formulate a special mechanism to carry out result-oriented, speedy and efficacious trials, imprisonment of piracy suspects as well as developing maritime enforcement capabilities through facilitation of training programmes. A range of activities can be undertaken by the relevant State authorities — from piracy prosecution models, prisoner transfers and training of members in the judicial system of the Atlantic and Indian Ocean to full time mentoring of coast guards and police units in Somalia, Kenya and Ghana.[25]

[24] United Nations, Protection of marine environment and biodiversity, Oceans and the Law of the Sea (26th September, 9:37 PM) https://www.un.org/en/sections/issues-depth/oceans-and-law-sea/.
[25] Ibid.