

Italy, the Law and Our Self-Respect

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In February 2012 two Italian marines on board an Italian merchant ship, “Enrica Lexie” off the Kerala coast near Kochi fired on some fishermen who were unarmed and going about their business, killing two of them. The ship then tried to flee into the high seas, but was intercepted by the Indian Coast Guard and escorted back to Kochi. On a complaint made by the fishermen the Kerala Police registered a case under section 302 IPC against the two marines, arrested them and produced them before a court. The Italian Government through its Ambassador in Delhi not only provided consular support to the marines but also questioned the jurisdiction of the Indian courts to try the case. The Italian contention was that the incident occurred outside Indian territorial waters and that marines whose job was to provide security to the Italian vessel were only doing their duty because they suspected the fishermen to be pirates. The Indian Government has not accepted the Italian argument.

International Law, our National Laws and International Convention is that so far as piracy is concerned, despite legal lacuna in this behalf, any nation can intervene to prevent piracy and for this purpose it may use necessary force against the pirates. In the instant case the Italian ship was not involved in piracy and, therefore, we may rule out action against it as part of our duty to prevent piracy. That brings us to a jurisdictional question of whether India has legal authority to take action against the marines. In this behalf the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act 1976 defines territorial waters, contiguous zone, the continental shelf and the exclusive economic zone of India. Our sovereignty extends over the territorial waters which stretch to a distance of twelve nautical miles from the nearest point of the appropriate base line. The contiguous zone extends to another twelve nautical miles and within this we are competent to take decisions on matters relating to security, immigration, sanitation, customs and other fiscal matters. The continental shelf and the exclusive economic zone, which extend to a distance of two hundred nautical miles from the base line, are deemed to be within the full and exclusive sovereign rights of India in the matter of exploration, exploitation, conservation and management of all resources and the protection and safety of all installations within this zone. Whether or not the Italian vessel was in territorial waters it was certainly within the contiguous zone and the exclusive economic zone. Sovereign ships are free to navigate these waters, but the passage has to be innocent and not prejudicial to the peace, good order and security of India.

The Italian ship passed through waters which are a legitimate fishing ground for Indian fishermen. The presence of fishing vessels in this area is normal and legitimate. The area is far from the normal zone of operation of Somali pirates. Within these waters irresponsible resort to firearms which results in casualties would be certainly be prejudicial to peace and good order in India, besides being violative of Indian law. Under these circumstances if Indians have died because of the action of the Italian marines, they have a case to answer. The exact location of the vessel would be determined by the evidence produced before the competent court, but till it can be definitely proved that the vessel was outside the territorial waters and contiguous zone, the action of the Kerala Police and the Coast Guard would be deemed to be legitimate and proper. The bona fides of our government and the generosity of our courts can be gauged by the

fact that the two marines were kept in custody in guest houses temporarily designated as lock ups and were not incarcerated in a regular jail. At Christmas they were given four weeks to visit their families in Italy, a facility which is not given to any Indian prisoner so far as I know. Fortunately the marines returned to India after celebrating Christmas.

In February 2013 the marines once again sought permission to visit Italy to cast their votes in the general elections. The Italian Ambassador filed an affidavit before the Supreme Court that Italian law does not permit a postal ballot and, therefore, the marines should be allowed to return to Italy for voting. He gave a solemn undertaking that the marines would return by 22nd March 2013. Unfortunately after the marines went to Italy the Italian Government said that they would neither return to India nor would the Italian Government allow them to be tried by an Indian court. Naturally this caused an uproar in India. The Italian Ambassador gave a false affidavit because the Italian law was amended after 2006 and service personnel can cast their vote by postal ballot. His undertaking that the marines would return is also false in view of what the Italian Government has announced. This is in contempt of the Supreme Court, the Indian judicial system, the rules of diplomacy and the code of behaviour expected of a foreign government. The Italian Government was free to raise jurisdictional questions before our court but it is not free to help offenders to abscond.

Under the Territorial Waters, etc., Act of 1976 it is the duty of Government to protect its territorial waters and the exclusive economic zone. This includes the protection of Indian fishermen. Under section 14 of the Coast Guard Act 1978 the Coast Guard is required to provide protection to fishermen, to give them assistance and to safeguard and enforce the sovereign rights of India in our maritime zone. The Coast Guard may use any means, including the use of force and this would be perfectly legitimate under Indian and international law. By preventing its naval personnel from answering before an Indian court the Italian Government becomes an abettor of the act of murder committed by these personnel.

What do we do with this perfidious ambassador and his partner in crime, the Italian Government? The Supreme Court has given notice to the Italian Ambassador not to leave Indian territory. One argument is that by giving an undertaking and by submitting a sworn affidavit to the Supreme Court the Italian Ambassador has subjected himself to the jurisdiction of that court and cannot claim diplomatic immunity. I am not totally in agreement with this proposition because under the Geneva Convention only the country to which the diplomat belongs can withdraw this immunity. The better course would be for India to declare the Italian Ambassador persona non grata and to expel him. We should also withdraw our ambassador from Italy and I am happy to note that government has directed the ambassador designate not to join at Rome till further orders. We should also publicly review all commercial agreements with Italy and to have a second look at all diplomatic and other initiatives and dialogues with Italy. The message which should go to Italy is that the Government of India will retaliate diplomatically and commercially for the Italian Government's act of deceit.
